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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

FRANK B. FUNSTON, Plaintiff and Appellant, v. JOE LUCIDO, Defendant and Respondent.	C034631 (Super.Ct.No. SCCVPO98476)

On or around September 1, 1997, defendant Joe Lucido's front-end loader slid into a work area during logging operations. When he backed the loader up to straighten it out, he ran over a log on which plaintiff Frank B. Funston was removing limbs, causing the tree to roll onto his legs and injuring him.

The jury found that the defendant was not negligent. Funston appeals, contending that the trial court erred in failing to grant his motion for a directed verdict and committed instructional error. We find no prejudicial error and shall affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Accident

The accident occurred during a logging operation in which both plaintiff Funston and defendant Lucido were employed. For this operation, helicopters would deliver felled trees to a large clearing, or "landing." A loader operator would then move each tree to a work area in which the "knot bumpers" -- plaintiff Funston was one -- measured and cut the tree to a 40-foot length with chainsaws and removed limbs and knots from the tree. The ground was kept wet to prevent debris from rising in the updraft created by the helicopters.

On the day of the accident, plaintiff Funston was one of three or four knot bumpers at work; defendant Lucido, an independent contractor, was the loader operator. The loader is a piece of heavy machinery approximately 23 feet long, 8 feet wide, and 10 feet high.

Neither Funston nor Lucido saw the accident happen, but they agree that moments before it occurred, Funston was working on a felled tree about 100 feet long, which had been placed there by Lucido. In his loader, Lucido was pushing brush away from the area where Funston was working.

Looking up from his work, Funston saw the back of Lucido's loader, about 40 to 50 yards away, moving away from where Funston was working. Lucido noticed Funston's location at about the same time. Funston then returned his attention to measuring and cutting limbs from the tree with a chainsaw.

Although he had an unobstructed view of Lucido’s loader, he did not look up again.

Simultaneously, Lucido attempted to make a turn while pushing debris away from where Funston was working. His loader lost traction and slid sideways about five or six feet toward Funston’s work area. Although Lucido did not know his loader was going to slide, it is not unusual for one to do so when pushing heavy loads on wet ground. To straighten the loader, Lucido backed up. Although Lucido’s loader had a backup warning bell, Funston claimed there “[w]asn’t enough time” to react. The loader’s tires went over the small end of the tree on which Funston was working, causing it to hit Funston. Lucido, who did not look in Funston’s direction before he backed up, was unaware that he had hit the tree.

There were no other witnesses to the accident.

B. The Lawsuit

Funston sued Lucido, doing business as Lucido Trucking, for negligence. Funston’s wife brought a separate action against Lucido for loss of consortium, and the two actions were consolidated for trial.

Defendant Lucido denied liability, and raised a variety of affirmative defenses, including that Funston had assumed the risk of injury and that Funston’s own negligence had caused the accident.

C. The Trial

At trial, the dispute focused on whether Funston or Lucido had the greater obligation to avoid the accident.

Operating from the presumption that logging is dangerous work for which special precautions must be taken, Funston's logging expert, Gary Rynearson, opined that a loader operator, such as Lucido, owes a duty of care to those working on the ground to maintain a safety zone between his machine and the workers and that Lucido's conduct fell below the standard of care for a loader operator. In Rynearson's opinion, Lucido breached the standard of care because he knew the tree's location and knew Funston and other knot bumpers were working on the tree. According to Rynearson, Lucido should not have backed up the loader without checking to see that the employees behind him were in a safe position. Indeed, Rynearson opined that a knot bumper (like Funston) is entitled to assume the loader operator will look out for him.

In Rynearson's view, Funston met his duty to work safely by taking a position on the side of the log that gave him a better view of the loader and by glancing up occasionally to check the loader's location and the relative safety of his location before returning to his work. It would have been impossible for Funston to have been watching the loader operator 100 percent of the time and still have performed his duties, according to Rynearson.

