A115625

IN THE

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
Division 4

NAHUM GUZIK

Plaintiff & Appellant,

vs.

WING K. KING

Defendant & Respondent.

Appeal from the Superior Court of California, County of San Francisco
The Hon. Thomas Mellon, Judge (case number CGC 04-435727)

RESPONDENT'S BRIEF

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INTRODUCTION

A man had an affair with a married woman. He then took umbrage at the anger of the woman's husband, which was expressed in a strongly worded, private letter. And he retaliated through aggressive, flawed, and, in part, downright frivolous litigation.

The Defamation Issue

The first part of the appeal challenges the summary adjudication of a defamation claim arising out of the letter in which the aggrieved husband vented to his wife's paramour about the latter's conduct.

The only purported "publication" was that the letter was "skimmed" by someone in the addressee's office who admits that she should not have been looking at it as she realized at the time that it was private. Her testimony indicates that she did not even notice the only part of the letter that — on appeal — is alleged to have been actionable.

Appellant's principal argument is that the trial court considered evidence included for the first time in the reply papers. But Appellant fails to point out that he never objected at the time and thereby waived the issue. Moreover, there are other bases on which to affirm that do not involve considering that evidence.

The Privilege Issue

The second part of the appeal arises from the ensuing jury trial on an

"invasion of privacy claim" related to Appellant's medical records. Appellant contended that Respondent — who is a physician — looked at confidential medical records when he had no business to do so. Respondent acknowledged having looked at the records, but testified that he did so in the course of his professional duties, since he had been consulted on the matter by his wife — also a doctor — who was treating Appellant at that time. The jury believed Respondent.

Appellant contends that the jury should not have been allowed to hear testimony about that consultation because it violated the marital privilege of Respondent's wife. Appellant's argument is riddled with obvious flaws.

For a start, Appellant has no standing to assert someone else's privilege. And the holder of the privilege never tried to assert it before the jury heard the challenged testimony, even though — contrary to what Appellant contends — she had an opportunity to do so. The subject of marital privilege was raised for the first time in post-trial proceedings (and, even then, evidence of the privilege holder's concern was introduced too late in those proceedings).

Equally important, it was Appellant who elicited this testimony while putting on his case. He is arguing for reversal based on alleged "error" that he invited. Moreover, the testimony did not even implicate marital privilege as it referred to the fact and not the content of a communication.

STATEMENT OF APPEALABILITY

Appellant's opening brief fails to include a statement of appealability as required by Rule of Court 8.204(a)(2)(B).

Respondent challenges this Court's jurisdiction to hear the portion of the appeal dealing with whether a witness' right to marital privilege was violated (i.e., the portion arising out of the jury trial as opposed to that dealing with the earlier summary adjudication of one of the claims).

The grounds and authority are set forth in the argument portion of this brief, but — concisely stated — are that Appellant has no standing to raise this issue, because he is not the holder of the privilege at issue and cannot assert it vicariously on a witness' behalf. (*People v. Barnett* (1998) 17 Cal. 4th 1044, 1137-1138.)

The standing requirement in an appeal is jurisdictional. (*United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1304.)

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STATEMENT OF FACTS & PROCEDURAL HISTORY

Part One:

Introduction to the Parties

1. Introduction to plaintiff and appellant Nahim Guzik

Plaintiff and appellant Nahim Guzik ("Guzik") is an individual who is the President and CEO of a company called Guzik Technical Enterprises. (Clerk's Transcript ("CT") 319:20-22.)

2. Introduction to defendant and respondent Dr. Wing K. King

Defendant and respondent Dr. Wing K. King ("King") is a physician with a private practice and operating privileges at the University of California at San Francisco Medical Center ("UCSF"). (Reporter's Transcript[1] ("RT") 4/7/06 4:1-23; CT 291:17.)

At the time of the events giving rise to this litigation, King was married to Dr. Martha Nolte ("Nolte"), who is also a physician at UCSF. (CT 316:20-23.)

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[1] Respondent cites to a variety of reporter's transcripts that he received from Appellant in response to a request to borrow the record pursuant to Rule of Court 8.153. Respondent assumes that the transcripts he received are the same as those on file with the Court. That said, the ones with which he was provided do not conform to the requirements of Rule 8.144. They comprise a series of individually prepared transcripts for various days of proceedings with no integrated page numbering or indexing system.

Nolte filed for a divorce in May 2004 and her marriage to King was subsequently dissolved. (CT 316:23-26.)

Part Two:

Brief Procedural History

Before outlining the facts in the underlying dispute, King will offer a brief procedural history to help the Court understand how those facts featured in different parts of the litigation.

3. The pleadings

On October 24, 2004, Guzik filed a complaint against King with causes of action for defamation and invasion of privacy. (CT 14-15.) The defamation claim related to a letter that King had sent to him. (CT 14:21-15:25.) The privacy claim related to the fact that King had reviewed his — Guzik's — medical records. (CT 15:8-10, 15:27-16:3.)

On July 15, 2005, Guzik filed a first amended complaint, in which he added a related cause of action for the unauthorized use or disclosure of medical information. (CT 281, 283:17-23.)

4. The motion for summary judgment

On May 10, 2005, King filed a motion for summary judgment or, in the alternative, summary adjudication. (CT 214-215.) The court subsequently entered an order granting summary adjudication as to the defamation cause of action only. (CT 570, 573:5-18.)

5. The jury trial and the judgment

The remainder of the lawsuit proceeded to a jury trial, which began on April 3, 2006. (CT 709:17.) On April 10, 2006, the jury returned a verdict in King's favor. (CT 708, 709-710.) Judgment was entered on April 11, 2006. (CT 709.) Notice of entry of judgment was filed on August 1, 2006.[2] (CT 711.) An amended judgment was entered on August 30, 2006 adding an award of costs. (CT 738-739.)

6. Post-trial proceedings and the appeal

On August 14, 2006, Guzik filed a notice of intention to move for a new trial. (CT 714.) The court denied the motion for a new trial on September 20, 2006. (CT 12 [the order denying the motion is not included in the Clerk's Transcript, but it is referenced in the register of actions].) The court later made an award of sanctions in the amount of $2,000 against Guzik on the grounds that the motion for a new trial had been brought on frivolous grounds. (See motion for sanctions filed concurrently with this brief and supporting exhibits.)

Guzik filed a timely notice of appeal on September 28, 2006. (CT 792.)

