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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CHRISTINA ACOBA et al., Plaintiffs and Appellants, v. OLIVERA EGG RANCH, LLC et al., Defendants and Respondents.	H041585 (Santa Clara County Super. Ct. No. CV220408)

Neighbors of an egg ranch sued for damages, claiming that intensified operations and improper manure treatment measures caused unreasonable levels of dust, odor, and flies. A jury rejected the plaintiffs' nuisance, negligence, and trespass claims, and the trial court entered judgment in favor of defendants. On appeal, plaintiffs contend that the judgment must be reversed due to instructional error, evidentiary errors, and juror misconduct. We find no reversible error and will affirm the judgment.

I. FACTUAL BACKGROUND

Plaintiffs are individual residents of French Camp, California, who live near an egg production facility known as the Olivera Egg Ranch (the ranch).[1] The ranch and

[1] The 28 plaintiffs at the time of trial were Christina Acoba, Christina Arana, Diane Arana, Carlos Chavez, James Edward Chavez, Mary Ellen Chavez, Andrew Franco, Ashley Gerstel, Chester Gish, John E. Gish, Joy Gish, John Westley Gish (minor), Myrna Gish, Lorraine Gomez, Rose Gomez-Delphin, Amber Noceti, Anthony Noceti, Carol Noceti, Consuelo Noceti, Danica Noceti, Patricia Paulsen, Pete Paulsen, Deanna Sarcos, Ruben R. Valencia, Benjamin Estepa (minor), Dasia Valencia (minor), Cion Vallesteros, and Rudy Vallesteros.

plaintiffs' properties are located in San Joaquin County, in the predominantly agricultural San Joaquin Valley. Among the 28 plaintiffs at trial, many were long-time residents of the San Joaquin Valley and themselves engaged in agricultural pursuits.

Defendants Edward F. Olivera, Jr. (Olivera), Olivera Egg Ranch, LLC, and the Edward F. Olivera, Jr. Trust (together, defendants) own and operate the ranch, which is located on 77 acres in French Camp. Defendants acquired the ranch in 1996. The ranch had already existed as an egg farm for about 20 years; it housed about 350,000 to 400,000 hens when defendants took over. Defendants later expanded the hen population to increase egg production. From 2004 to 2008, the number of birds about doubled, reaching a high of 729,000 hens in 2008. At the time of trial in 2014, the ranch housed 650,000 to 700,000 hens, produced about 468,000 eggs daily, and generated about 142,670 pounds of chicken manure daily.[2]

The ranch contains egg laying houses, a 13-acre primary lagoon, and an eight-acre combined overflow pond or secondary lagoon. The primary lagoon was the largest chicken manure lagoon in the region. A report commissioned by Olivera upon acquiring the ranch in 1996 stated that if the number of birds approached 600,000, the lagoons would be only marginally efficient. Starting in 2006, the San Joaquin County Environmental Health Department (environmental health department) required defendants to submit a manure management plan based on the size of the operation. The ranch also became subject to regulations for air emissions under the authority of the San Joaquin Air Pollution Control District (air district).

The manure from the ranch was managed in several ways. For years, it was flushed into the primary lagoon. Defendants began phasing out the use of the lagoons in

[2] The 142,670 pounds of chicken manure generated daily was calculated at trial based on 648,500 chickens and did not include the manure from chickens housed in what are known as the ranch's cage-free barns, which are subject to a different manure removal schedule.

2008 and 2009 as part of the manure management plan. Defendants began spreading the manure to dry it in a method known as dry padding.

In October 2008, eight neighbors of the ranch—unrelated to plaintiffs in this case—sued defendants in federal court in the matter of *Avila et al. v. Olivera Egg Ranch, LLC et al.*, E.D.Cal., No. 2:08-CV-02488-JAM-KJN (*Avila*). At that trial, the jury found that each of the eight individual plaintiffs had proven their nuisance claim against the ranch from October 2005 to October 2008. The *Avila* lawsuit resolved in 2011 after trial. In response to the *Avila* lawsuit, defendants tried to dredge the perimeter of the primary lagoon to expand its volume. In 2010, defendants implemented a method in which the manure is placed in piles known as windrows and turned every few days to dry it; defendants later began adding wood fines to the windrows to speed the drying.

The primary lagoon was retired in June 2012, at which point manure was no longer added to it. In 2013, defendants excavated the materials from the primary lagoon, and a few months before trial in this case, they converted the area of the primary lagoon into an almond orchard. Defendants also installed a manure drying tunnel that at the time of trial was functional for one chicken house.

II. PROCEDURAL BACKGROUND

A. OPERATIVE COMPLAINT

Plaintiffs filed this action against defendants in March 2012. The second amended complaint (complaint), filed in June 2013, asserted causes of action for private nuisance, negligence, and trespass.

Plaintiffs alleged that egg production at the ranch had resulted in significant releases of offensive odors, high levels of ammonia and other hazardous substances, excessive flies, and excessive amounts of animal waste. They claimed that defendants' negligent and improper management practices for both manure and dead animals at the ranch had interfered with their ability to enjoy and use their properties due to the offensive odors, flies and dust, and other noxious emissions, and that the extent of their

injury outweighed the social utility of the ranch, since defendants could have taken measures to prevent the harm while continuing to operate. The complaint asserted that in May 2011 in the *Avila* matter, a jury found that defendants had created a nuisance "based on similar facts and allegations" yet the obnoxious conditions remained unabated.

Plaintiffs sought damages for their discomfort, annoyance, and loss of use and enjoyment of their properties, as well as a mandatory injunction for defendants to abate the nuisance. Plaintiffs also claimed entitlement to punitive damages for defendants' willful and conscious disregard of their rights, including based upon defendants' continuing generation of nuisance conditions even after the adverse jury finding in *Avila*.

B. TRIAL AND VERDICT

Various motions preceded the trial, including unsuccessful defense motions to strike and for summary adjudication as to the punitive damages claim. The parties filed trial briefs and motions in limine in December 2013, but the trial court continued the trial to the end of May 2014. The delay led to a dispute about the cutoff for evidence admitted at trial, which became one of several issues that dominated the parties' legal arguments during trial and is an issue on appeal.

Another dominant issue was whether substantial evidence existed to support an affirmative defense under Civil Code section 3482.5, referred to during voir dire and at trial as the "Right to Farm" Act. Plaintiffs sought to exclude any use of the term "right to farm" as misleading and prejudicial.[3] Plaintiffs later argued in a motion for directed verdict that the defense did not apply because defendants could not carry their burden on the elements. Plaintiffs also sought to exclude reference to a notice titled "San Joaquin County Right-To-Farm Notice," a local ordinance allegedly sent to residents to inform

[3] The words "right to farm" do not appear in the statute or its title, though courts have referred to Civil Code section 3482.5 as the "Right to Farm Act." (See, e.g., *W&W El Camino Real, LLC v. Fowler* (2014) 226 Cal.App.4th 263, 265 (*W&W El Camino Real*).)

them of the agricultural character of the county. (To avoid confusion between the Civil Code section 3482.5 "Right to Farm" Act and the San Joaquin County Right-To-Farm notice, we refer to the affirmative defense as the Civil Code section 3482.5 defense, and to the notice as the right-to-farm notice or "Exhibit 1072.")

The parties also disputed to what extent plaintiffs could refer to the jury verdict in *Avila*. The court ruled that it would allow the jury to be told only that there was a lawsuit in federal court, the matter proceeded to trial, and it was resolved by a confidential settlement agreement.

At trial, individual plaintiffs testified about their personal and family histories in French Camp, all of which predated defendants' expansion of egg production at the ranch in 2005 and many which predated defendants' acquisition of the ranch.

Plaintiffs described in visceral details the disturbing odors, dust, and flies that they experienced on their properties and attributed to the ranch. Often, the intensity and magnitude of the odor and fly problems interfered with plaintiffs' ability to enjoy their properties, host family or friends, and work or play outdoors. Many plaintiffs testified that while a smell from the chicken ranch existed before Olivera took over, it progressively worsened over the years to a horrible, intolerable smell—like chemicals and dead animal, bad enough to occasionally make some feel physically ill. Nonparty witnesses who corroborated plaintiffs' accounts of odors and flies included a longtime friend of plaintiff Lori Gomez, who described throwing up on several occasions from the smell when she visited Gomez, and the postal carrier whose route served many of plaintiffs' homes for 25 years.

Olivera admitted in testimony that he had never seen a manure lagoon as large as the primary lagoon at the ranch, and that starting in 2005 certain plaintiffs had legitimate complaints about odors from the lagoon.

Plaintiffs' experts testified about the problems with defendants' manure management systems that contributed to excessive odors, dust, and flies. For example,

Dr. Bruce Bell, who testified as an expert on environmental engineering, opined that in the time period of 2006 through 2009, the primary lagoon was "overloaded" with ammonia concentrations that inhibited the anaerobic function of the lagoon and produced odors. Bell opined that the maximum hens the system could handle was about 340,000. Kathy Martin testified as an expert on best management practices in livestock management and waste treatment facilities and control. Martin calculated the pounds of ammonia released annually by 680,000 birds, which was enough to trigger federal permitting requirements had it "been an industry other than an egg facility." She also observed the state of the lagoon and noted that Olivera had allowed it to fill with sludge and solids for a significant period of time. Martin opined that defendants were "not maintaining that lagoon at all."

Plaintiffs introduced complaints about the ranch made to the air district and the environmental health department. The ranch received notices of violation at several points from the air district, including for failing to obtain a permit for several years based on the size of the flock and for exceeding the flock limit of 680,000 during 14 weeks in 2010. Although an in-limine ruling prevented plaintiffs from introducing the jury verdict in *Avila* as evidence that the ranch was previously deemed a nuisance, there were frequent references to evidence and expert testimony from the federal case. In closing argument, plaintiffs' counsel asked the jury to award damages of $250,000 for plaintiffs living further from the ranch, $500,000 for those living closer, and $1 million for those most closely affected—for a total of over $10 million.

Defendants introduced several witnesses whose testimony generally contradicted plaintiffs' experts' characterizations of the conditions at the ranch and whether its manure management systems conformed to generally acceptable standards in San Joaquin County. Robert McClellon, a program coordinator for the environmental health department, testified that in 2009, manure lagoons were accepted and custom in egg and

poultry operations and that he viewed past and current manure management practices at the ranch as consistent with the accepted customs and standards of the county.