For his part, Funston testified that he had been "working in the woods" for more than 20 years and was an experienced

chainsaw operator. On the date of the accident, he had complied with his responsibilities to let Lucido know his location and to watch out for his own safety while using the chainsaw. In fact, Funston testified, “I did everything in my power” to avoid injury from the loader “other than shutting down my chainsaw and sitting there watching” the loader. Moreover, Funston proffered that it was Lucido’s obligation to “look out for everybody that’s on the ground.”

Lucido testified at trial that his actions on the day of the accident did not fall below the standard of care. He testified that he was doing his job and paying attention the whole time. Lucido described the environment of the landing as “controlled chaos.” In that environment, Lucido explained, he could not watch the knot bumpers every minute that he was operating the loader, and they knew it. Consequently, Lucido expected the landing personnel (including Funston) to keep track of the loader’s location. When he started pushing brush away from Funston with the loader, it became Funston’s responsibility to watch out for Lucido because Lucido could not see him. However, in a seemingly significant concession for plaintiffs, Lucido testified under cross-examination that “under the circumstances” backing up over the tree “fell below the standard of care of a loader operator.”

Defense logging expert, Dan Peter McLaughlin, opined that Lucido was acting as a reasonably careful loader operator at the time of the accident, but that Funston was not acting as a reasonably careful knot bumper, because he was not watching the

loader. However, McLaughlin conceded that a reasonable loader operator, were he paying attention, would not run into a log on which someone is working, would not knowingly back over a tree that he knows a knot bumper is working on, and should look before he backs up "when he can." But McLaughlin did not consider a loader operator who backs up 10 seconds after seeing a person working on a tree behind him to be negligent.[1]

By a vote of 10-2, the jury found by special verdict that Lucido was not negligent, and judgment was entered in his favor. The court thereafter denied Funston's motion for a judgment notwithstanding the verdict, or alternatively, for a new trial.

II. DISCUSSION

A. The Trial Court Did Not Err in Denying Plaintiffs' Motion for a Directed Verdict

Plaintiffs argue that their motion for a directed verdict should have been granted because "Mr. Lucido admitted unequivocally that his actions were below the standard of care of a load operator" and such an admission was binding.

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[1] While Funston argues on appeal that McLaughlin agreed with the defendant's concession that backing over the tree fell "below the standard of care," McLaughlin's testimony on that point was ambiguous, stating that he did not "dispute Lucido's testimony" (which might only suggest that he did not dispute that the defendant so testified).

1. Background

During plaintiffs' case-in-chief, Lucido testified during direct examination by Funston's counsel as follows:

"Q. And you do know that running over a -- bumping a log that someone is working on can cause an injury?

"A. Yes.

"Q. And it's not something that you would normally do?

"A. No.

"Q. Not something you would do if you were paying attention?

"A. No, it isn't.

". . . . .

"Q. And you backed up over the tree that he was working on?

"A. Accidentally.

"Q. I'm not saying you did it intentionally, but it's not something you would normally do as a loader operator, correct?

"A. No.

"Q. It fell below the standard of care of a loader operator, didn't it?

"A. Under the circumstances, it did.

". . . . .

"Q. Frank had no reason to expect that you were going to run over that tree that he was working on?

"A. No.

"Q. And Frank . . . did have the right to expect that you were going to act as a reasonable loader operator?

"A. Yes.

"Q. And a reasonable loader operator wouldn't have run over that tree while Frank was working on it?

"A. Not under the circumstances, no."

But when examined by his own attorney during the defense case, Lucido testified -- to the contrary -- that his actions on the day of the accident did *not* fall below the standard of care, that he *was* paying attention the whole time, and that Funston was obliged to watch out for Lucido (and not the reverse) when the rear of the loader was toward Funston.

At the close of evidence during trial, Funston's counsel moved for a directed verdict (Code Civ. Proc., § 630) as to Lucido's negligence, based on Lucido's testimony that his actions "fell below the standard of care of a loader operator." The trial court denied the motion.

2. Analysis

"Like a motion for nonsuit, a motion for a directed verdict is in the nature of a demurrer to the evidence. [Citations.] In determining such a motion, the trial court has no power to weigh the evidence, and may not consider the credibility of witnesses. It may not grant a directed verdict where there is *any* substantial conflict in the evidence." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629, and cases cited therein, original italics.) "Thus, if the party resisting a motion for directed verdict produces sufficient

evidence to support a jury verdict in his or her favor, the motion must be denied." (*Id.* at p. 630.)