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[2] The date of service of entry of judgment is not apparent from the record, but Respondent represents that it took place on the same day. The timeliness of the notice of appeal is not at issue.

Part Three:

Facts Relating to the Defamation Issue

The following is derived from the papers before the trial court in the summary adjudication proceedings that led to the dismissal of Guzik's defamation cause of action.

7. King sent a letter to Guzik in order to vent his feelings about Guzik's affair with his wife

On or about September 10, 2004, King sent a letter to Guzik. (King Undisputed Material Fact ("UMF") 1 at CT 209 citing to CT 51:8-14 and CT 175.) This fact was undisputed. (Response to UMF 1 at CT 333.)

In the letter, King wrote about Guzik's relationship with Nolte (King's wife). (CT 175-177 cited to in UMF 1 at CT 209.) The letter accused Guzik of having seduced her. (CT 176 cited to in UMF 1 at CT 209.) King's purpose was to convey his feelings over the break-up of his marriage that ensued. (UMF 2 at CT 209 citing to CT 33:21-34:3.) As he put it:

GUZIK LAWYER:	What was the purpose of you writing this letter?...
KING:	... The main and major purpose of me writing the letter is as a means of private discussion with Mr. Guzik to let him know about my personal feelings and my views of the entire event. *(CT 33:21-34:3 cited to in UMF 2 at CT 209.)*

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From the context, the reference to "event" referred to the affair between Guzik and Nolte.[3] In the letter, King expressed strongly worded, critical opinions of Guzik, describing him as "evil," "immoral," an "animal," a "home wrecker," and a "shameless and ruthless wolf." (CT 176-177 cited to in UMF 1 at CT 209.)

For the convenience of the Court, a copy of King's three-page, typed letter — corresponding to pages 175-177 of the Clerk's Transcript — can be found in the attachment to this brief. (Rule of Ct. 8.204(d).) The strongest language appears on the second and third pages of the letter.

Guzik disputed UMF 2 — dealing with the letter's purpose — only to the extent that he tried to distinguish the text of UMF 2 from the testimony quoted above that had been cited in its support. (Response to UMF 2 at CT 333.) The difference — to the extent that there was any — was semantic and immaterial. There was really no dispute that the letter was King's effort at venting his personal feelings about what had happened.

In the final paragraph of the letter, King wrote: "You also had the raw nerve to ask my wife to convey the threatening message to me that you have

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[3] By way of background, Nolte testified at the trial that was held on Guzik's privacy claims that she did have an intimate relationship with Guzik that began in June 2004, before King sent his letter. (RT 4/7/06 at 77:5-9.) Guzik, however, denied having had an affair with Nolte, describing the suggestion as a "lie." (RT 4/7/06 at 63:10-13.) The jury may well have considered that someone was being less than candid.

very powerful friends in the city and at UCSF and you can terminate my professional and social activities at UCSF and San Francisco." (CT 177 cited to in UMF 1 at CT 209.) He added: "I am a man of principle and I do not yield to threat or blackmail." (*Ibid*.)

8. Guzik considered the epithets used in the letter as statements of King's opinion

Guzik testified at his deposition that he considered assertions in the letter that he was "immoral," a "home wrecker," an "animal" and a "shameless and ruthless wolf" as statements of opinion by King. (UMF 14 at CT 211 citing to CT 68:7-69:1, 70:9-18.) Guzik did not dispute that he had described those comments as King's "opinions." (Response to UMF 14 at CT 336.) He purported to "dispute" UMF 14 only by stating that these were not all of the statements that he regarded as defamatory. (*Ibid*.)

9. The letter was intended to be private

The letter was intended to be a private one to Guzik. (UMF 3 at CT 209.) King sent it to Guzik at his place of work because he did not want it to be intercepted by Nolte. (UMF 6 at CT 210.) As King explained in his deposition:

GUZIK LAWYER:	[W]hy did you decide to address your letter, the envelope of your letter[,] to his place of business rather than his home?
KING:	That is because I want him to be the

	one receiving the letter and since I suspect — I highly suspect Dr. Nolte was living with him at his home, I didn't want the letter to be intercept by her.
GUZIK LAWYER:	Why not?
KING:	Well, because I want him to get the letter. It is my discussion with him. *(CT 40:19-41:3 cited to in UMF 3 at CT 209 and in UMF 6 at CT 210.)*

Guzik disputed UMF 3 — stating that the letter was intended to be private — only to the extent that he cited to testimony that King showed a draft of the letter to his son (and that he may have allowed other family members to see the draft) and that he sent it to Guzik at his place of work without marking the envelope "personal." (Response to UMF 3 at CT 333.)

Replying, King asserted that his communications with family members was privileged. (Reply to response to UMF 3 at CT 540-541; see also UMF 12-13 at CT 210-211 [facts alleging privilege, which were undisputed by Guzik at Response to UMF 12-13 at CT 335-336].) King contended that the rest of Guzik's response to UMF 3 was argumentative and that Guzik had not supplied any evidence as to King's actual intent. (Reply to response to UMF 3 at CT 540-541.)

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10. The letter was opened by another person at Guzik's workplace, Mari Shido, who read the first few lines and — upon realizing it to be "personal" — skimmed the rest

The envelope was handwritten. (CT 178 cited to in UMF 1 at CT 209.) It did not resemble that of a conventional business-oriented communication. (*Ibid*.)

On receipt, the letter was, in fact, opened by someone other than Guzik — Mari Shido, who was Vice President of Sales and Customer Service at Guzik's business ("Shido"). (UMF 8 at CT 210 citing to CT 149:6-7.[4]) That was undisputed. (Response to UMF 8 at CT 335.)

After reading the first two lines of the letter, Shido concluded that it was "personal." (UMF 10 at CT 210 citing to CT 87:14-88:2, 93:1-11.) Guzik disputed this only to the extent of citing testimony in which Shido said that it was of a "more personal nature." (Response to UMF 10 at CT 335.) The difference between "personal" and of a "more personal nature" is not material. If anything, being of a "*more* personal" nature is stronger than being merely "personal."

Either way, it was undisputed that Shido did quickly realize that the letter was "personal" or "more personal," whichever way one prefers to put

[4] UMF 8 referred to her as "Vice President of Sales and Marketing." (CT 210.) The cited interrogatory response referred to her as "Vice President of Sales" and also indicated that she was Guzik's "assistant."

it. Plainly, according to both sides, Shido did *not* think this was a business letter that she was expected to read in the course of her employment.