In addition, defense experts Dr. Frank Mitloehner and Dr. Jeffrey Hicks testified about subjects including wind patterns and odor testing, which in their opinions showed the odors did not carry from the ranch to plaintiffs' properties. Dr. William Donahue testified as an expert entomologist that there were not significant fly breeding sites on the ranch and that plaintiffs' experiences with excessive flies and biting flies were not likely attributable to ranch operations. Olivera testified that after receiving the *Avila* complaint and working with the air district and environmental health department, he explored measures to increase the lagoon's function before shifting manure management to dry padding and windrows, and ultimately converting the lagoon into an almond orchard.

After the close of evidence, the trial court denied plaintiffs' motion for directed verdict on defendants' Civil Code section 3482.5 affirmative defense. The trial court instructed the jury on plaintiffs' causes of action and gave a special instruction on the affirmative defense. Plaintiffs' counsel later argued that the affirmative defense instruction that had been read to the jury was missing key language; plaintiffs requested that the court correct the language in the set of written instructions that was to be delivered to the jury room. The court declined to modify the instruction, noting that it had been published to the jury and referred to extensively by both sides.

Jurors received a verdict form that set forth the causes of action as alleged by each plaintiff but did not provide a form for the jury to indicate whether defendants had proven their affirmative defense. The jury deliberated for over two days and returned a defense verdict for each of the 28 plaintiffs.

C. MOTION FOR A NEW TRIAL

Plaintiffs moved for a new trial, arguing that juror misconduct, erroneous jury instructions and evidentiary rulings, and a 10-day break shortly before the close of defendants' evidence prevented plaintiffs from having a fair trial.

In support of the juror misconduct claim, plaintiffs submitted evidence that two jurors responded falsely during jury selection to written voir dire questions related to prior involvement in lawsuits. A declaration from another juror further stated that three jurors—including two who were subject to the first claim—had prejudged the case and expressed negative bias against plaintiffs. Defendants in response submitted sworn declarations from two jurors to refute the bias claim and to demonstrate that any failure to disclose prior lawsuits was inadvertent and not intended to deceive the court.

After briefing and oral argument, the trial court denied the motion for a new trial in a written order filed on October 1, 2014. This appeal timely followed the notice of entry of judgment for defendants.

II. DISCUSSION

Plaintiffs challenge the defense verdict on each of the independent grounds referenced above. These are as follows: (1) instructional error related to defendants' Civil Code section 3482.5 affirmative defense; (2) evidentiary errors related to the right-to-farm notice, exclusion of the *Avila* verdict, remedial measures taken by Olivera before trial, and expert testimony on whether air district regulations exempted agricultural operations like the ranch; and (3) juror misconduct in jury selection and deliberations.

A. INSTRUCTIONAL ERROR AS TO DEFENDANTS' AFFIRMATIVE DEFENSE UNDER CIVIL CODE SECTION 3482.5, SUBDIVISION (A)

Plaintiffs contend that the trial court erred in allowing a jury instruction on Civil Code section 3482.5 that was both contrary to the law and to the evidence at trial. Plaintiffs maintain—as they did throughout the trial and in a motion for directed verdict—that the affirmative defense did not apply because defendants did not carry their burden on all elements of the defense. Plaintiffs also challenge the form of the instruction, which they contend was inconsistent with the law and misleading to the jury,

as demonstrated by two questions posed by the jury during deliberations. Plaintiffs argue for de novo review of their instructional error claim.

Defendants respond that the trial court properly instructed the jury regarding the affirmative defense. Defendants also maintain that plaintiffs cannot show prejudice from any error in the instruction because the judgment was entered on a general defense verdict, which must be upheld if supported by substantial evidence in the record. Defendants contend that while the legal accuracy of a jury instruction is reviewed de novo, the evidentiary support for an instruction is evaluated for substantial evidence. Defendants also contend that plaintiffs have forfeited any claim of instructional error because they proposed the language of the instruction that the trial court ultimately used.

1. Substantial Evidence Supported Instructing the Jury on Defendants' Affirmative Defense

When a party has presented substantial evidence to support its theory of the case, it is entitled upon request to a correct, nonargumentative instruction on that theory. (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572 (*Soule*).) In considering the Civil Code section 3482.5 affirmative defense instruction, we "review the evidence most favorable to the applicability of the requested instruction, since a party is entitled to that instruction if that evidence could establish the elements of the theory presented." (*Chanda v. Federal Home Loans Corp*. (2013) 215 Cal.App.4th 746, 755 (*Chanda*), citing *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1540.) This feature of our review applies only to whether there was sufficient evidence to warrant the instruction (*Soule, supra,* at p. 572); it is consistent with the principle that a party is entitled to have his or her theory of the case submitted to the jury in accordance with the pleadings and proof

" 'if the evidence so viewed could establish the elements of the doctrine.' " (*Sills v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 633.)[4]

Under Civil Code section 3482.5, subdivision (a), "a commercial agricultural activity conducted for more than three years consistent with accepted standards in the locality is deemed not to be a nuisance due to any changed condition in the locality if the activity did not constitute a nuisance when it began." (*W&W El Camino Real, supra,* 226 Cal.App.4th at p. 265.) The statute states, "No agricultural activity, operation, or facility, . . . conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance,

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[4] Plaintiffs' contention that de novo review applies to this part of the appeal misapprehends the standard. The cases relied upon by plaintiffs reinforce our conclusion that the appellate court looks only for substantial evidence in the record that would require the trial court to instruct on the affirmative defense. Thus in *People v. Baniani* (2014) 229 Cal.App.4th 45, the court noted that " ' "[i]t is well settled that a defendant has a right to have the trial court . . . give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation]—evidence sufficient for a reasonable jury to find in favor of the defendant [citation]—unless the defense is inconsistent with the defendant's theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . . .' " ' " (*Id.* at p. 52.)

This plain statement of substantial evidence review is consistent with our Supreme Court's precedent. In *People v. Mentch* (2008) 45 Cal.4th 274, 288, the court described the task of the appellate court in terms of "only whether the requested instruction was supported by substantial evidence—evidence that, if believed by a rational jury, would have raised a reasonable doubt as to whether" the defendant presented facts to establish the defense. Plaintiffs' reliance on language in *People v. Manriquez* (2005) 37 Cal.4th 547, 581 and *People v. Waidla* (2000) 22 Cal.4th 690, 733 is misplaced because those cases address a separate issue of instruction on lesser-included offenses. (See *People v. Manriquez, supra,* at p. 581 ["If it were a true affirmative defense, . . . an instruction would be required only if it appears that . . . there was substantial evidence supportive of the defense, and the defense was not inconsistent with the defendant's theory of the case."].)

private or public, due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began." (Civ. Code, § 3482.5, subd. (a)(1).) The statute expressly preempts any contrary local ordinance or regulation (*id*., subd. (d)) and defines "agricultural activity, operation, or facility . . ." to include, as relevant here, "the raising of livestock, . . . or poultry, and any practices performed by a farmer or on a farm as incident to or in conjunction with those farming operations . . . ." (*id*., subd. (e)).

Courts, beginning with *Souza v. Lauppe* (1997) 59 Cal.App.4th 865 (*Souza*), have interpreted Civil Code section 3482.5 as having broad application. *Souza* involved a dispute between farmers of neighboring parcels. The plaintiffs claimed that water from the defendants' rice farming operation had seeped onto their property and damaged their row crops. (*Souza*, *supra*, at p. 868.) The plaintiffs, who also previously farmed rice, noticed the water intrusion only after they shifted the use of their land from rice to row crops. (*Id*. at pp. 869-870.) The trial court granted summary judgment for the defendants, finding the nuisance claim barred by Civil Code section 3482.5 because the defendants had been growing rice commercially, and in a manner consistent with the customs and standards of the locality, for more than three years before the claim of nuisance arose as a result of the plaintiffs' change in their use of the land. (*Souza*, *supra*, at p. 870.)

On appeal, the court in *Souza* rejected the plaintiffs' attempts to narrow the reach of Civil Code section 3482.5 by claiming that the statute was only intended to bar so-called " ' "coming to the nuisance" ' " claims by nonagricultural plaintiffs brought close to agriculture by suburban expansion. (*Souza*, *supra*, 59 Cal.App.4th at p. 871.) The court found that while not defined by the statute, the phrases " 'any changed condition' " and " 'in or about the locality' " were intended to "encompass countless varieties of change in all manner of conditions in the general area" (*id*. at p. 873) and evince "an unambiguous legislative intent to broadly apply the statute." (*Ibid*.)

The *Souza* court interpreted Civil Code section 3482.5, subdivision (a) as requiring a defendant to satisfy seven elements: "The activity alleged to be a nuisance must be (1) an agricultural activity (2) conducted or maintained for commercial purposes (3) in a manner consistent with proper and accepted customs and standards (4) as established and followed by similar agricultural operations in the same locality; the claim of nuisance arises (5) due to any changed condition in or about the locality (6) after the activity has been in operation for more than three years; and the activity (7) was not a nuisance at the time it began." (*Souza*, *supra,* 59 Cal.App.4th at pp. 874-875.)

Looking to the fifth element, the court concluded that the substitution of row crops for rice farming was a "changed condition" based upon common usage of the word "change" and within the meaning of the statute. (*Souza*, *supra*, 59 Cal.App.4th at p. 875.) Since the plaintiffs alleged that their damages occurred only after this changed condition, which was more than three years after the defendants began their farming operation consistent with the other elements of the defense, the court found that the defendants had satisfied all seven statutory requisites. (*Id*. at pp. 875-876.)

Similarly in *Rancho Viejo v. Tres Amigos Viejos* (2002) 100 Cal.App.4th 550 (*Rancho Viejo*), the court upheld the application of Civil Code section 3482.5 as a complete defense to the plaintiff's causes of action for trespass and nuisance. (*Rancho Viejo*, *supra*, at p. 557.) It found that modifications made by the plaintiff to its property to prepare for development, including removing trees and grading cut slopes into the hills along the boundary with the defendant's property, constituted a changed condition. (*Id.* at pp. 555-556.) Citing *Souza*'s interpretation of the statutory phrase " 'any changed condition' " as unambiguous and broadly applicable, the court explained that "[t]he statute does not limit its language to specified persons who must initiate the changed condition, nor does it specify the type or nature of the condition that must have changed." (*Id*. at p. 567.) It concluded that because the damage from water intrusion when the defendant irrigated its avocado groves accrued only after the plaintiff's grading activities,

the plaintiff's claims came "directly within the intent and unambiguous language of section 3482.5, which broadly immunizes established, traditional farming operations from becoming a nuisance due to '*any* changed condition in or about the locality.' " (*Id.* at p. 566.)