On appeal from a trial court's denial of a motion for a directed verdict, we may ask only "whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment." (*Howard v. Owens Corning, supra,* 72 Cal.App.4th at pp. 630-631, original italics.) "As a general rule, therefore, we will look only at the evidence and reasonable inferences supporting the successful party, and disregard the contrary showing." (*Id.* at p. 631; see also *Bell v. State of California* (1998) 63 Cal.App.4th 919, 927.)

Considering all the evidence proffered at trial, while on paper Funston would appear to have the stronger case, we cannot say that there was not substantial evidence to support the jury's determination that Lucido was not negligent: Funston knew Lucido was only 40 to 50 yards away; the log on which Funston was working was over 33 yards, and thus was close to

where Lucido was driving; the loader itself was over 7 yards long, leaving little margin for error, and a reasonably prudent person of Funston's experience observing this would have been vigilant; it was not unusual for a loader to slide on wet ground, and in fact, the loader did slip; although Funston had an unobstructed view of the loader, he was injured because he was not looking, and he did not deny hearing the loader's backup warning bell. McLaughlin testified that a loader operator would not necessarily be negligent, even assuming he knew that a knot bumper was working on a tree and within 10 seconds backed up over the tree. The fact that the jury came back with a no-liability verdict, despite the repeated occasions on which plaintiffs' counsel read Lucido's concessions about falling below the standard of care, suggests that the jury found Lucido's position more credible.

However, Funston urges us to find that the evidence in Lucido's favor was "insubstantial" as a matter of law because it contradicted Lucido's "admissions" elsewhere that a reasonable loader operator would not have run over the log that Funston was working on and that his actions fell below the standard of care of a reasonable loader operator. Funston's argument analogizes this trial admission to the role that a party's deposition admission plays in a motion for summary judgment: "If the . . . admissions by Mr. Lucido and the subsequent testimony by his expert had been made in deposition or in answers to interrogatories, the trial court would have been required to grant plaintiffs summary judgment on the issue

of negligence. However, instead of informal judicial admissions, the admissions of Mr. Lucido and of his own expert, Mr. McLaughlin, were made during the course of trial while in the formality of a court setting. Thus, such admissions should have even more value than if they had been made during the course of discovery; certainly they should not be less [*sic*].”

It is settled that “when discovery has produced an admission or concession on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried, certain of th[e] stern requirements [for summary judgment] applicable in a normal case are relaxed.” (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.) But it is not clear that this rule applies to inconsistent testimony at trial. Neither of the cases cited by Funston are squarely on point with respect to the binding effect of a trial admission that is later contradicted at trial.

In *Mikialian v. City of Los Angeles* (1978) 79 Cal.App.3d 150 (*Mikialian*)), cited by Funston, the plaintiff, a tow truck operator, sought damages for a personal injury sustained when he was struck by a hit-and-run driver while afoot on the traffic side of a towed vehicle parked on Vineland Avenue in the City of Los Angeles. The City moved for nonsuit at trial based on the plaintiff’s trial testimony -- consistent with his deposition testimony -- that he had not been directed by police to park in the location where he was subsequently hit, but had chosen that location for himself. (*Id*. at pp. 154-155.) Three

other times during his trial testimony, however, the plaintiff testified that he *was* told where to park by police. (*Id.* at pp. 154, 159.) Citing *D'Amico v. Board of Medical Examiners, supra,* 11 Cal.3d 1, for the proposition that a party opposing summary judgment may not create an issue of fact by submitting a counteraffidavit that simply contradicts his prior discovery admissions, the court in *Mikialian* ruled that the City's motion for nonsuit was properly granted on the ground that there was no substantial evidence that the police violated any duty to the plaintiff where the trial testimony was inconsistent with his deposition testimony and other trial testimony:

"These unequivocal statements in [plaintiff's] deposition were confirmed by his trial testimony that it was his, and not the officers', decision to move the vehicles to the east curb of Vineland. . . . [¶] If plaintiff's testimony in this respect as given in his deposition was in error, he had nine months prior to trial within which to correct it. Had he done so, he would have been called upon to explain the former testimony . . . . Such an explanation would have created a fact issue. But plaintiff did not choose this course. He chose, instead, simply to make contradictory statements to the effect that he was directed where to park while continuing to make corroborative admissions that the decision was his own. Under these circumstances, we conclude that there was no substantial evidence that the officers directed plaintiff where to park. [¶] . . . . [¶] . . . The rule stated in *D'Amico* is that the assertion of facts contradictory to deposition

testimony by affidavit does not constitute '"*substantial* evidence of the existence of a triable issue of fact"' for the purpose of denying a motion for summary judgment. A fortiori, trial testimony simply contradicting a clear and unequivocal admission in a deposition cannot require denial of a nonsuit." (*Mikialian, supra,* 79 Cal.App.3d at pp. 160-161, original italics.)

Thus, *Mikialian* addressed a conflict between trial testimony, on the one hand, and an admission in discovery, corroborated by trial testimony, on the other. Nor does *In re Marriage of Brigden* (1978) 80 Cal.App.3d 380, 388-389, cited by plaintiffs, unequivocally hold that inconsistent testimony at trial can be ignored. It merely found that an *equivocal* statement at trial was insubstantial when it conflicted with "clear and unequivocal testimony" twice admitting a point.

However, we need not reach the issue whether the rule enunciated in *D'Amico v. Board of Medical Examiners, supra* -- a rule that gives deference to discovery admissions for purposes of determining the existence of a triable issue of fact for purposes of summary judgment -- applies to an admission at trial that is inconsistent with other trial testimony. Even assuming that it does, it could not control here because Funston does not seek to bind Lucido to testimony on factual matters, but on legal matters: Funston desires to prevent Lucido from altering his testimony over the ultimate legal issues in this case -- whether his actions were "reasonable" or had "fallen below the standard of care." But whether Lucido

believed his conduct to reflect that of "a reasonable loader operator" or to fall below the standard of care are not admissions of facts, but ultimate legal conclusions.

The case law draws a distinction between a party's admissions of fact (to which the party may be bound, notwithstanding subsequent conflicting testimony) and his or her statement of "mere legal conclusions" (which are not given great weight, and which the party may contradict to create a triable issue of fact). (E.g., *R.J. Land & Assoc. Constr. Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 425; *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1502-1503.)

The seminal California Supreme Court case on the issue of binding admissions for purposes of a motion for summary judgment -- *D'Amico v. Board of Medical Examiners, supra,* 11 Cal.3d at page 22 -- made the distinction between factual and legal issues in its conclusion: "Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exist triable issues of *fact* (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits." (*Ibid.*, original italics.)

And *R.J. Land & Assoc. Constr. Co. v. Kiewit-Shea, supra,* 69 Cal.App.4th at page 425, summarized: "The doctrine that admissions made in depositions are given great weight does not apply to mere legal conclusions."

Accordingly, the legal conclusions of Lucido did not bind the trial court for purposes of determining whether to grant a motion for directed verdict. It did not therefore err in denying plaintiffs' motion.[2]

B. *There Was No Reversible Error in the Jury Instructions on Negligence.*

Funston argues that "[t]he trial court's contradictory instructions regarding the duty owed by defendant to plaintiffs were, necessarily, prejudicial."