Shido's deposition testimony was that, realizing it was "personal," she stopped "reading" the letter after about three lines but then "skimmed" the rest:

KING LAWYER:	Ms. Shido, did you read the letter?
SHIDO:	I read the first few sentences and skimmed through the rest, yes.
KING LAWYER:	When you say the first few sentences, how far down did you go that you read?
SHIDO:	I got up to "my wife"[5] and realized that it's not — it's for Nahum Guzik.
KING LAWYER:	Did you realize it was for Nahum Guzik from the envelope?
SHIDO:	Yes.
KING LAWYER:	So when you say realized it was for Nahum Guzik, do you mean that you realized it was of a more personal nature?
SHIDO:	Yes. *(CT 87:14-88:2 cited in UMF 10 at CT 210.)*

Shortly afterwards, she continued:

KING LAWYER:	Why did you continue to skim the letter after you read the first two lines?
GUZIK LAWYER:	Asked and answered.
SHIDO:	Trying to understand if this was of concern.

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[5] The words "my wife" are in the first line of the second paragraph, or three lines into the letter as a whole. (CT 175 cited to in UMF 1 at CT 209.)

KING LAWYER:	Okay. But you did testify earlier that when you got to "my wife," which are the first two words of the second paragraph, you realized that it was personal?
SHIDO:	Yes.
	(CT 93:1-11 cited in UMF 10 at CT 210.)

There is nothing in the entire record where Guzik disputed that Shido only "skimmed" the letter beyond the first two or three lines.

11. Shido's conduct in continuing to skim the letter after realizing it was "personal" violated the policies at her workplace

Shido's action in skimming the letter appeared to have been in violation of the policy at her place of work. (UMF 11 at CT 210 citing to CT 86:11-18 and CT 93:21-94:11.) As she testified at her deposition:

KING LAWYER:	Is it the policy at Guzik Technical Enterprises that you are not to open other people's mail unless you are asked to do so?
SHIDO:	Correct.
KING LAWYER:	When you are asked to open other people's mail, is it also the policy that you are not to open mail that's stamped personal or confidential?
SHIDO:	Correct.
	(CT 86:11-18 cited to in UMF 11 at CT 210.)

Soon afterwards, the following exchanges occurred:

KING LAWYER:	Did you testify earlier that the policy was not to read personal and confidential letters?

SHIDO:	That were marked personal and confidential, yes.
KING LAWYER:	And didn't you testify that you weren't to read personal and confidential letters that weren't marked personal and confidential?
GUZIK LAWYER:	The record will speak for itself as to what she testified.
KING LAWYER:	You can answer.
SHIDO:	I believe so.
KING LAWYER:	So when you realized that this was personal in nature, to continue reading it, wouldn't that constitute a violation of that policy?
SHIDO:	Yes, it could.
	(CT 93:21-94:11 cited to in UMF 11 at CT 210.)

Guzik disputed Shido's testimony cited above about the policy against reading personal letters — even absent an express "personal" mark — only by citing to a letter written by Guzik's attorney to the court reporter stating corrections that Shido purportedly wanted to make to this deposition testimony to make it the opposite of what it had originally been (i.e., so that she would now be saying that there was *no* policy against reading personal letters sent to other people if they did not bear an express "personal" mark). (Response to UMF 11 at CT 335 citing to CT 421.) However, that letter — which was not signed by Shido herself — did not meet the requirements for a deponent to make corrections to a deposition transcript. (See Code Civ. Proc. § 2025.520(c) [letter must be signed by deponent].)

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12. Shido's reaction on seeing the letter was that it was a prank

Guzik testified that Shido's reaction on seeing the letter was that it was a "prank." (CT 62:21-63:2 cited in King reply papers at CT 528:22-23.) It was only afterwards, during a two-hour discussion he had with her, that she understood the context. (CT 528:23-529:1 citing to CT 63:15-65:16.) This indicates that it was not Shido's "skimming" that caused any alleged "damage," but her subsequent discussion with Guzik.

13. The opinions in the letter describing Guzik as "evil" and an "animal" caused Shido to have doubts about his integrity

In any event, Shido did come to have doubts about Guzik's integrity based on what she had seen in the letter:

KING LAWYER:	What is it about the statements [in the letter] that give you doubts about his integrity?
SHIDO:	Well, it's stated evil animal. *(CT 511:15-17 cited in King reply papers at CT 528:15-16.)*

Nowhere in the record did Shido indicate that she had noticed the "blackmail" language.

King agrees with Guzik that the court's order granting summary adjudication erroneously stated that Shido's testimony about what it was that had influenced her opinion was referenced in UMF 17. This evidence was actually in the reply papers.

King also acknowledges that Guzik is arguing on appeal that testimony cited for the first time in the reply papers should not have been considered by the court. King will deal with that issue in the argument portion of this brief, where he will show that Guzik has waived that argument.

14. Any effect on Guzik did not amount to very much

Although Shido's testimony indicated that she had doubts about Guzik's integrity after seeing the letter, the effect on Guzik did not amount to very much.

It was undisputed that Shido continued to work for Guzik. (UMF 17 at CT 212 citing to CT 84:6-9; response to UMF 17 at CT 337.) Asked whether Shido's opinion of him had fallen as a result of having read the letter, Guzik prevaricated and answered inconsistently before eventually stating that Shido's opinion of him might, in fact, have become "higher." (UMF 17 at CT 212 citing to CT 80:1-81:6.)

Guzik suffered no property damage or loss of income. (UMF 21-22 at CT 212 citing to CT 130:5-132:17; response to UMF 21-22 at CT 338.) It was undisputed that he suffered no special damages. (UMF 23 at CT 212 citing to CT 150:15-19; response to UMF 23 at CT 338.) And it was undisputed that he had no treatment for emotional distress. (UMF 20 at CT 212 citing to CT 70:24-72:1; response to UMF 20 at CT 337.)

Part Four:

Facts Relating to the Privilege Issue

The other part of this appeal arises out of the jury trial that took place on Guzik's privacy claims. The following facts are germane to that issue.

15. It was undisputed that King had accessed certain of Guzik's medical records

Guzik's first amended complaint contended that King improperly and unlawfully accessed his — Guzik's — medical records at UCSF in order to obtain personal information, including his home address. (CT 282:13-15.)