Here, plaintiffs contend that defendants failed to present substantial evidence to prove five elements of the Civil Code section 3482.5 affirmative defense. They assert that contrary to elements three and four,[5] the evidence showed the ranch was not operated in a manner consistent with locally accepted customs and standards. For support, they cite testimony that the ranch was the largest egg facility in the county and had generated more complaints to the environmental health department about odor and flies than any other facility Robert McClellon had inspected since 2006. McClellon also testified that other chicken ranches in the county did not have problems with their lagoons "to this same degree." Steven Brodie, an inspector for the regional air quality district, testified similarly about the size of the manure lagoon and number of complaints received by the air district. He confirmed that for 14 weeks in 2010, the ranch maintained more birds than its permit allowed, and he acknowledged that he did not know of any other egg ranch that failed for five years to obtain a permit for having more than 500,000 birds. Plaintiffs also cite Olivera's admission at trial that certain neighbors had legitimate complaints about odor from the lagoon.

Plaintiffs make similar claims about the fifth, sixth, and seventh elements under the statute.[6] They assert a lack of evidence to support any changed condition within the

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[5] For reference, as construed in *Souza*, these are that the activity is conducted "(3) in a manner consistent with proper and accepted customs and standards (4) as established and followed by similar agricultural operations in the same locality . . . ." (*Souza, supra*, 59 Cal.App.4th at pp. 874-875; see Civ. Code, § 3482.5, subd. (a).)

[6] For reference, these are that the claim of nuisance arose "(5) due to any changed condition in or about the locality (6) after the activity has been in operation for more than (continued)

meaning of Civil Code section 3482.5, subdivision (a), and contend that uncontroverted evidence based upon the testimony of multiple plaintiffs showed that the ranch was a nuisance since Olivera's acquisition of the property in 1996 and only worsened after the expansion of production in 2005. They further argue that the verdict in *Avila* reinforced this evidence, because the jury expressly found that the ranch operations constituted a nuisance from October 2005 to October 2008.

We find that in exclusively citing evidence to show that the ranch was not operated in a manner consistent with locally accepted customs and standards, plaintiffs fail to comport with the standard of review. (See *Chanda*, *supra*, 215 Cal.App.4th at p. 755 [reviewing court considers evidence most favorable to the requested instruction, since a party is entitled to the instruction if the evidence could establish the elements].) That is, even as plaintiffs' evidence suggested that the ranch was an outlier in the region based on the size of its operation, overloaded lagoon, and permit lapses, defendants adduced substantial evidence to suggest that the ranch operated within the norms of the agricultural region and eventually implemented manure management measures that surpassed local standards. For example, despite the number of complaints about odor and flies, environmental health department regulator McClellon testified that past and current manure management practices at the ranch were consistent with accepted customs and standards for the county. If believed by a rational jury, the contravening evidence would be sufficient to establish elements three and four of the defense. (See *People v. Mentch*, *supra*, 45 Cal.4th at p. 288; *Chanda*, *supra*, at p. 755.)

The same is true for evidence that when the nuisance claim arose, the agricultural activity had "been in operation for more than three years" and "was not a nuisance at the time it began." (Civ. Code, § 3482.5, subd. (a)(1).) As we discuss further in addressing

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three years; and the activity (7) was not a nuisance at the time it began." (*Souza*, *supra*, 59 Cal.App.4th at p. 875; see Civ. Code, § 3482.5, subd. (a).)

the form of the jury instruction, in this case there was no consensus as to whether the "activity" was the establishment of an egg ranch in the 1970's, defendants' operation of the ranch starting in 1996, or the expansion of production in 2005. We need not resolve the dispute, however, because there is sufficient evidence in the record to support an inference by the jury that the ranch was not a nuisance at each time point.

For example, several plaintiffs recalled an offensive odor in the years before 1996, but also described it as one that could be tolerated and which was not as strong as developed after 2005. Olivera and his ranch manager, John Den Dulk, both testified that they first became aware of problems with the lagoon in the 2008 to 2009 time frame. When asked if he was concerned about neighbors experiencing excessive odors, flies, or dust from the ranch in 2006, Olivera said that he was not because "[t]here had been no changes on the conditions on my ranch" and it was the "same as it was in '96." In reviewing complaints to the environmental health department about the ranch, McClellon testified that there was one complaint prior to 1996, six complaints from 1996 to 2006, one complaint in 2006, one in 2007, none in 2008, a French Camp community meeting in 2009 in which residents discussed the odors from the lagoon and asked the environmental health department to do more, and three complaints in 2010. Regarding complaints to the air district, Brodie testified that there were 15 complaints about the ranch in 2010, 18 complaints in 2011, five complaints in 2012, and none since the lagoon was retired in 2013. Viewed most favorably to the applicability of the instruction, we find that this and other evidence in the record could establish the challenged elements of Civil Code section 3482.5 defense.[7] (*Chanda*, *supra*, 215 Cal.App.4th at p. 755.)

[7] We also reject plaintiffs' contention that the jury's finding of nuisance in *Avila* precluded defendants in this case from establishing that the ranch was not a nuisance in 2005, for the reasons discussed *post* (part II.B.2).

Finally, plaintiffs contend that defendants failed to present evidence to satisfy the fifth element linking the claim of nuisance to a "changed condition in or about the locality." (Civ. Code, § 3482.5, subd. (a)(1).) They argue that this provision requires a changed condition in the neighborhood of the agricultural activity but does not include changes in the agricultural operation itself. Since the neighborhood surrounding the ranch had not changed, plaintiffs maintain that this element could not be satisfied. Defendants respond that evidence of the decreasing number of egg farms in the region supported an inference that the "changed condition" was the reduction in the number of egg operations and the concomitant expansion of those remaining, including the ranch.

We find plaintiffs' restrictive interpretation of "changed condition" to be inconsistent with the statutory language and its broad construction in case law. The provision states that an agricultural facility operating consistent with specified criteria shall not "be or become a nuisance . . . due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began." (Civ. Code, § 3482.5, subd. (a)(1).) The term "any" expresses an unambiguous legislative intent to broadly apply the statute. (*Souza*, *supra*, 59 Cal.App.4th at p. 873; see also *Burnsed v. State Bd. of Control* (1987) 189 Cal.App.3d 213, 217.) It "indicate[s] lack of restrictions or limitations on the term modified." (*U.S. ex rel. Barajas v. U.S.* (9th Cir. 2001) 258 F.3d 1004, 1011.) The statute places no restrictions on the type of changed condition or its source—only that it be " 'in or about the locality.' " As observed in *Souza*, the language conveys an intent to "encompass countless varieties of change in all manner of conditions in the general area surrounding the alleged nuisance . . . ." (*Souza*, *supra*, 59 Cal.App.4th at p. 873.) The court in *Rancho Viejo* also recognized this in finding that the actions of the defendant's predecessor farmer did not prevent the defendant from establishing a changed condition. (*Rancho Viejo*, *supra*, 100 Cal.App.4th at pp. 565-566.)

At the same time, neither *Rancho Viejo* nor *Souza* addressed a "changed condition" in terms of the nature or scope of the agricultural operation itself. *Rancho Viejo* in fact refrained from deciding the applicability of the defense to changes in the nature or extent of the operation, since in that case the defendant had not changed its irrigation practices from those in the past. (*Rancho Viejo*, *supra*, 100 Cal.App.4th at p. 567, fn. 10.)

We find that while the Legislature could have precluded a landowner who changed the nature or extent of an agricultural operation from invoking Civil Code section 3482.5, it did not. In construing a statute, "we are not free to 'give the words an effect different from the plain and direct import of the terms used.' " (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) We also note that the other requisites for the defense ensure its application only when all the statutory conditions are met. That is, even if the "changed condition" coincides with or precipitates changes to the nature or extent of the agricultural activity giving rise to the nuisance claim, the defendant must still demonstrate that the activity at issue is consistent with local customs and practices, has been in place for at least three years, and was not a nuisance when it began. (Civ. Code, § 3482.5, subd. (a)(1).)

Mohilef v. Janovici (1996) 51 Cal.App.4th 267 (*Mohilef*) illustrates this point. The Mohilefs for many years at their ranch were involved in buying and selling domestic and exotic animals. (*Id.* at p. 276.) The business eventually extended to commercial farming of ostrich and emu, and by July 1994 there were about 800 ratite birds on the ranch. (*Id.* at pp. 276-277.) The city brought nuisance abatement proceedings that same year (*id.* at p. 278), and in defense the Mohilefs invoked Civil Code section 3482.5. (*Mohilef*, *supra*, at p. 306.) The court held that the statute did not apply because while the ranch had hosted ostriches and emus "*intermittently* since 1981" (*id.* at p. 307), the commercial, 800-bird operation had not existed for the minimum statutory time period of three years

(*ibid*.), and the Mohilefs failed to show that it was maintained consistent with proper and accepted customs and standards in the locality. (*Ibid*.)

It is implicit in *Mohilef* that the condition giving rise to the city's nuisance claim was the expansion of the ranch to commercial ostrich farming. Before that, the Mohilefs had engaged in business involving domestic and exotic animals on their ranch for "at least four decades . . . ." (*Mohilef, supra*, 51 Cal.App.4th at p. 276.) The deciding factor for the court was not the change in operation from the prior decades, but whether the defendants could show that the "present operation" at the time of the nuisance action satisfied the elements of the defense. (*Id*. at p. 307.)

The same is true in this case. As we discuss further in connection with the jury instruction given, the nature of the "changed condition" in this case was not defined for the jury. Defendants introduced evidence that showed a decline in the number of egg ranches in San Joaquin County—from "north of a hundred" to 11 facilities in 2009. Defense expert Mitloehner observed a widespread trend, including in San Joaquin County "that small poultry operations have shut down and the larger ones have grown larger." Olivera testified that he expanded egg production at the ranch after plans to open another facility fell through. Thus, the jury could reasonably have viewed defendants' evidence of the changing landscape of existing chicken farms as a "changed condition in or about the locality" (Civ. Code, § 3482.5, subd. (a)(1)) that precipitated the plaintiffs' nuisance action based upon the present, expanded operation of the ranch. Unlike in *Mohilef*, where the ostrich farm had not been in operation for more than three years and the defendants offered no evidence that it comported with proper and accepted customs and practices in the locality (*Mohilef, supra*, 51 Cal.App.4th at pp. 306-307), defendants here proffered enough evidence to carry their burden on each of the elements.