1. Background

Funston asked that the jury be instructed on the applicable standard of care for "professional negligence" with BAJI No. 6.37[3] and on the determination of that standard of

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[2] We note that plaintiffs' argument that no substantial evidence supports the verdict does not cite all the material evidence on the point, but only Lucido's admissions; accordingly, even though we have explored the substantiality of the evidence, plaintiffs have waived any claim that the evidence was not substantial, apart from their argument that Lucido's admissions bound him. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

[3] The form BAJI No. 6.37 instruction states: "In performing professional services for a client, [a][an] ________ has the duty to have that degree of learning and skill ordinarily possessed by reputable _______, practicing in the same or a similar locality and under similar circumstances. [¶] It is a further duty to use the care and skill ordinarily used in like cases by reputable members of the same profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and best judgment in the exercise of professional skill and in the application of learning, in an effort to accomplish the purpose for which the professional was employed. [¶] The failure to fulfill any such duty is negligence."

care pursuant to expert testimony in accordance with BAJI No. 6.37.4.[4]

The trial court granted Funston's request for BAJI No. 6.37 with respect to the standard of care, and instructed the jury as follows:

"A loader operator has the duty to have that degree of learning and skill of other loader operators he is working with in the same or similar locality or and [*sic*] under similar circumstances. [¶] It is a further duty to use the care and skill ordinarily used by other loader operators working in the same or similar locality under similar circumstances[, a]nd to use reasonable diligence and best judgment in the exercising of that skill and effort to accomplish the purpose for that which the loader operator was employed. [¶] The failure to fulfill any such duty is negligence.

"A knot bumper has the duty to have that degree of learning and skill of other knot bumpers working in the same or similar locality and under similar circumstances. [¶] It is a

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[4] BAJI No. 6.37.4 states: "You must determine the standard of professional learning, skill and care required of the defendant only from the opinions of the _______ [including the defendant] who have testified as expert witnesses as to such standard. [¶] You should consider each such opinion and should weigh the qualifications of the witness and the reasons given for his or her opinion. Give each opinion the weight to which you deem it entitled. [¶] [You must resolve any conflict in the testimony of the witnesses by weighing each of the opinions expressed against the others, taking into consideration the reasons given for the opinion, the facts relied upon by the witness and the relative credibility, special knowledge, skill, experience, training and education of the witness.]"

further duty to use the care and skill ordinarily used by other knot bumpers working in the same or similar locality under similar circumstances and to use reasonable diligence and best judgment in the exercising of that skill and effort to accomplish the purpose for which the knot bumper was employed. [¶] The failure to fulfill any such duty is negligence."

The court denied Funston's request for BAJI No. 6.37.4, which would have instructed the jury that the standard of care be determined only pursuant to expert testimony.

The court also instructed the jury on negligence pursuant to BAJI Nos. 3.10,[5] 3.11,[6] and 3.12,[7] each of which indicates

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[5] The court instructed with BAJI No. 3.10 as follows: "'Negligence' is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence. [¶] It is the failure to use ordinary or reasonable care. 'Ordinary or reasonable care' is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under the circumstances similar to those shown by the evidence. [¶] You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one. But a person of reasonable and ordinary prudence."

[6] The court instructed with BAJI No. 3.11 as follows: "One test that's helpful in determining whether or not a person was negligent is to ask and answer the question, whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he or she would have foreseen or anticipated that someone might have been injured by or from it -- or as a result of his or her action or inaction. [¶] If the answer to that question is 'yes,' and if the action or inaction reasonably could have been avoided, then not to avoid it would be negligence."

[7] The court instructed with BAJI No. 3.12 as follows: "The amount of caution required of a person in the exercise of ordinary care depends upon the conditions that are apparent or

(Continued.)

that the standard of care for assessing negligence is that of a "reasonably prudent person" under "similar" circumstances (BAJI Nos. 3.10 and 3.12), or of "persons of ordinary prudence" (BAJI Nos. 3.10 and 3.11).

On appeal, Funston contends that the trial court erred in instructing the jury on the standard of ordinary prudence pursuant to BAJI Nos. 3.10, 3.11, and 3.12 and in failing to instruct pursuant to BAJI No. 6.37.4.

First, he argues that "instructions regarding ordinary negligence were simply inapplicable," because all the evidence indicated that a loader operator "needed *special knowledge and skill* which is not possessed by the ordinary layman" (original italics); consequently, the jury was instructed prejudicially "on a standard of care lower than that required by law."

Second, he claims that by instructing the jury both with the standard of care applicable to a person of special expertise pursuant to BAJI No. 6.37 *and* with the ordinary prudence standard pursuant to BAJI Nos. 3.10, 3.11, and 3.12, "the trial court gave the jury two conflicting standards of care by which to measure defendant's conduct," thereby misleading the jury.