At trial, King agreed that he had accessed Guzik's medical records on two occasions. (RT 4/7/06 at 41:4-7.) However, as shown below, Guzik's attorney elicited information from King that explained *why* he had been *entitled* to do so.

16. Guzik elicited testimony from King that Nolte had consulted him — King — about Guzik's treatment

Nolte, it will be recalled, was, like King, a doctor at UCSF. (RT 4/7/06 at 71:4-9.) And Guzik was one of her patients. (RT 4/7/06 at 71:16-18.) At trial, and as part of his case in chief, Guzik's attorney elicited the following testimony from King — whom he called as a witness — about a medical consultation he had with Nolte concerning Guzik:

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GUZIK ATTORNEY:	It's your understanding then that you provided a curbside consultation for Mr. Guzik; is that right?
KING:	Correct.
GUZIK ATTORNEY:	And who did you provide — who did you have this curbside consultation with?
KING:	My wife, Dr. Nolte, at the time. *(RT 4/7/06 at 12:27-13:4.)*

A "curbside consultation" is an informal consultation between doctors; it does not necessarily literally take place on a curbside, but can occur anywhere or by phone or via email. (RT 4/7/06 at 12:17-26.)

As shown in the argument portion of this brief, the second part of this appeal concerns the testimony just quoted, which — according to Guzik — violated Nolte's marital privilege. The jury had not heard this testimony before. It was elicited by Guzik's attorney in the first instance.

Nowhere during the trial did Guzik object to King being able to give this testimony. And in closing argument, Guzik's attorney referred to it. (RT 4/10/06 at 18:23-19:12.)

Guzik's attorney also asked Nolte about the curbside consultation, and received a reply that none had taken place. (RT 4/7/06 at 76:6-17.)

17. King testified that the only use made of the medical records he accessed was in connection with his recommendations concerning Guzik's treatment

King testified that he did not use or disclose any of Guzik's medical

information except in connection with his evaluation of the recommendations he made to Nolte concerning the patient's treatment. (RT 4/7/06 at 48:18-20.)

18. The jury found that King did not invade Guzik's privacy or use the medical information improperly

The jury found that King did not invade Guzik's privacy by accessing his medical records. (CT 709:28-710:1.) It also found that King did not use or disclose medical information about Guzik. (CT 710:2-3.) Judgment was therefore entered in King's favor. (CT 710:6-7.)

19. The issue of marital privilege was raised after trial

Before trial, Nolte — although not a party — filed a motion in limine asking for a protective order barring questions about her sexual relationship with Guzik. (CT 677.) That motion did not ask for any protective order about matters relating to marital privilege. (*Ibid*.; see also CT 679-683.)

As shown in the argument portion of this brief, the privilege issue came up only in Guzik's motion for a new trial. (CT 719.) Even then, the first evidence that Nolte herself was concerned about her marital privilege was a declaration by her submitted with the reply papers relating to that motion. (CT 786.)

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ARGUMENT

PART ONE:

THE DEFAMATION ISSUE

A. IF THE SUPERIOR COURT'S DISMISSAL OF THE DEFAMATION CAUSE OF ACTION WAS CORRECT ON ANY LEGAL GROUND, IT MUST BE AFFIRMED

On appeal of a summary adjudication, this Court independently examines the record to determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) The Court is concerned with the correctness of the trial court's ruling, not its reasoning. (*Bealmear v. Southern Cal. Edison Co.* (1943) 22 Cal.2d 337, 339.) Therefore, the decision will be affirmed if it was correct on any legal ground, even if that ground differs from the ones stated by the lower court judge. (*D'Amico v. Board of Med. Examiners* (1974) 11 Cal.3d 1, 19.)

Here, King will argue that the summary adjudication was correct on the grounds that the trial court stated. However, he will *also* show that there are *other* bases on which to affirm.

As the respondent, King "is not confined to the arguments used in the trial court." (*California Civil Appellate Practice* (CEB) § 13.22.) A

respondent "can argue in support of the judgment on any ground raised in the trial court or, if no new evidence is required, on grounds not previously considered." (*Ibid*.)

B. GUZIK HAS WAIVED ANY ARGUMENT THAT THE TRIAL COURT SHOULD NOT HAVE CONSIDERED ALL THE EVIDENCE THAT IT DID

(i) Guzik failed to object in the trial court to consideration of evidence cited for the first time in King's reply and/or not expressly referred to in the separate statement

Guzik contends that in granting summary adjudication, the court relied improperly on evidence that had not been included in King's separate statement of undisputed facts filed with the moving papers. (Guzik brief at 10-11.) He refers in particular to Shido's testimony about having only "skimmed" the letter and to her testimony that made no mention of "blackmail" when describing the elements of the letter that had led her to doubt Guzik's integrity.

Some of what Guzik contends was included in the reply papers for the first time was, in fact, presented in the moving papers (albeit perhaps not in the ideal place). More on that later.

But, even more importantly, what Guzik's opening brief fails to point out is that he is raising the issue of the "late presented" — or "improperly

presented" — evidence for the first time on appeal. *He did not object to this evidence in the trial court, even though he knew it was under consideration.*

The Clerk's Transcript contains no document showing that Guzik objected during the six days between the filing of the reply papers and the hearing on the motion — August 2, 2005 and August 8, 2005, respectively. (CT 520, 802.)

The Reporter's Transcript on file with this Court does not include the proceedings of what took place at the hearing on the motion for summary judgment. However, a transcript is included in the Clerk's Transcript at pages 802-812 (where it is attached to the notice designating the record on appeal).

Even if one overlooks any issue as to whether that is a proper method of presenting a reporter's transcript on appeal, a review of that transcript shows that Guzik did not make any objection at the hearing about the content of the reply papers or the court's consideration of evidence that he now contends was out of bounds. (CT 802-812.) This was despite the fact that counsel for King referred to this evidence in oral argument. (CT 806:11-26.)

Furthermore, Guzik had an opportunity to make an objection *after* the hearing but *still* failed to do so. The court did not rule from the bench on the motion but asked the parties to submit proposed orders. (CT 811:13-14.)

That was on August 8, 2005. (CT 802.) The order granting summary adjudication was signed on August 16, 2005 — a little over a week later. (CT 573:17.) So Guzik *continued* to acquiesce to the consideration of all the evidence that King had propounded. Only now — more than two years later when the case is on appeal — has he made his objection for the first time.