2. The Civil Code Section 3482.5 Instruction Was Not Erroneous

Having concluded that substantial evidence warranted an instruction under Civil Code section 3482.5, we turn to plaintiffs' contention that the instruction confused and misled the jury.

The trial court instructed the jury on Civil Code section 3482.5 as follows: "Defendants claim that they are not liable for nuisance or trespass or negligence. To succeed on this defense, they must prove all the following: That they were conducting an agricultural activity, operation, or facility for commercial purposes; that the agricultural activity, operation, or facility was conducted or maintained in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations in the same locality; that there was a changed condition on or about the locality; and after the activity has been in operation for more than three years and the activity was not a nuisance at the time it began."

After the reading of the jury instructions but before the jury had received a written set to use in deliberations, plaintiffs informed the court that the instruction had omitted a key phrase. Plaintiffs argued that the phrase "claim of nuisance arises due to . . ." should have preceded the final part of the instruction to reflect the language used in *Souza*. The instruction thus should have read: "Defendants claim that they are not liable for nuisance or trespass or negligence. To succeed on this defense, they must prove . . . that **the claim of nuisance arises due to any** changed condition [i]n or about the locality after the activity has been in operation for more than three years and the activity was not a nuisance at the time it began."

The trial court declined to reinstruct the jury, noting the instruction had been published to the jury and "used extensively by both sides" in closing arguments. On appeal, plaintiffs contend that the omission rendered the instruction erroneous and misleading. Defendants respond that the instruction accurately tracked the statute, and that the phrase "claim of nuisance arises due to" was not essential to convey the

substance of the affirmative defense. Defendants also contend that plaintiffs forfeited the instructional error claim on appeal because they proposed the language and invited the error of which they now complain.

It is true that plaintiffs proposed the version of the jury instruction used by the trial court, but the circumstances do not support defendants' position on invited error and forfeiture. The doctrine of invited error "bars an appellant from attacking a verdict that resulted from a jury instruction given at the appellant's request." (*Stevens v. Owens-Corning Fiberglas Corp*. (1996) 49 Cal.App.4th 1645, 1653.) It is consistent with the adversarial system, in that trial lawyers select their strategies but if "a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error" on appeal. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686 (*Mesecher*).) A plaintiff who requests the instructions given by the court and fails to request any additional or qualifying instructions therefore forfeits the right to argue instructional error on appeal. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130.)

Here, plaintiffs supplied the language used by the trial court only after the court overruled their motion in limine to exclude the affirmative defense and later denied their motion for a directed verdict on the same issue. Although plaintiffs' counsel at one point argued against defendants' proposal to add the language that plaintiffs now contend should have been included, the argument hardly constituted a deliberate strategy or tactical decision.[8] (*Mesecher*, *supra*, 9 Cal.App.4th at p. 1686.) Rather, it appears that counsel's statement was a misconceived response to the confused shuffling of proposed

[8] During argument over the affirmative defense instruction, defense counsel asked the trial court to "look at ours again . . . it goes, 'The **plaintiffs' claim arose due to** a changed condition in or about the locality which the Olivera Egg Ranch operates,' . . . ." (Emphasis added.) Plaintiffs' counsel responded that "plaintiffs' version should not be changed to 'plaintiffs' claims arose [due] to a changed condition in or about the locality.' That is not consistent with *Sousa* [*sic*] or the statute."

language during arguments on the affirmative defense instruction. Given the continuous attempts to exclude the affirmative defense, and the request to rectify the perceived error once the jury was instructed, we find that plaintiffs did not induce the error or forfeit the resulting claim on appeal.

Turning to the merits, we independently review the claim of instructional error. (*Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 525.) A trial court's duty "is fully discharged if the instructions given by the court embrace all the points of the law arising in the case. [Citations.] [¶] A party is not entitled to have the jury instructed in any particular phraseology and may not complain . . . if the court correctly gives the substance of the law applicable to the case." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335 (*Hyatt*).) " ' "For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." ' " (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82 (*Cristler*).) An error is cause for reversal if it is probable that the erroneous instruction prejudicially affected the verdict. (*Morales, supra,* at p. 525.) As stated in *Soule*, "[a] judgment may not be reversed on appeal, even for error involving 'misdirection of the jury,' unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule, supra,* 8 Cal.4th at p. 574.)

Here, we find that the instruction imperfectly but adequately conveyed the substance of the applicable law. As noted above, courts have interpreted Civil Code section 3482.5 as consisting of seven elements. (*Souza, supra,* 59 Cal.App.4th at pp. 874-875.) The jury instruction grouped those elements into four subparts.[9] The jury

[9] The instruction appeared in the written set provided to the jurors as follows: Defendants "claim that they are not liable for nuisance, trespass, or negligence. To succeed on this defense, they must prove all the following: [¶] (1) That they were conducting an agricultural activity, operation or facility for commercial purposes; [¶] (continued)

was told that to succeed on the defense, defendants had to prove "that there was a changed condition in or about the locality" (subpart 3) and "[a]fter the activity has been in operation for more than three years, and the activity was not a nuisance at the time it began" (subpart 4).

Plaintiffs do not explain how omission of "the claim of nuisance arises . . ." affected whether the instruction conveyed the substance of the law. That phrase is not part of the language of the statute. (See Civ. Code, § 3482.5, subd. (a).) Apparently to restate the defense in the form of seven, affirmative elements, the *Souza* court added "the claim of nuisance arises" (*Souza*, *supra*, 59 Cal.App.4th at p. 875) language. But even without the added phrase, the essential meaning is that a defendant asserting the defense must demonstrate alongside "any changed condition in or about the locality" (*ibid*.) that the activity subject to the nuisance claim has been in operation for at least three years and was not a nuisance when it began. As defendants point out, the instruction read in its entirety necessarily required the jury to relate the requirements of the defense—including that of a changed condition in the locality and of the agricultural activity having endured for three years without having started out as a nuisance—to the claims of nuisance, trespass, and negligence. Accordingly, the instruction given adequately conveyed the substance of the applicable law. (*Hyatt*, *supra*, 79 Cal.App.3d at p. 335.)

Nor do we find it reasonably likely that the jury misunderstood and misapplied the instruction. (*Cristler*, *supra*, 171 Cal.App.4th at p. 82.) During deliberations, the jury submitted three questions related to the defense instruction. The trial court responded in writing after discussions on the record with counsel. A trial court has discretion to

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(2) That the agricultural activity, operation or facility was conducted or maintained in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations in the same locality; [¶] (3) That there was a changed condition in or about the locality; and [¶] (4) After the activity has been in operation for more than three years, and the activity was not a nuisance at the time it began."

provide additional guidance to a deliberating jury. (*People v. Waidla, supra,* 22 Cal.4th at p. 746; *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 50; see Code Civ. Proc., § 614.) In reviewing a claim of error in a response to the jury, we apply the same standard of review as to jury instructions. (See *Soule, supra,* 8 Cal.4th at p. 574 [error involving " 'misdirection of the jury' " is not ground for reversal of the judgment unless the error caused a " 'miscarriage of justice' "].)

The jury first asked if it could get a copy of "the defense argument chart showing the timeline of Olivera changes?" The trial court responded, "No. The chart itself is not evidence and it cannot be provided to you during deliberations." The jury next asked, "When (what year) can we determine the 'activity' began? 1970 or 1996 or 2004[?]" The court responded, "You must weigh the evidence to decide when the particular use of the agricultural activity which is the subject of plaintiffs' claim began." The jury then asked, "What is identified as 'in' (Egg Ranch?) 'about' (French Camp?) definition of 'locality' (Stockton, Lathrop County?)[?]" The court responded, "The use of [the] word 'locality' is to be understood in its ordinary and usual meaning. It is for you to decide how to apply 'locality' in this case."

Plaintiffs submit in relation to the second question that the trial court should have defined "activity" as the particular use at issue, meaning the expansion of the egg operation. They assert that failing to do so was misleading, because Civil Code section 3482.5 is intended for agricultural uses in which the *offending* activity has operated for at least three years and was not a nuisance when the use began. Plaintiffs assert that their "particular use" definition is consistent with *Mohilef* in which the appellate court looked to how long the ranch had been in existence as an ostrich farm. (*Mohilef, supra,* 51 Cal.App.4th at p. 306.) Plaintiffs also point to *W&W El Camino Real, supra,* 226 Cal.App.4th 263, for the proposition that the nuisance giving rise to the claim should be defined for the jury.

We agree in concept that the term "agricultural activity" may be identified in appropriate cases as a particular use. The statute supports this understanding insofar as it defines "agricultural activity, operation, or facility" not only as broad categories of activity like the raising of livestock but as "any practices performed by a farmer or on a farm as incident to or in conjunction with those farming operations, including preparation for market, delivery to storage or to market, or delivery to carriers for transportation to market." (Civ. Code, § 3482.5, subd. (e).) Under this definition, the challenged agricultural activity might be a distinct practice of the farm—like waste disposal, irrigation, or as plaintiffs contend, the expansion of egg production and its outputs. Thus in *Mohilef*, the court recognized that the agricultural activity was not the general operation of the defendant's ranch but the commercial farming of ostrich and emu that the defendant had initiated. (*Mohilef, supra*, 51 Cal.App.4th at p. 306.)

Yet we find that the trial court's response to the jury question was not inconsistent with that interpretation or misleading under the statute. Over the objection of defendants' counsel and drawing from *Mohilef*, the trial court included the phrase "particular use" in its written response, explaining to counsel that the phrase expressed "in a broad and general way . . . that an activity can exist in one form but the important thing is the form it is in at the time . . . the claim of nuisance arises." The court's response thus directed the jury to consider the "agricultural activity" in relation to the subject of plaintiffs' claim without invading the jury's factfinding role in deciding when the pertinent agricultural activity began to operate and whether it was a nuisance at that time. Plaintiffs' reference to *W&W El Camino Real* is unhelpful, because in that case the parties disputed whether a lemon grove operated by the defendant was an " 'agricultural activity' " or "operation" for purposes of Civil Code section 3482.5, leading the court to conclude that on remand, "the activity and/or operations alleged to be the nuisance should be defined for the jury in order for it to determine whether [Civil Code] section 3482.5 applies." (*W&W El Camino Real, supra*, 226 Cal.App.4th at p. 276.) In this case, there is no dispute that the

Olivera Egg Ranch was an "agricultural activity" under the statute. Given the competing evidence as to whether the agricultural activity at issue was a nuisance at its inception, or upon its expansion, or not at all, the trial court acted within its discretion by directing the jury to weigh the evidence.