Finally, Funston maintains that the error in giving the "necessarily conflict[ing]" instructions was "compounded" by the trial court's refusal to instruct the jury with BAJI No.

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that should be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence."

6.37.4, which would have charged it to determine the standard of care only from expert testimony.

2. BAJI Nos. 3.10, 3.11, and 3.12

Funston is estopped from raising any claim of error related to the court's instruction with BAJI Nos. 3.10, 3.11, and 3.12 because those instructions were given at his request.

The document entitled "Plaintiff's Proposed Standard BAJI Instructions and Special Verdict," filed with the court, states that Funston is requesting the jury be directed with BAJI Nos. 3.10, 3.11, and 3.12. And Funston did not object to those instructions when the trial court stated that it would give those instructions. Funston's insistence to the contrary in his appellate brief that "*at the request of the defendant, and over plaintiff's objection*, the trial court instructed the jury that defendant should be held to an ordinary standard of care (BAJI Nos. 3.10 through 3.12) [italics added]" and that "BAJI 3.10 . . . was proposed by defendant" is without support in the record.

It is well established that "[t]he doctrine of invited error bars a [party] from challenging an instruction given by the trial court when [he] has made a 'conscious and deliberate tactical choice' to 'request' the instruction." (*People v. Lucero* (2000) 23 Cal.4th 692, 723; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213; *Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117, 122 [defendant cannot complain

on appeal of inconsistent verdicts rendered in accordance with jury instruction it requested].)

"The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. [Citations.] At bottom, the doctrine rests on the purpose of the principle, which prevents a party from misleading the trial court and then profiting therefrom in the appellate court." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

Although it applies in other contexts as well, the invited error doctrine applies with particular force in the area of jury instructions in civil cases. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.) As stated in *Stevens v. Owens-Corning Fiberglas Corp., supra,* 49 Cal.App.4th at p. 1653, "Whereas in criminal cases a court has strong sua sponte duties to instruct the jury on a wide variety of subjects, a court in a civil case has no parallel responsibilities. A civil litigant must propose complete instructions in accordance with his or her theory of the litigation and a trial court is not "obligated to seek out theories [a party] might have advanced, or to articulate for him that which he has left unspoken.' [Citations.]'" (Original brackets.)

The court granted Funston's request to have the jury instructed with BAJI Nos. 3.10, 3.11, and 3.12 without

discussion or objection. Funston never rescinded that request, even after the court also granted his request to instruct the jury with the professional standard of care under BAJI No. 6.37. It was *defense counsel* who complained (during the court's consideration of whether to grant Funston's further request to instruct the jury with BAJI No. 6.37.4) that the instructions presented a potential conflict:

"THE COURT: 6.37.4, that's the standard of care professional negligence [*sic*].

"MR. ENOCHIAN [Lucido's Counsel]: Again your honor, the whole problem with this series of instruction is you're establishing something other than just the standard of care for negligence in this case. [¶] And, quite frankly, if your honor is really going to give those instructions, if you take a look at the cases in the headnotes and the case notes, you shouldn't be giving the ordinary negligence instructions. [¶] So, I guess, your honor is going to have to make a decision as to whether or not this is an ordinary negligence case or whether we're going to go under the six's, but you can't give both.

"MR. NEEDHAM [Funston's Counsel]: To the contrary, your honor, I believe, if you look at the following instructions, that they tie in with the professional negligence instructions, and in either event, the -- the question becomes if the person has something that is unusual or different than the ordinary skill, that's when you become a professional. [¶] The fact that this guy works with his hands doesn't mean he's less a

professional, has less expertise than somebody who sits at a desk.