(ii) Since Guzik did not object to consideration of the late-filed evidence, the trial court was entitled to consider it

It is settled that where a plaintiff fails to object to the inclusion of new evidence included with a defendant's summary judgment reply papers, the trial court is "entitled to consider the evidence as within the record before it." (*Gafcon, Inc.v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402; see also *California Practice Guide: Civil Procedure Before Trial* (Rutter) § 10:222.1 ["The opposing party *must* object to avoid a waiver." (Emphasis added.)].)

Therefore, the issue is waived. On appeal, the evidence that was considered by the trial court should be considered by this Court, too.

(iii) The "skimming" evidence *was* referenced in King's moving papers, although the evidence about what had caused Shido to doubt Guzik's integrity was not

Even though Guzik has waived any issue about the evidence considered by the court, it should be noted that Shido's testimony that she

had only "skimmed" the letter beyond the third line *was* referenced in King's separate statement included with his moving papers. The portions of her testimony in which she spoke of "skimming" were cited in support of UMF 10. (CT 87:14-88:2 and 93:1-11 cited in support of UMF 10 at CT 210.)

The "skimming" language was not expressly quoted in the text in the left-hand column of UMF 10, which stated only: "After reading the first two lines of the letter, Shido concluded it was "personal and confidential."" (UMF 10 at 210.) However, the page and line numbers of Shido's deposition containing the "skimming" testimony *were* cited in the right-hand column of UMF 10 and the relevant pages *were* included in the separate volume of exhibits.

Moreover, King's memorandum of points and authorities that was part of the moving papers *did expressly refer to* Shido's statement that she had only "skimmed" the bulk of the letter. It stated: "Shido testified that she "read the first few sentences and skimmed through the rest," but realized the letter was personal after just two lines." (CT 184:26-27, fn. 2.) This cited to UMF 10. (*Ibid*.)

What was, admittedly, "new" in King's reply papers was the citation to the portion of Shido's deposition in which she testified that it was the "evil" and "animal" language in the letter that gave her "doubts" about Guzik's integrity. (CT 528:15-17 citing to CT 511:15-22.) But, as argued

above, it is too late for Guzik to make an issue of that now.[6]

C. GUZIK RELIES ON A DATED VIEW OF THE SO-CALLED "GOLDEN RULE"

Even if the issue of evidence left out of the separate statement had not been waived, the law does not impose the type of categorical rule that Guzik contends should have been in effect. Guzik refers to the so-called "golden rule" that "if it is not set forth in the separate statement, *it does not exist*." (Guzik brief at 15, citing to *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, emphasis in original.)

However, Guzik is relying on a standard that is out of date. More recently, the Court of Appeal has "taken a less stringent approach" than that which Guzik cites. (*Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1477.)

Under the modern standard, a trial court has discretion to overlook procedural errors in the moving papers where the evidence presented warrants it. (*Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson*, 131

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[6] By way of background, the way this testimony came to be in the reply papers for the first time was as follows: In his moving papers, King argued that the fact that Guzik admitted to suffering no monetary losses meant that there was no damage. (CT 201:21-203:2.) Guzik, in his opposition, then argued that the "blackmail" language was "libel per se," not requiring proof of special damages. (CT 299:12-300:2.) King then introduced the evidence in his reply indicating that the blackmail language was not what had caused Shido to have a lesser opinion. (CT 528:15-17 citing to CT 511:15-22.)

Cal.App.4th at 1478.) Thus, in *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, the Court held that a trial court has discretion to consider evidence not referenced in the moving party's separate statement and grant summary judgment or summary adjudication despite an inadequate separate statement. (*Id*. at 315.)

The decision in *San Diego Watercrafts* was based on the express terms of the governing statute, which provides that the failure on the part of the moving party to comply with the separate statement requirement "*may* in the court's discretion constitute a sufficient ground for denial of the motion." (Code Civ. Proc. § 437c, subd. (b), emphasis added.)

This means — according to the *San Diego Watercrafts* Court — "we may not mechanically conclude, as the 'Golden Rule' would have us do, that the court should never consider evidence not referenced in the separate statement. The statute is permissive, not mandatory.... Whether to consider evidence not referenced in the moving party's separate statement rests with the sound discretion of the trial court, and we review the decision to consider or not consider this evidence for an abuse of that discretion." (*San Diego Watercrafts, Inc.*, 102 Cal.App.4th at 315-316.)

King acknowledges that the Court in *San Diego Watercrafts* did go on to find — under the procedural facts of that case — that the trial court should not have utilized evidence that "was not filed until after [the

nonmoving party] had responded to the issues raised in the separate statement" and that to do so violated the latter's due process rights. (*San Diego Watercrafts, Inc.*, 102 Cal.App.4th at 315-316.)

However, that holding — barring consideration of evidence submitted with the reply papers — was predicated on the fact, stated clearly in the opinion, that the trial court considered the evidence *over the objection of the nonmoving party*. (*Id*. at 312.) In the present case, as noted earlier, there was *no objection*. And there is nothing in *San Diego Watercrafts* that is in conflict with the authority cited above that, *without* an objection, a trial court *can* consider evidence filed for the first time with the reply. *San Diego Watercrafts* stands for a more flexible approach, not a more restrictive one.

Moreover, to the extent that some of Guzik's argument refers not to the evidence filed with the reply papers, but to the "skimming" evidence that *was* referred to in the moving papers — albeit perhaps not identified as expressly in the separate statement as might have been ideal — then the rule adopted in *San Diego Watercrafts* clearly gave the court discretion to consider that evidence, whether there was an objection or not.

Having shown that the trial court was entitled to consider all the evidence that it did, the focus now turns to whether the order granting summary adjudication was correct. As shown below, some of the grounds on

which this Court can affirm do not even rely on the evidence that Guzik contends should not have been considered.

D. THERE WAS NOTHING IN THE LETTER THAT WAS ACTIONABLE

(i) Guzik has not challenged the portion of the court's decision that distinguished the "opinion" and "fact" portions of King's letter

Statements of fact may be actionable as libel, but statements of opinion are not. (*McGarry v. University of San Diego* (2007) 154 Cal.App. 4th 97, 112.) In determining whether a statement is actionable under that rule, the test is whether a reasonable fact finder could conclude that the published statement declares or implies an assertion of fact. (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 701.)

Here, the trial court found that statements in the letter such as those accusing Guzik of being "evil" and an "animal" fell within the "opinion" category. (CT 572:18.) Indeed, Guzik had already conceded this. (UMF 14 at CT 211 citing to CT 68:7-69:1, 70:9-18; Response to UMF 14 at CT 336.)