Plaintiffs point to the third jury question concerning "in" "about" and "locality" as further evidence of the jury's confusion and the court's error in failing to correct the omission of the phrase "claim of nuisance arises due to . . . ." They contend, as they did at trial, that the trial court should have told the jury that the change in condition meant a change in the neighborhood, not the ranch itself, and not including the surrounding city or county. As we noted in considering the sufficiency of defendants' evidence to support this element of the defense, plaintiffs' restrictive interpretation of the phrase "in or about the locality" to mean the immediate neighborhood of the ranch is inconsistent with the broad language of the statute. (See Civ. Code, § 3482.5, subd. (a); *Souza, supra,* 59 Cal.App.4th at p. 873.) Plaintiffs' reliance on the specific facts of *Souza, Rancho Viejo,* and *W&W El Camino Real* is unavailing because while the changed condition in each of those cases occurred on a property immediately adjacent to the claimed nuisance, the statutory language is not so limited.

In sum, our independent review of the record does not support plaintiffs' claim of instructional error based on the substance of the instruction or its likelihood to confuse or mislead the jurors. (*Hyatt, supra,* 79 Cal.App.3d at p. 335; *Cristler, supra,* 171 Cal.App.4th at p. 82.) The questions submitted to the trial court during deliberations reveal that the jurors grappled with each side's competing narratives about when the alleged nuisance activity began and what changed conditions in or about the locality, if any, were related to plaintiffs' claims. The trial court's responses properly directed the jurors to weigh the evidence and to decide how to apply the facts in the case to the given instruction. The asking of the questions, without more, does not demonstrate a

reasonable likelihood that the jury misunderstood or misapplied the instruction, because the trial court provided adequate responses consistent with the substantive law.

B. EVIDENTIARY ERRORS

Plaintiffs challenge several evidentiary rulings and contend that each, independently, was prejudicial and constituted reversible error.

We review a trial court's evidentiary rulings for abuse of discretion. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.) It is not enough for the complaining party to "merely argu[e] that a different ruling would have been better." (*Ibid.*) Rather, it is commonly said that a trial court abuses its discretion when in the exercise of discretion it " 'exceeds the bounds of reason, all of the circumstances before it being considered' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 (*Denham*)) or "transgresses the confines of the applicable principles of law" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393-394 (*Horsford*)). A judgment of the trial court may not be reversed on the basis of the erroneous admission or exclusion of evidence, unless the error was prejudicial, resulting in a miscarriage of justice. (*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 799; Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.)

1. San Joaquin County Right-to-Farm Notice (Exhibit 1072)

In connection with discussions of the Civil Code section 3482.5 defense, the parties debated the admissibility of Exhibit 1072 and whether the jury would be instructed on its applicability. It is titled "San Joaquin County Right-To-Farm Notice (Section 6-9004(e))." It reads in part, "The County of San Joaquin recognizes and supports the right to farm agricultural lands in a manner consistent with accepted customs, practices, and standards. Residents of property on or near agricultural land should be prepared to accept the inconveniences or discomforts associated with

agricultural operations or activities, including but not limited to noise, odors, insects, fumes, dust . . . and the storage, application and disposal of manure. San Joaquin County has determined that inconveniences or discomforts associated with such agricultural operations or activities shall not be considered a nuisance."

Plaintiffs repeatedly tried to exclude reference to and evidence of the right-to-farm notice, arguing it would distract and confuse the jury, and that by its own terms—looking to sections of the ordinance not set forth in the notice—the local policy did not alter state nuisance law or apply to a private nuisance action. The trial court allowed defendants to question witnesses about their awareness of a local ordinance advising residents to anticipate discomforts related to agricultural operations. In their case-in-chief, defendants adduced evidence from the county tax collector that the notice has been mailed to property owners annually, with their property tax bill, since October 2004. None of the testifying plaintiffs who were asked recalled seeing or receiving the right-to-farm notice.

The trial court ultimately instructed the jury that the right-to-farm notice was preempted by state law and did not apply as the law in this case.[10] Plaintiffs' counsel repeated the instruction in closing and suggested that as the right-to-farm notice was not the law, its only purpose at trial was to deceive and confuse—the "biggest red herring I've seen in a case in years and years . . . ." Plaintiffs' counsel also challenged the proposition that the "supposed notice that went out to everybody" informed plaintiffs

[10] The instruction to the jury on Exhibit 1072 stated, "State law regarding nuisance, trespass, and negligence preempts the local San Joaquin County Right to Farm ordinance. The county ordinance does not apply as the law in this case. The only law that applies in this case is as I have explained it to you."

This instruction immediately followed the instruction on nuisance and preceded instructions that neither the location of the ranch in an agriculturally-zoned district nor its compliance with permits or regulations immunized the ranch from liability for nuisance, trespassing, or negligence.

about the agricultural character of the county: "These are farmers. They didn't need a notice and a tax statement that they were living in farm land. They knew it."

Defense counsel highlighted the exhibit as well and related the right-to-farm notice to the concept of consent as a defense to the nuisance claim. Counsel argued that consent "can be implied by, No. 1, living next to the egg ranch, or, No. 2, being a citizen of a county where you were advised by the ordinance" to accept that there are going to be odors, dust, and flies. Defense counsel also related the notice to plaintiffs' credibility by pointing to the "tug of war" over "famous" Exhibit 1072 though "every property owner who I asked denied ever receiving it."

Plaintiffs contend that admission of the right-to-farm notice was highly prejudicial because the language declaring the inconveniences or discomforts associated with agricultural activities *not* to be a nuisance likely misled the jury into believing that the case was barred as a matter of law, and the instruction clarifying the applicable law came only after the jury was steeped in references to the right-to-farm ordinance. Plaintiffs argue that its admission was especially egregious because the county code section under which the notice was promulgated expressly states that it does not "in any way" modify or abridge the California Civil Code "or any other applicable provision of State law relative to nuisances; rather it is only to be utilized in the interpretation and enforcement of the provisions of this code and County regulations." (San Joaquin County Code, § 6-9001, subd. (b).) Plaintiffs also argue based on the language in the code that the right-to-farm provisions were designed to apply "[w]hen nonagricultural land uses extend into agricultural areas . . . ." (*Id.*, subd. (a).)

We are not persuaded by plaintiffs' claims. To recover damages for nuisance, the invasion of interest in the plaintiffs' use and enjoyment of the land must be substantial, according to the sensibilities of persons living in that same community, and unreasonable, considering the gravity of the harm against the social utility of the defendant's conduct. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938.) As the

California Supreme Court has explained, "this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions *is a problem of relative values* to be determined by the trier of fact in each case in the light of all the circumstances of that case.' " (*Id.* at pp. 938-939, italics added.)

Evidence of the agricultural character of French Camp and the surrounding county permeated the trial. Plaintiffs' counsel appealed to the agricultural history and sensibilities of the neighborhood to demonstrate the legitimacy of plaintiffs' complaints and to dispel any notion that plaintiffs were simply poorly-adjusted to the rural character of the neighborhood. The right-to-farm notice dovetailed with this evidence and was relevant to the jury's consideration of these factors, as well as to the element of consent posited by defense counsel at trial. Nothing in the county code precludes its consideration as evidence relevant to community expectations.

Not only did the trial court exercise its broad discretion to make the relevance determination (*Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1213), it revisited the issue throughout the trial and ultimately instructed the jury that the right-to-farm notice "does not apply as the law in this case." This instruction, which both sides reiterated in closing arguments, should have dispelled any question as to whether the notice stated the law in the case, particularly considering there was an explicit instruction on the Right to Farm defense as the applicable defense to plaintiffs' claims. We conclude that the trial court was not required to exclude Exhibit 1072, because the dangers of undue prejudice and issue confusion—while present—did not substantially outweigh the probative value of the evidence. (Evid. Code, § 352.) Accordingly, we find no abuse of discretion in the trial court's decision to admit the right-to-farm notice.

2. **Avila *Verdict***

Plaintiffs contend that the limitations placed on evidence regarding the federal jury verdict in *Avila* unfairly prejudiced its claims at trial. As noted above, the *Avila* lawsuit

was filed in federal court in October 2008 by eight neighbors of the ranch unrelated to plaintiffs in this case. According to the verdict form in *Avila*, the jury found that each of the eight individual plaintiffs had proved their nuisance claim by a preponderance of the evidence; the jury assigned damages for each plaintiff from October 2005 to October 2008. The case resolved by confidential settlement agreement after trial.

The parties introduced competing motions in limine regarding use of the *Avila* verdict and judgment in this case. Plaintiffs sought to exclude evidence related to the amount of the jury verdict or settlement and lack of punitive damages award, but argued that the verdict was relevant and admissible to show that defendants were on notice of the nuisance conditions yet did not resolve the problems on the property. Defendants sought to exclude evidence of any prior judgment based on a verdict against the ranch. They asserted that the verdict was inadmissible hearsay offered as substantive evidence of the matters determined, that plaintiffs could not rely on collateral estoppel given that the findings in *Avila* were based on different time periods than at issue in this case, and that the danger of prejudice outweighed any probative value under Evidence Code section 352.

The trial court observed that while the fact of the prior lawsuit was interwoven into a number of issues and could not be ignored, conveying the verdict in *Avila* risked prejudice to defendants, because the jury would understand there was a finding against defendants without appreciating that the verdict "could have been full of all sorts of errors that would have been overturned on appeal or even a post-trial motion." Plaintiffs' counsel interjected at that point, "How about we just . . . say that the matter itself was resolved?" Over a defense objection, the court ruled the jury would be told that there was a prior lawsuit about a nuisance, it proceeded to trial, and it was resolved by confidential settlement agreement.

Plaintiffs contend that the jury in this case should have been allowed to consider the 2011 jury verdict in weighing the evidence to decide both the nuisance cause of

action and the Civil Code section 3482.5 defense—particularly the requirement under the defense that defendants show the agricultural operation was not a nuisance when it began. Since the verdict in *Avila* pertained to the period of October 2005 to 2008, plaintiffs claim that the jury's nuisance finding precluded defendants from establishing that the ranch was not a nuisance at the time of the ranch's expansion in 2005. Defendants respond that plaintiffs have forfeited the issue on appeal because they proposed the resolution that the trial court adopted for the *Avila* case. They also reiterate their arguments from trial regarding relevance, prejudice, and estoppel—which we will refer to as issue preclusion. (See *Samara v. Matar* (2018) 5 Cal.5th 322, 326 (*Samara*) [preferred terminology associated with the law of preclusion has evolved to " 'issue preclusion' in place of 'direct or collateral estoppel' "].)