"MR. ENOCHIAN: Again, if the court has the time to review the instructions together, it will see the kinds of cases that the six's are designed to cover. [¶] And the negligence instructions and the 6.37 instructions would be redundant, if the court indeed has deemed knot bumpers and loader operator as quote, professionals, under the definition of . . . these BAJI instructions. [¶] It's a negligence case. And the negligence -- the standard of care for A, quote, professional, can be governed by the six's, doctors, lawyers, CPA's and the like, standard of care under ordinary negligence is covered under the ordinary negligence instructions and my position, if the court -- you know, rules that these guys are, quote, professionals, and wants to give the six's then my position is we don't give the others because it's duplicative, it's redundant, it's potentially confusing to the jury.

"MR. NEEDHAM: I don't have a problem with that -- I don't have a problem with that, if that's what he believes is, if it's appropriate, we can drop the things.

"MR. ENOCHIAN: We don't want it.

"THE COURT: Drop the three's or drop the six's.

"MR. NEEDHAM: Strongly believe that the six's are appropriate in this instance.

"MR. ENOCHIAN: And it seems to me that --

"MR. NEEDHAM: Mr. Enochian has continued to say, gee, that's what -- we're one of the -- we're back in it. Well, I tried many cases with the conundrum he says that's what it is,

I disagree. I can have -- I argue strongly that if I have somebody who has an expertise as a carpenter, that lay people don't have expertise as a carpenter. What a carpenter does with his skill saw, how he should use that, is beyond the expertise of an ordinary layman. . . . Otherwise, we're saying, well, gentlemen, only time you could be a professional is if you work with a desk and a white shirt, and I don't think that's the law."

Accordingly, the extent to which Funston induced the error of which he now complains is evident from the colloquy: He requested all of the instructions that he now contends were confusing -- BAJI Nos. 3.10, 3.11, and 3.12 -- and never withdrew any of his requests, even in the face of defense counsel's assertion that they were likely to confuse the jury. At best, Funston's counsel was willing to *acquiesce* to defense counsel's desire to drop one set of the instructions. ("I don't have a problem with that, if that's what he believes . . . .") But he never withdrew BAJI Nos. 3.10, 3.11, and 3.12, and never objected to them.

Accordingly, having requested them and not having withdrawn them, he is now estopped from raising any argument based on the trial court's giving of BAJI Nos. 3.10, 3.11, and 3.12.

3. BAJI No. 6.37.4

However, Funston did request BAJI No. 6.37.4, which the trial court refused.

Nonetheless, even if the court's refusal to instruct with BAJI No. 6.37.4 was error, Funston has not met his burden of showing prejudice. There is no per se reversal for instructional error in civil cases. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573-575; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106-107.) Such an error does not warrant reversal unless Funston has demonstrated he was prejudiced by the omission. (*Paterno v. State of California, supra,* 74 Cal.App.4th at pp. 106-107; see Cal. Const., art. VI, § 13.)

BAJI No. 6.37.4 advises the jury to determine the standard of professional care required of defendant only from the opinions of expert witnesses. However, Funston took the position at trial in requesting the instruction that Funston, Lucido, and the parties' retained expert witnesses were experts. Said Funston's counsel to the court during discussions over BAJI No. 6.37.4: "We do know these two gentlemen [referring to Funston and Lucido] are both experts in their field." He acknowledges this point in his reply brief. Hence, he was not prejudiced from the absence of an instruction advising the jury to determine the standard of care based on the testimony of expert witnesses, given that all the witnesses who testified about the standard of care *were* experts.

Funston argues, however, that "in argument, counsel for [Lucido] claimed that one should not look to the testimony of the experts, but rather make[] its determination from what an ordinary person would do under those circumstances." Thus, he

argues, the failure to give an instruction to consider only the testimony of the expert witnesses for purposes of determining the standard was prejudicial.

But since the jury was instructed with BAJI Nos. 3.10, 3.11, and 3.12 at Funston's request, any prejudice based on the use of the reasonably prudent person standard was the result of invited error. Funston cannot be heard to complain that he was prejudiced by the jury's possible reliance, or defense counsel's reliance, on the very instructions that he proffered.

DISPOSITION

The judgment is affirmed. Defendant shall recover his costs on appeal. (Cal. Rules of Court, rule 26.)

Kolkey, J.

We concur:

Nicholson, Acting P.J.

Hull, J.