The court's order did not expressly state whether the "blackmail" accusation fell under the "opinion" or "fact" category, but it did indicate that

there were questions of fact as to whether they were "defamatory per se."[7] (CT 572:22-24.) That tends to suggest that the court considered it a "factual" allegation (since if opinions are not actionable, it is hard to see how they could be "defamatory per se").

On appeal, Guzik has chosen to argue the summary adjudication solely with respect to the "blackmail" language. The argument section of his opening brief does *not* state an argument that, regardless of whether the court was right in ordering summary adjudication on account of the "blackmail" language, there were other parts of the letter that should have defeated summary adjudication.[8] Any argument concerning other elements of the letter is, therefore, waived. (*Katelaris v. County of Orange* (2001) 92 Cal.App.4th 1211, 1216, fn. 4.)

(ii) King's use of the word "blackmail" was hyperbole

During much of the argument in this brief, King, will, arguendo, join

[7] The court's order indicated that "blackmail" may not have been the only portion of the letter that was "defamatory per se." (CT 572:23-24.) However, it did not indicate what other parts might have been.

[8] Guzik's argument does contain a passing, parenthetic mention of the word "seduction" as being something else that Shido might have seen when skimming the letter. (Guzik brief at 21.) However, Guzik does not develop that with any argument as to why the inclusion of that word in the letter should have defeated summary adjudication. (See *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522 [an appellant's failure to develop an issue with meaningful argument constitutes a waiver of that issue].) To "seduce" means to "entice into sexual activity" or to "attract powerfully." (*New Oxford American Dictionary*, 2nd Ed.) That is not defamatory per se.

Guzik in assuming that the trial court was correct in its "opinion/fact" delineation. But his primary contention is that the "blackmail" statement was hyperbole, which did not rise to an allegation of "fact," and that it was not, therefore, actionable *even if* Shido had read it.[9]

As a matter of law, hyperbole is not actionable as libel if the context and tenor of the statements negate the impression that the author seriously is maintaining an assertion of actual fact. (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385.) Here, the word "blackmail" appeared briefly on the third page of the letter toward the end of an angry vent, but there was no indication that it was to be taken literally as an accusation of criminal activity.

To "blackmail" means to "demand money from (a person) in return for not revealing compromising or injurious information about that person" or to "force (someone) to do something by using threats or manipulating their feelings." (*New Oxford American Dictionary*, 2nd Ed.)

There was nothing in the letter from which a reasonable person would infer that King was accusing Guzik of demanding money in return for not revealing injurious information. And there was nothing in the letter from which a reasonable person would infer that King was protesting about being

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[9] As previously noted, the trial court's summary adjudication would be correct if affirmed on any ground, not merely that which the trial court adopted. (*Gafcon, Inc.v. Ponsor & Associates*, 98 Cal.App.4th at 1402.)

"forced to do something" — quite the opposite, he was complaining about what *Guzik* had already done.

"Blackmail," taken literally, makes no sense in this context. It can only be understood as part of the general, hyperbolic vent — not to be read any more literally than the statement a few lines earlier that Guzik was a "shameless and ruthless wolf." (CT 177.) (Guzik may, in King's opinion, have been "shameless" and "ruthless." But he was plainly not a four-legged animal.)

To satisfy the elements of defamation, it is necessary that the person to whom the allegedly defamatory statement was communicated *understood both* the defamatory meaning of the statement *and* its application to the person to whom reference was made. (*Ringler Associates Inc. v Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1179.) Here, it is hard to imagine that — *even if* Shido did read the "blackmail" language — she could, from the context, have understood it as anything more than hyperbole. Indeed, there is no evidence in the record that she *did* understand it that way (or, for that matter, that she even noticed it while skimming the letter).

Moreover, Guzik's own testimony tends to suggest that both he and Shido did not take the language in the letter literally in terms of what it was meant to convey. For example, he surmised that Shido might have thought "higher" of him as a result of what she had seen. (UMF 17 at CT 212 citing

to CT 80:1-81:6.) That is not consistent with Shido having read — and understood — an accusation of criminal activity.

Furthermore, as King pointed out in the summary judgment proceedings, Guzik himself testified that Shido's reaction on seeing the letter was that it was a "prank." (CT 528:22-23 citing to CT 62:21-63:2.) It was only afterwards, during a two-hour discussion he had with Shido about the letter, that she understood the context. (CT 528:23-529:1 citing to CT 63:15-65:16.) This indicates that it was not Shido's "skimming" that led to the alleged "damage," but Guzik's subsequent discussion.

Maybe there was a hint of some negotiation going on to which the term "blackmail" referred. But, as the U.S. Supreme Court remarked in a case in which someone sued on account of being accused of blackmail: "[E]ven the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [defendant's] negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone... thought [plaintiff] had been charged with a crime." (*Greenbelt Co-op. Pub. Ass'n v. Bresler* (1970) 398 U.S. 6, 14.) *So, too, here.*

In opposing a motion for summary judgment, a plaintiff must make independent showing of having sufficient proof to raise triable question of fact; equivocal evidence is *not* sufficient. (*Jane D. v. Ordinary Mutual*

(1995) 32 Cal.App.4th 643, 654.) Here, Guzik failed to offer unequivocal evidence that the blackmail language, assuming it were read at all, was understood by Shido to have been more than hyperbole. Indeed, his very own testimony — cited to above — indicates that Shido did not take the language seriously even if she did read it but, rather, considered it a "prank."

If the Court agrees with King about the use of the word "blackmail," the argument on the defamation issue stops there. The summary adjudication can be affirmed simply by finding that this language, in the context, was not actionable. However, King will now argue why summary adjudication was correct even on the basis that the letter was potentially actionable.

E. THERE WAS NO TRIABLE ISSUE OF FACT AS TO THE "PUBLICATION" ELEMENT OF THE DEFAMATION CAUSE OF ACTION

(i) King presented evidence that showed that Shido's doubts about Guzik's integrity were caused by the language that Guzik has conceded merely stated "opinions"

One of the essential elements of the tort of defamation is "publication." (*Haley v. Casa Del Rey Homeowners Ass'n* (2007) 153 Cal.App.4th 863, 877.) Publication occurs when a statement is communicated to a person *other than* the party defamed. (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 284.) In this case, the only third

person to whom any part of the letter was communicated was — at least for the purposes of this appeal — Shido.[10]

Logically, if Shido had not become aware of the blackmail allegation, it could not have been communicated to her. Therefore, the publication element could not have been met.