We find defendants' forfeiture and invited error argument unavailing for similar reasons as discussed in relation to plaintiffs' claim of instructional error. (See *ante*, part II.A.2.) Plaintiffs' counsel proposed language for the trial court regarding *Avila*'s resolution but continued to argue the relevance of the *Avila* verdict in that it "does away with that Right to Farm Act defense by taking away [defendants'] ability to prove that this wasn't a nuisance." Since plaintiffs never relinquished their position that the *Avila* verdict should be admitted as evidence, they did not " 'expressly or impliedly agree[] at trial to the ruling or procedure objected to on appeal' " (*Mesecher, supra*, 9 Cal.App.4th at p. 1685) and have not forfeited that argument here.

Plaintiffs do not, however, demonstrate an abuse of discretion. To the contrary, we find that plaintiffs' effort to leverage the *Avila* verdict as evidence that defendants could not prove an element of their affirmative defense would have been improper under the circumstances.[11] One of the threshold requirements that must be fulfilled for issue

[11] Plaintiffs assert in their reply briefing that they sought to introduce *Avila* only to highlight Olivera's alleged inaction in the face of notice that the ranch was creating a (continued)

preclusion to apply is that "the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; see *Samara, supra,* 5 Cal.5th at p. 327 [issue preclusion "prevents 'relitigation of previously decided issues' "].) "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings . . . ." (*Lucido, supra,* at p. 342.) That is not the case here.

The verdict in *Avila* reflected the jury's nuisance finding for the ranch between October 2005 and October 2008 in relation to the eight plaintiffs in that case. Even assuming the jury in this case determined that the agricultural activity for purposes of defendants' Civil Code section 3482.5 defense began in or around 2005 with the expansion of ranch operations, the factual allegations are not identical because the plaintiffs are not identically situated, and there is no way to ascertain what factual considerations were at issue in *Avila*. The trial court appropriately identified this failing, asking counsel "What were the matters that were in play in *Avila*? What were the problems? . . . Is that something you want to get into?" The court was also rightly concerned with inferences the jury might draw from the verdict in *Avila*, given that the settlement in that case would have terminated review for error by appeal or posttrial motion. (See *Samara, supra,* 5 Cal.5th at p. 333 [observing that the "availability of appellate review" has evolved as an important factor "in ensuring that a determination is sufficiently reliable to be conclusive in future litigation"].)

Use of the *Avila* verdict also created a substantial risk of prejudice. The trial court struck a balance by permitting factually relevant evidence while minimizing the risk that the jury in this case would infer liability based on the liability findings in that case.

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nuisance, not to serve as offensive collateral estoppel. This position is inconsistent with the record and with the opening appellate brief, which identifies the affirmative defense as one of two bases for which the *Avila* verdict should have applied.

What is more, the exclusion of the verdict did not preclude plaintiffs from introducing relevant evidence related to defendants' alleged inaction in response to the prior lawsuit. Plaintiffs examined Olivera about the effect of the *Avila* lawsuit on his perception of any problems with the ranch and on the timing of defendants' implementation of changes, at the ranch. Also, both sides utilized prior testimony from the *Avila* trial in their cross-examination of witnesses. (Cf. *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 267 [finding "[o]verly restrictive limitations on the introduction of evidence" to be an abuse of discretion "if it destroys a plaintiff's evidentiary presentation"].)

We conclude that the trial court did not abuse its discretion in limiting the admissibility of the *Avila* verdict.

3. Evidence of Remedial Measures After the Discovery Cutoff

Plaintiffs challenge the admission of evidence that showcased remedial measures taken by defendants after the discovery cutoff and before trial. The issue arose due to the continuance of the trial from December 2013 to May 2014. This created a seven-month window after the November 2013 close of discovery, during which time Olivera executed plans for an almond orchard in the footprint of the 13-acre primary lagoon, and defendants conducted additional air testing. Plaintiffs complain that because they were unable to conduct discovery during that time—other than limited depositions authorized by the trial court during trial, and defendants did not supplement their discovery responses, plaintiffs suffered an unfair disadvantage. Plaintiffs contend that this post-discovery evidence misled the jury to overlook the conditions that had aggrieved plaintiffs "unabated for decades" based on the belief that defendants had mitigated the nuisance.

The dispute over the admissibility of evidence postdating the discovery cutoff was closely bound to two other contested issues—the time period for which plaintiffs could

seek damages and the claim for punitive damages. In a motion in limine to limit evidence to the close of discovery, plaintiffs sought to define the time period for damages from March 2009 to November 2013. They argued that although a continuing nuisance action allows for recovery of damages through the time of trial, nothing in the law required the damages period to extend that far. Plaintiffs urged the trial court to limit unfair surprise and prejudice to both sides by restricting the time period for damages and excluding events or conditions that occurred after the close of discovery.

Defendants responded that under the Civil Code and applicable case law, the relevant period for damages was through the conclusion of the action. They argued that to exclude evidence regarding mitigation would unfairly limit their defense against plaintiffs' punitive damages claim. They also questioned plaintiffs' claim of unfair surprise, noting that Olivera had testified at his October 2013 deposition about plans to implement changes at the ranch, and that plaintiffs could have moved during the continuance to reopen discovery.

The trial court ultimately denied plaintiffs' request to limit the time for damages, noting the issue was a "very close call." The court examined the tension between plaintiffs' right to waive damages after a certain date and defendants' right to defend against the punitive damages claim. It concluded that to the extent plaintiffs had alleged defendants' ability to abate the nuisance and were seeking punitive damages for despicable and oppressive conduct, defendants needed to be able to rebut those allegations up to the time of trial.

We find the trial court's carefully-reasoned decision neither " 'exceed[ed] the bounds of reason, all of the circumstances before it being considered' " (*Denham*, *supra*, 2 Cal.3d at p. 566) nor " 'transgress[ed] the confines of the applicable principles of law' " (*Horsford*, *supra*, 132 Cal.App.4th at p. 393). Civil Code section 3283 provides that "[d]amages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof . . . ." The Court of Appeal in *Renz v. 33rd Dist. Agricultural*

Assn. (1995) 39 Cal.App.4th 61, 68 interpreted this provision to mean that damages incurred between the commencement and conclusion of a continuing nuisance action should be recoverable in that action. The court reasoned that even a plaintiff who seeks a temporary restraining (TRO) at the start of a continuing nuisance action "may still suffer additional injuries from the continuing nuisance between the *commencement* of the action and the conclusion of the action (i.e., the judgment) if either a TRO is not issued or is not obeyed" (*ibid*.), justifying the entitlement to damages through the conclusion of the action.

We agree with plaintiffs that the holding in *Renz* does not *require* the damages period to extend unalterably through submission of the cause to the jury. In the absence of a formal mechanism to address new evidence or post-discovery developments, it was within the trial court's discretion to consider plaintiffs' request to curtail the time period for damages. At the same time, the punitive damages claim necessarily entered the court's consideration of an evidentiary cutoff. The purpose of punitive damages "is a purely *public* one. The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110.) The relevance of a defendant's efforts to mitigate ongoing or future harm becomes apparent when considering that deterrence of future misconduct by the defendant is "the quintessence of punitive damages . . . ." (*Ibid*.)

Plaintiffs alleged in support of the punitive damages claim that Olivera's willful disregard of the neighbors' rights and failure to remediate offensive conditions at the ranch constituted oppressive and despicable conduct. As the court noted when it denied defendants' motion for nonsuit on plaintiffs' claim for punitive damages, plaintiffs obtained testimony from Olivera suggesting that he had not acted to alleviate the possibility of odors and flies and was not concerned about the effect of odors on neighbors of the ranch. Under these circumstances, we find that it was not unreasonable

for the trial court to determine that limiting defendants' ability to present evidence in mitigation, including that Olivera completed his plan to retire the primary lagoon, would severely prejudice defendants' ability to contest plaintiffs' allegations of oppressive and despicable conduct.

We furthermore do not find support for plaintiffs' claim that the trial court's ruling prevented them from fairly presenting their properly-disclosed evidence on decades of unabated conditions. The record was well-developed as to the conditions that plaintiffs experienced over many years. Multiple plaintiffs further testified that the latest changes at the ranch did not totally abate the odors, despite the declining intensity and frequency of the nuisance conditions.

Finally, plaintiffs claim that the trial court acted inconsistently in permitting evidence of remedial measures that postdated the close of discovery while excluding certain documents and witnesses that had been omitted from pretrial disclosures. But there is an important difference in that the evidence of remedial measures up to the time of trial was not improperly omitted from discovery or pretrial disclosures; it simply postdated those procedures. Plaintiffs cannot claim prejudice from any perceived inconsistency since it was to their benefit—and at their request—that the trial court excluded the undisclosed documents and witnesses. In sum, we conclude that the trial court did not abuse its discretion in denying plaintiffs' effort to limit evidence to the close of discovery. Rather, the court's decision fairly reflected the law on available damages in a continuing nuisance action and allowed defendants to present evidence to potentially mitigate plaintiffs' punitive damages claim.

4. Expert Testimony Concerning Air District Rule 4102

Plaintiffs also challenge the expert testimony of defendants' agricultural expert, Dr. Frank Mitloehner, concerning San Joaquin Valley Air Pollution Control District

Rule 4102. Plaintiffs contend that the trial court committed reversible error by allowing Dr. Mitloehner to testify about the ultimate issues of fact in the case.

During the relevant exchange, Mitloehner read from the air district rule, which was already in evidence and relates to odors. He testified without objection that " '[u]nder Rule 4102, no air contaminant shall be released into the atmosphere which causes a public nuisance,' . . . but . . . '[p]ursuant to Section 371, the prohibitions of this rule do not apply to odors emanating from agricultural operations.' " Mitloehner explained that the rule means the air district will investigate odor complaints and work with the parties to resolve the issue, but "has no authority over regulating odors." Defense counsel then asked, "Are agricultural facilities exempt from any such regulation?" Plaintiffs' counsel objected, and the trial court sustained the objection. Plaintiffs contend, however, that the "bell had already been rung" because the jury was led to believe, erroneously, that the ranch could not be a nuisance by virtue of its agricultural status.

