

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SIMPSON STRONG-TIE COMPANY,
INC.,

Plaintiff and Appellant,

v.

PIERCE GORE et al.,

Defendants and Respondents.

H030444
(Santa Clara County
Super. Ct. No. CV057666)

ORDER MODIFYING OPINION AND
DENYING REHEARING

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on April 30, 2008, be modified as follows:

1. The paragraph commencing at the bottom of page 29 with “Further, the survey fails” and ending at the top of page 30 with “cannot be estimated” is modified to read as follows:

Further, the survey fails to show what Simpson claims for it, i.e., that “consumers understood Gore’s advertisement to mean Simpson’s galvanized screws *are defective . . .*” (Italics added.) Respondents were asked six questions before and after seeing the advertisement. The most germane was the nebulous query, “*How likely would it be that galvanized screws manufactured by Simpson Strong-Tie would be defective?*” (Italics added.) The available responses, in the order offered to respondents, were, “[v]ery [l]ikely,” “[s]omewhat [l]ikely,” “somewhat unlikely,” “[v]ery [u]nlikely,” “[n]ot [s]ure,” and “[d]on’t [k]now.” The declaration describing the survey does not provide a complete breakdown of responses, disclosing most pertinently that after seeing the advertisement,

46 percent of respondents “said they thought it was very likely *or somewhat likely* that the galvanized screws made by Simpson Strong Tie [*sic*] *were defective.*”¹⁵ (Italics added.) This result does not support the interpretation attributed to it by Simpson. What it shows is that an unknown proportion of respondents thought it “very likely” that Simpson’s galvanized screws “would be defective” in some unspecified situation. To reach a number approaching one-half, the declarant had to combine that group’s responses with those who thought this hypothesis “somewhat likely.” But describing a proposition as “somewhat likely” is deeply ambiguous. It triggers all the concerns we have already expressed about the unprovability of statements of mere possibility. To be sure, ambivalent respondents were permitted to choose between “somewhat likely” and “somewhat unlikely,” but logically those terms mean exactly the same thing—the posited proposition is possible, but the degree of probability cannot be estimated.

2. On page 30, footnote 15 is modified to read as follows:

¹⁵The corresponding number before seeing the advertisement was six percent. It is no surprise that people are more likely to *entertain the possibility* of a proposition to which they have been exposed, however tentatively, than of one to which they have not been exposed. We also question the effect of making the most reasonable responses to the question—“not sure” and “don’t know”—the last ones offered to respondents, thus arguably relegating those responses to a disfavored position. The advertisement and survey were, after all, an interruption in activities on which respondents were already embarked—entering a store to shop, or leaving the store for their next destination. Newspaper readers *choose* to engage in that activity, and may be expected to devote themselves somewhat more carefully to comprehending what they read.

There is no change in the judgment.

Appellant’s request for rehearing is denied.