The evidence propounded by King to the effect that Shido had not become aware of the blackmail allegation was as follows:

- Shido testified that she had read only the first three lines on the first page and had skimmed the rest. (CT 87:14-88:2 cited in UMF 10 at CT 210; CT 93:1-11 cited in UMF 10 at CT 210.)
- The reference to "blackmail" came on the third page — i.e., in the portion "skimmed" not "read." (CT 177.)
- When asked what it was about the letter that had caused her to have doubts about Guzik's integrity, Shido only stated that it was the "evil" and "animal" epithets. (CT 511:15-17 cited in King reply papers at CT 528:15-16.)

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[10] In the proceedings below, there was also an issue of whether publication occurred when King showed a draft of the letter to his sons and whether the letter might even have been passed to his wife before it was sent to Guzik. (CT 296:3-7.) King argued then any act of sharing this draft with close family members would have been a privileged communication. (CT 195:17-198:2, 545:5-546:6.) The court's order granting summary adjudication addressed this issue and agreed with King. (CT 572:2-6.) The argument in Guzik's opening brief is silent on the issue, which is, therefore, waived. (*Katelaris v. County of Orange*, 92 Cal.App.4th at 1216, fn. 4.)

These allegations caused the burden to shift to Guzik, because the combination of Shido having only skimmed the lengthy letter and making no mention of the "blackmail" allegation resulted in a prima facie showing that her cursory review had not made her aware of that language. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [defendant bears burden to make prima facie showing of the nonexistence of any triable issue of material fact such that the matter can be decided as one of law; if defendant makes this showing, burden shifts to plaintiff to show that some triable issue of material fact does exist].)

Guzik offered no evidence in opposition that created a triable issue of fact with respect to this evidence. There was nothing that he *could* have offered: The positioning of the "blackmail" language toward the end of this densely worded letter is beyond dispute; and Shido's testimony speaks for itself on matters that only she could know about.

(ii) Guzik misstates the record when he quotes Shido as saying that certain words in the letter "stood out"

Guzik's arguments about why the burden did not shift are flawed. For a start, his account of what Shido testified is misleading.

Guzik states in his opening brief: "Ms. Shido testified that the words "evil" and "animal["] in Dr. King's letter "stood out" for her in terms of causing her to doubt Guzik's personal integrity." (Guzik brief at 21.) Guzik

places the phrase "stood out" in quotation marks, as though to indicate that he is quoting from her testimony. But he does not cite to the record.

In fact, that testimony is *not* in the record. Shido did *not* use the phrase "stood out," which — if it had been used — would have tended to indicate that there may have been a number of other things in the letter, but that these were the main ones. Rather, the testimony was as follows:

KING LAWYER:	What is it about the statements [in the letter] that give you doubts about his integrity?
SHIDO:	Well, it's stated evil animal. *(CT 511:15-17 cited in King reply papers at CT 528:15-16.)*

(iii) Guzik's dictionary definitions do not create a triable issue of fact

As for the dictionary definition of "skimming," Guzik is somewhat selective in the ones he picks. The *New Shorter Oxford English Dictionary* (4th Ed.) includes the following definition: "[To] read or look over cursorily...." And the word "cursory" means "hasty and therefore not thorough or detailed." (*New Oxford American Dictionary*, 2nd Ed.)

But this appeal does not turn simply on the precise meaning of the word "skim." It is not merely Shido's use of that word that defeats Guzik, it is her own undisputed testimony about what she took away from her "skimming." There is *nothing* in the record that indicates that she took away

an understanding that Guzik had been accused of "blackmail" (even assuming that "blackmail" in this context would be treated as actionable).

(iv) Shido gave her answer to the question about what in the letter had given her doubts about Guzik

Guzik argues that Shido's testimony was inconclusive on the subject of what had caused her to doubt Guzik's integrity, because she was not asked whether her answer was exhaustive. (Guzik brief at 21-22.) But it was not necessary to have asked Shido that. The question posed was not whether she could provide some "examples" of what had led her to have doubts. It was: "What is it about the statements that give you doubts about his integrity?" (CT 511:15-16.) A true answer to that question necessarily had to be fully responsive.

Guzik is essentially relying on his speculation that, *maybe*, Shido might have come up with a different answer if she had been asked a different question. However, that type of conjecture is not sufficient to defeat summary adjudication. Rather, a plaintiff must present admissible evidence to the trial court — "not merely claims or theories" — which reveal a triable, material factual issue. (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.) An opposition to summary adjudication "will be deemed insufficient when it is essentially conclusionary, argumentative, or based on conjecture and speculation." (*Ibid*.)

The fact is that some 10 months after filing his complaint — with depositions complete — Guzik could not provide a single piece of evidence that Shido was aware of the only allegation in the letter on which he relies in this appeal.

Moreover, even if Guzik *had* offered a declaration from Shido that effectively changed her deposition response by saying that the "blackmail" allegation had, in fact, caused her to think less of Guzik, that would not have defeated summary adjudication. Triable issues of fact cannot be conjured up by declarations that conflict with a declarant's deposition testimony. (*Jacobs v. Fire Ins. Exchange* (1995) 36 Cal.App.4th 1258, 1270 [court may disregard declaration prepared for purposes of opposing summary judgment motion that conflicts with declarant's deposition testimony].)

The argument just made defended the summary adjudication on the grounds stated by the trial court. But, as shown below, there is another way of finding that there was no "publication." This one does not rely on the evidence that — on Guzik's theory — should not have been considered by the trial court.

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F. THE "PUBLICATION" ELEMENT OF DEFAMATION IS NOT SATISFIED WHEN SOMEONE PRIES INTO A PERSONAL LETTER NOT INTENDED FOR HER EYES

(i) Defamation requires intentional publication

"The tort [of defamation] involves the intentional publication of a statement of fact...." (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 27.) The reference to "intentional publication" has been echoed in numerous other cases. (See, e.g., *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 104; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645; *Ringler Associates Inc. v. Maryland Casualty Co.*, 80 Cal.App.4th at 1179.)