Plaintiffs fail to explain how this limited exchange constituted reversible error. The air district rule and its limitations had already been the subject of earlier testimony. Plaintiffs' expert Kathy Martin acknowledged on cross-examination that the air district rule "with respect to public health and safety . . . does not apply to growing of crops or raising of fowl or animals." Steven Brodie, the air quality district inspector, testified in plaintiffs' case-in-chief that "agriculture is exempt for [*sic*] the odor complaints; however, the reason we keep on going out to odor complaints is because . . . when I'm on the facility, I'm not just looking for odors. I'm looking for other non-compliant issues." Defense counsel confirmed during Brodie's cross-examination that he had "mentioned a minute ago that the agriculture facilities are exempt from odor complaints," and Brodie responded, "Yes."

It is unclear how Mitloehner's testimony exceeded the bounds of permissible expert testimony, as plaintiffs claim, since the subject of the air district's limited

jurisdiction over odors from agricultural facilities was already established in the record. There is no evidence that Mitloehner opined as to the legal significance of the air district rule or implied that it meant that the ranch could not be a nuisance. In fact, the trial court sustained the objection interposed by plaintiffs' counsel and Mitloehner never answered the question of whether agricultural facilities are exempt from such regulation.

We conclude that plaintiffs have failed to support their contention of reversible error as to the admission of Mitloehner's testimony about air district rule 4102, and in any event find no abuse of discretion.

C. JUROR MISCONDUCT

Plaintiffs identify two instances of juror misconduct that they contend prejudiced their case and, together or independently, require reversal. The first concerns two jurors who failed to provide accurate disclosures during jury selection. Plaintiffs claim that the misinformation prevented counsel from addressing the nondisclosed issues in voir dire and deprived plaintiffs of a jury of 12 unbiased jurors. The second instance concerns an allegation by one juror that three jurors prejudged the case before deliberations began.

The trial court rejected both juror misconduct claims in a written order denying the motion for a new trial. On appeal, we defer to the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence on the question of whether juror misconduct occurred. (*People v. Collins* (2010) 49 Cal.4th 175, 242 (*Collins*), citing *People v. Nesler* (1997) 16 Cal.4th 561, 582 (*Nesler*).) Juror misconduct—if established—raises a presumption of prejudice. (*Nesler*, *supra*, at p. 578; see also *Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 321 (*Glage*).) The presumption may be rebutted by an independent examination of the entire record to determine whether there is a substantial likelihood that actual prejudice resulted from the misconduct. (*Glage*, *supra*, at p. 321; see *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417.)

1. Nondisclosure By Juror No. 8 and Juror No. 12

Juror No. 8 responded to written voir dire questions about any prior involvement in litigation, stating she had never been a party or witness in a civil case or in a lawsuit; she had been to court only for "family court, child support"; and "N/A" for whether "a claim for money damages has ever been made against you or anyone close to you" and "you or anyone close to you has ever sued or been sued in any type of lawsuit."

Plaintiffs contended in their motion for a new trial that the questionnaire responses were inaccurate. They submitted evidence that Juror No. 8 had been sued in two unlawful detainer complaints in 2005, had filed for bankruptcy three times—in 1997, 2000, and 2001, and had been charged with felony fraud in 2006 for obtaining AFDC (aid to families with dependent children) and food stamps in an amount exceeding $400, violating the Welfare and Institutions Code. Plaintiffs also showed that Juror No. 8 had obtained a temporary restraining order against a domestic partner in 1995.

In a declaration submitted to the trial court in support of defendants' opposition to the motion for a new trial, Juror No. 8 stated that it was her "belief" that at the time she completed the questions about prior lawsuits, "I either misread or misinterpreted the questions" as referring to involvement in then-current lawsuits, of which there were none. She explained that her mistake was inadvertent "and at no time did I intentionally attempt to deceive the court by knowingly providing false information."

Juror No. 12 was the jury foreperson. His written voir dire responses indicated that he had never been sued in a lawsuit, had not been to court for any reason, and had never had a claim for money damages made against him or anyone close to him. Plaintiffs submitted contravening evidence, namely a complaint for money (account stated) filed in September 2013 against Juror No. 12 in Santa Clara County Superior Court, seeking to recover a $1,187.90 balance on a credit account.

The trial court found that insofar as the written voir dire referred only to civil lawsuits and complaints for money, the questions would not have required Juror No. 8 to

disclose the criminal complaint or the temporary restraining order. It found that failing to disclose the bankruptcy filings may have been "in good faith" since bankruptcy "may not be easily understood by a lay person to be a lawsuit or a claim involving money." In contrast, the court found that the unlawful detainer complaints "are clearly understood to be civil complaints involving claims for money and unquestionably should have been disclosed."

As to Juror No. 12, the trial court did not credit the alleged inconsistency between the questionnaire responses and the complaint for account stated. The court took judicial notice of relevant superior court records, which showed the case had been dismissed without prejudice two months after filing without an appearance by Juror No. 12. Based on this information, the court reasoned that it could not determine whether Juror No. 12 knew about the claim for money filed against him. The court thus found insufficient evidence that Juror No. 12 had deliberately concealed the truth.

The trial court concluded that while plaintiffs may have elected to exclude Jurors No. 8 and No. 12 from the jury based on these legal actions, the showing would have been insufficient to sustain a challenge for cause and was insufficient to establish prejudice. It found the unlawful detainers, bankruptcies, and complaint for recovery of a credit card account balance did "not indicate a bias or prejudice against plaintiffs in a case charging nuisance against the owner of a neighboring egg ranch."

Plaintiffs dispute the trial court's finding that the written questions did not require Juror No. 8 to disclose the criminal complaint and domestic violence restraining order. More to the point, plaintiffs contend that the felony fraud charge and failure to disclose the unlawful detainer actions demonstrate that Juror No. 8 was unable to be honest and forthright in her voir dire responses, thus depriving plaintiffs of the chance to assess her fitness as a juror. They emphasize that the unlawful detainer actions alone would have caused counsel to question Juror No. 8 about her apparent disregard for the property rights of others—a key issue in this nuisance action involving the property rights of 28

plaintiffs. Plaintiffs similarly frame Juror No. 12's failure to disclose the complaint for money filed against him as a deliberate concealment that shows an inability to tell the truth and to follow the rules. Plaintiffs argue that these omissions were prejudicial because they were deprived of the opportunity to develop a challenge for cause or to exercise a peremptory strike against one or both jurors.

We accept, as supported by substantial evidence, the trial court's findings that neither Juror No. 8 nor Juror No. 12 engaged in deliberate misconduct. Several written voir dire questions asked in varying terms whether the potential jurors had ever been sued or been a witness in "a lawsuit," "any type of lawsuit," or had ever been a party or a witness in a civil case. Given that the term "lawsuit" is commonly understood to refer to civil actions,[12] the trial court reasonably inferred that Juror No. 8, or any layperson, would not have understood the questions to pertain to something other than civil litigation. The trial court also inferred from the rapid dismissal of the money claim against Juror No. 12 without an appearance by him in the proceeding that he may not have known of the claim. Plaintiffs have not effectively challenged these findings and inferences based upon the historic facts. (*Collins, supra,* 49 Cal.4th at p. 242.)

Next, the trial court found that Juror No. 8 should have realized the unlawful detainer complaints were subject to disclosure under the questionnaire. However, the court concluded that even if the omission was intentional, it did not indicate bias or prejudice against plaintiffs. We note that the court's finding on bias does not negate its

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[12] While the term "lawsuit" or "suit" is used synonymously with a court proceeding, the meaning derived from its etymological development is that of "a complainant's attempt to redress a wrong, enforce a right, or compel application of a rule." (Black's Law Dict. (10th ed. 2014) p. 1663.) This carries a subtly different meaning from that of "action" which may commonly refer to a civil action *or* criminal prosecution. (See *ibid.* ["Because *action* denotes a mode of proceeding in court not just to enforce a private right or to redress or prevent a private wrong, but also to punish a public offense, it is possible to speak of criminal actions."].)

predicate finding of misconduct. " 'Voir dire is the crucial means for discovery of actual or potential juror bias. Voir dire cannot serve this purpose if prospective jurors do not answer questions truthfully.' [Citation.] Thus, 'when a juror conceals bias on voir dire, . . . the event is called juror misconduct.' " (*Herrera v. Hernandez* (2008) 164 Cal.App.4th 1386, 1390.) The determination that Juror No. 8 improperly failed to disclose the unlawful detainer actions therefore requires us to consider possible bias and the presumption of prejudice.

The California Supreme Court's analysis of juror misconduct in the form of exposure to out-of-court information in *Nesler, supra*, 16 Cal.4th 561 provides a helpful framework. The court explained that "[a]lthough inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term 'misconduct,' it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut." (*Id.* at p. 579.) This is analogous to plaintiffs' claim that they had no opportunity to confront Juror No. 8 about her potential bias and arguable disregard for private property rights, or to excuse her on that basis.

Nesler looked to the federal constitutional standard for assessing whether a juror is "impartial." According to the United States Supreme Court, impartiality is a state of mind for which there are " 'no particular tests and procedure is not chained to any ancient and artificial formula.' [Citation.] . . . 'It is sufficient if the juror can lay aside his impression or opinion *and render a verdict based on the evidence presented in court*.' " (*Nesler, supra*, 16 Cal.4th at pp. 580-581.) Thus, "[a]n impartial juror is someone 'capable and willing to decide the case solely on the evidence' presented at trial." (*Id.* at p. 581.) "[I]f a juror's partiality would have constituted grounds for a challenge for cause during jury selection, or for discharge during trial, but the juror's concealment of such a state of mind is not discovered until after trial and verdict, the juror's actual bias constitutes misconduct that warrants a new trial . . . ." (*Ibid.*)

Here, plaintiffs have not demonstrated how the failure to disclose the two unlawful detainer actions filed against her about eight years earlier hindered Juror No. 8's ability to remain impartial, or constituted grounds for a challenge for cause. Although Juror No. 8 did not disclose the earlier legal actions, she indicated in other responses to the juror questionnaire that the experience of being a party in a lawsuit would not keep her from being fair and impartial in this case, and that if chosen to sit as a juror she would follow the law as given by the judge "regardless of any personal feelings you may have about the law." The trial court also found that the nondisclosure would not have supported a successful challenge for cause. Plaintiffs do not appear to challenge that finding.

We find under these circumstances that Juror No. 8's misconduct in failing to disclose the unlawful detainer claims from 2005 did not establish actual bias, expressed as an inability " 'to decide the case solely on the evidence' presented at trial." (*Nesler, supra,* 16 Cal.4th at p. 581; see *People v. Ledesma* (2006) 39 Cal.4th 641, 670 [a juror may be excused for " '[a]ctual bias' if the court finds that the juror's state of mind would prevent him or her from being impartial"]; Code Civ. Proc., § 225, subd. (b)(1)(C).) There remains a question, however, whether the misconduct nevertheless prevented a fair trial, given the second instance of alleged juror misconduct also involving Juror No. 8.

2. Prejudgment By Juror No. 8, Juror No. 9, and Juror No. 12

Plaintiffs contend that Jurors No. 8, No. 9, and No. 12 were predisposed against plaintiffs prior to the start of deliberations, as attested to posttrial by Juror No. 1. Counsel for plaintiffs learned of the alleged bias in speaking with Juror No. 1 after the verdict was read.

In a declaration submitted in support of plaintiffs' motion for new trial, Juror No. 1 described the alleged misconduct: "Before the other jurors and I began deliberating, I observed that . . . [Juror No. 8], [Juror No. 9], and [Juror No. 12] had prejudged the case. By that, I mean I observed these jurors had already decided that they

were not going to vote in favor of any of the plaintiffs during deliberations, before deliberations had begun. These jurors openly expressed negative bias against the plaintiffs' case before deliberations began. [¶] This negative bias was also expressed as soon as the other jurors and I were in the deliberation room for the first time when jurors [Nos. 8, 9, and 10] made comments that all we had to do was prove the Defendants' case and we could all go home quickly. [¶] It was also my observation that jurors [Nos. 8, 9, and 10] were not going to vote in favor of any of the plaintiffs because they did not feel the plaintiffs adequately complained to local, state or federal authorities about the nuisance-causing conditions at Olivera Egg Ranch, even though that was not something that the plaintiffs had to prove in their case and was not part of any of the instructions given to us by the Judge."

Defendants submitted sworn declarations from two jurors to refute the bias claim. Juror No. 8's declaration, discussed above, stated that her mistake in failing to note the prior lawsuits was inadvertent and not intended to deceive the court. Juror No. 8 also denied any expression of bias, stating that "[a]t no time before the deliberations commenced did I openly express any negative bias towards the plaintiffs, nor did I hear any such statements made by any of the other jurors. [¶] The deliberations began with a thorough review of the evidence and involved preparation of a time-line chronology which served to assist in the jury's evaluation of the case. It was not until after the jury reviewed the evidence that I, or any of the other jurors, made our opinions known. [¶] At no time before or during the deliberations did I make a comment to the effect that 'all we had to do was prove the Defendants' case and we could all go home,' nor did I hear that comment made by any of the other jurors."

Defendants also submitted a declaration by Juror No. 4, who was not implicated in plaintiffs' misconduct allegations. She denied hearing "any of the jurors openly express any negative bias towards the plaintiffs" at any point before the deliberations began, nor did she hear "any juror make a comment to the effect that 'all we had to do was prove the

Defendants' case and we could all go home.' " She described the deliberations as "exceedingly thorough" including "at least two evaluations of each individual plaintiff."

The trial court found that the declaration of Juror No. 1 lacked credibility and did not establish bias or prejudice. The court observed that the declaration purported to understand the other jurors' thoughts and mental processes, was vague as to Juror No. 1's understanding of when the deliberations began—a critical point given the assertion of negative bias "before deliberations began," and was not specific as to how the sentiment to prove defendants' case so " 'we can all go home' " was expressed—whether by the three jurors in unison or otherwise. The court also found that Juror No. 1's statements were contradicted by the other declarations. Given that deliberations continued for two-and-a-half days, the court concluded that the jurors "had a considerable amount of time to hear and weigh the opinion of others" and that even if Juror No. 1's report was accurate, "the other nine jurors clearly were not swayed by the premature statements . . . ."

Plaintiffs claim several types of prejudice based upon the alleged bias observed and reported by Juror No. 1. They argue that the jury held them to a higher burden of proof because the prejudging jurors suggested that plaintiffs should have complained more robustly about the conditions created by the ranch before suing.

It is not debatable that a juror who prejudges the case commits misconduct. (*Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 361.) But we find that plaintiffs have skipped the crucial step of establishing misconduct related to the prejudgment claim in the first instance. Plaintiffs do not discuss the trial court's findings, which given the limited evidence appear to be adequately supported by the record.

" 'When an issue is tried on affidavits . . . and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 108 (*Weathers*).) Such is the case here. The trial court found Juror No. 1's description of

misconduct was not credible given the ambiguity in describing both the timing of the alleged bias "before deliberations began" and the statement attributed to the three jurors, as well as the fact that the other two declarations contradicted the claim. We defer to that finding because "weighing the credibility of conflicting declarations on a motion for new trial is uniquely within the province of the trial court." (*Id*. at p. 109.) The trial court also questioned the admissibility of the evidence, to the extent that Juror No. 1's conclusion was not attributed to "observable statements or actions."

Evidence Code section 1150 authorizes a party challenging the validity of a verdict to submit admissible evidence "as to statements made, or conduct . . . within or without the jury room, of such a character as is likely to have influenced the verdict improperly" but deems inadmissible evidence "to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a).) The rule " 'distinguishes between "*proof of overt acts, objectively ascertainable*, and *proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved, . . .*" ' " (*Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 506 (*Enyart*).) Simply stated, "[t]he only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict . . . are those open to sight, hearing, and the other senses and thus subject to corroboration." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350.) The rule "prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent." (*Ibid*.)

Juror No. 1's observations of negative bias are admissible as statements or conduct that is objectively ascertainable and subject to corroboration. (*Enyart*, *supra*, 76 Cal.App.4th at p. 506.) In contrast, the observation that the three jurors had decided against plaintiffs "because they did not feel the plaintiffs adequately complained" is not based on conduct seen or heard, but shows an improper attempt to discern the subjective

reasoning processes of fellow jurors. (*Ibid*.; see Evid. Code, § 1150, subd. (a).) Looking only to the admissible evidence, we find that to the extent that Juror No. 1's assertions of biased statements by Jurors No. 8, No. 9, and No. 12 are contradicted by other declarations, the trial court's finding of no credible proof of misconduct is supported by the record. (*Weathers*, *supra*, 5 Cal.3d at pp. 108-109.)

3. The Record Showed No Substantial Likelihood of Prejudice

Plaintiffs challenge the notion that they could have received a fair trial despite the misconduct outlined above. For the reasons stated in the preceding analysis, we find the trial court's factual determinations regarding bias to be supported by substantial evidence in the record. Our independent review of the entire record, moreover, supports the conclusion that to the extent misconduct did occur—at a minimum Juror No. 8's failure to disclose the unlawful detainers—it is unlikely that it prevented a fair trial for plaintiffs.

"Some of the factors to be considered when determining whether the presumption is rebutted are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." (*Hasson v. Ford Motor Co.*, *supra*, 32 Cal.3d at p. 417.) None of these factors offer a compelling case for reversing the judgment here.

The strength of the evidence that misconduct occurred rests upon Juror No. 8's responses on the juror questionnaire, affidavit, and the observations and suppositions set forth in the declaration of Juror No. 1. As sources of evidence, these lack key details, and the charges of bias are contradicted by the counter-declarations of Jurors No. 8 and No. 4.

Plaintiffs' argument regarding the seriousness of the misconduct rests upon the unsubstantiated belief that an individual who has been subject to two unlawful detainer actions does not value the property rights of others, *and* that further voir dire on the subject would have revealed Juror No. 8's assumed disregard for property rights and inability to remain impartial. Such assumptions are insufficient in comparison with cases

in which the presumption of prejudice went unrebutted. (See, e.g., *Weathers*, *supra*, 5 Cal.3d at pp. 109-111 [misconduct in medical malpractice wrongful death suit included intentional concealment by several jurors of racial bias and of views favoring defendant hospital]; *Enyart*, *supra*, 76 Cal.App.4th at pp. 509-511 [three jurors concealed negative feelings about the city and police department during voir dire, but later expressed pervasive mistrust of those entities during deliberations]; *Glage*, *supra*, 226 Cal.App.3d at pp. 324-326 [two jurors referred to dictionary for term in an instruction, shared dictionary definition with other jurors and discussed the term at length, creating substantial risk the jury would apply a different standard based on the dictionary term].)

We find the probability that actual prejudice may have ensued appears to be minimal. " 'When the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial. By contrast, when the misconduct does not support such a finding, we must hold it nonprejudicial.' " (*Glage*, *supra*, 226 Cal.App.3d at pp. 321-322.) Our review of the entire record, including voluminous evidence on both sides, the length of deliberations and questions submitted by the jury, and the jury's unanimous verdict for 21 of the 28 plaintiffs,[13] supports this conclusion. Since we find that the presumption of prejudice has been rebutted, the trial court did not err in denying plaintiffs' motion for a new trial.

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[13] The jury was polled after the verdict was read.

The vote was 12-0 (in favor of defendants) for plaintiffs Christina Acoba, Christina Arana, Diane Arana, Carlos Chavez, James Edward Chavez, Mary Ellen Chavez, Andrew Franco, Ashley Gerstel, John E. Gish, Joy Gish, John Westley Ray Gish (minor), Lorraine Gomez, Rose Gomez-Delphin, Amber Noceti, Anthony Noceti, Carol Noceti, Consuelo Noceti, Danica Noceti, Patricia Paulsen, Pete Paulsen, Deanna Sarcos.

The tally for the remaining plaintiffs was 11-1 for plaintiffs Chester Gish and Myrna Gish, 10-2 for plaintiff Benjamin Estepa (minor), and 9-3 for plaintiffs Ruben R. Valencia, Dasia Valencia (minor), Cion Vallesteros, and Rudy Vallesteros.

D. THE WEIGHT OF THE EVIDENCE

Plaintiffs contend in the final paragraph of their opening appellate brief that because they put forth "more than substantial evidence" to support their nuisance claims, but for the errors cited on appeal, they should have received a favorable verdict. While plaintiffs may be correct that the evidence admitted at trial was sufficient to support a verdict in their favor, that is not the standard for a successful appeal. Rather, error must be affirmatively shown. (*Denham*, *supra*, 2 Cal.3d at p. 564.) Having carefully reviewed each of the individual rulings challenged in this appeal and finding none that require reversal, we conclude that the jury's verdict stands.

III. DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

Premo, J.

WE CONCUR:

Greenwood, P.J.

Elia, J.

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