The "intent" refers not to the uttering of the defamatory statement, but to the publication thereof. In *Tradewinds Escrow, Inc. v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704, the Court of Appeal sided with an insurance company that had been sued by an insured which claimed that the insurer breached the terms of a policy in not providing a defense to a defamation claim. (*Id*. at 714.) The *Tradewinds* Court cited with approval to a U.S. District Court case in which — applying California law — it was held that an insurer owed no duty to defend its insured in a defamation action because the defamation was not accidental. (*Ibid*., citing to *Allstate Ins. Co. v. LaPore* (N.D.Cal.1988) 762 F.Supp. 268.)

The *Allstate* court had explained: "Defamation, which includes libel

and slander, is an intentional tort which requires proof that the defendant *intended to publish* the defamatory statement. The very nature of defamation precludes the conclusion that it can occur 'accidentally.'" (*Allstate Ins. Co. v. LaPore*, 762 F.Supp. at 271, emphasis added, internal citation omitted.)

In the present case, there was no evidence before the court that King actually intended that someone other than Guzik should read the letter. Thus, he could not have "intended" to publish a defamatory statement. Summary adjudication would be proper for that reason alone.

(ii) Even if "negligent publication" can suffice, this does not occur where someone reads a letter addressed to someone else knowing that it is personal

King acknowledges that there is also some authority that — notwithstanding the cases cited above — indicates that there is such a thing as "negligent" publication giving rise to a defamation claim. (See *Hellar v. Bianco* (1952) 111 Cal.App.2d 424, 426.) Case law is not entirely consistent. However, even those cases that do recognize "negligent publication" limit the circumstances in which it can occur — the mere fact that someone else did read or hear a private communication does not suffice.

Thus, for example, it was held that someone did not "publish" her defamatory statements when she went to a neighbor's front door and accused the neighbor of incest, even though another person who happened to be

inside the apartment — but not visible to the caller — overheard the conversation. (*Haley v. Casa Del Rey Homeowners Ass'n.*, 153 Cal.App.4th at 878-879.) This was because there was no evidence that the person making the accusation knew that the third person was inside the apartment or had reason to believe that he could overhear what was being said. (*Ibid*.)

In that example, the fact that it was always *possible* that there could have been someone else in the apartment did not satisfy the publication requirement — even under the standard that allows for negligent publication, which that opinion appeared to adopt. (*Haley v. Casa Del Rey Homeowners Ass'n.*, 153 Cal.App.4th at 877-878.) Applying that standard to the present case, the fact that it was always *possible* that someone other than Guzik might read King's letter does not satisfy the publication requirement, either.

The lack of publication under the facts of this case is all the more apparent when one considers authority that specifically concerns letters of a personal nature that are read by someone other than the addressee. As Witkin points out, "no publication occurs where a letter is stolen and read, or opened despite a "personal" mark." (5 Witkin, Summary 10th (2005) Torts, § 536, citing to Rest.2d, Torts §577, Comments k et seq.; 50 Am.Jur.2d (1995 ed.), Libel and Slander §§237, 251; 92 A.L.R.2d 219 [publication by accidental communication, or communication only to plaintiff].)

Here, the letter did not have an express "personal" mark on the

envelope or on the top of the first page. (CT 175, 178.) However, Shido *realized* from the first three lines that it *was* personal. (CT 87:14-88:2 cited in support of UMF 10 at CT 210; CT 93:1-11 cited in support of UMF 10 at CT 210.)

If — as Witkin indicates — "publication" for defamation purposes does not occur if someone skims a letter after seeing a "personal" mark, it surely also does not occur if she skims the entire contents despite *knowing* from the opening few lines that the contents were, indeed, "personal." Those opening lines successfully served the same function as a "personal" mark. They put Shido on notice that this was none of her business.

Guzik is expected to argue that it is commonplace for letters sent to a person at an office to be opened by someone other than the addressee and that King knew this. However, that would miss the point. Even though it may not be unusual for people to *open* letters sent to someone else's attention at a place of work, it is not expected that they will then go on and *read* what they *recognize* to be an obviously personal — and inherently confidential — communication.

Indeed, Shido testified that there was a policy at her place of work that people were *not* to read letters that were personal and confidential *even if* letters were not marked as such. (CT 86:11-18 cited to in UMF 11 at CT 210; CT 93:21-94:11 cited to in UMF 11 at CT 210.) So Shido's skimming

of the letter was outside of her duties and contrary to the policies in force where she worked.

As noted earlier, Guzik failed in his effort to create a triable issue on that fact by pointing to a letter his attorney wrote purporting to make corrections to this portion of the transcript in order to change it to the opposite of what Shido had actually said. (Response to UMF 11 at CT 335 citing to CT 421.) The letter was not signed by Shido as is required Code of Civil Procedure § 2025.520(c) for it to have any effect. Therefore, the letter by Guzik's attorney does not constitute "evidence" that can be factored into the analysis.

So when Shido continued to skim, she became, in effect, a snooper — equivalent to an eavesdropper who, after accidentally catching a few words of a conversation, decides to listen in to the rest. There is no authority that intrusive conduct of that type by a third party turns an otherwise private communication between two people into one that has been "published" for defamation purposes.

And had Shido stopped at the first three lines when she realized that the letter was personal, she would never have seen the only language that, on appeal, Guzik contends was actionable (not that the record shows that she saw it anyway).

In the proceedings below, Guzik cited to Shido's testimony that she

found the letter “threatening,” as though that justified the fact that she kept on skimming it. (CT 345:13-16.) But that testimony is irrelevant. If it was “personal,” she had no business skimming it, whatever the nature of the contents. Moreover, there was nothing in the letter that did constitute a “threat,” let alone one of such imminent harm as to create exigent circumstances suspending normal rules, nor was there any other evidence of such.

That concludes the argument on the defamation issue. The argument now moves to the privilege issue.

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PART TWO:

THE PRIVILEGE ISSUE

G. GUZIK HAS ALREADY CONCEDED THAT HE LACKS STANDING TO ASSERT NOLTE'S MARITAL PRIVILEGE

In the second part of this appeal, Guzik argues that the judgment following the jury trial on the privacy claims must be set aside and a new trial ordered, because Nolte — who was not a party — did not have an opportunity to assert her marital privilege, which, according to Guzik, was violated. Whereas Guzik's defamation argument is flawed, this one crosses the line where frivolity begins.[11]

In his motion for a new trial, Guzik — acknowledging that he had not tried to bring up the privilege issue at trial — explained: "Plaintiff, who is not the holder of the privilege under Evidence Code § 980, had no standing to assert the privilege...." (CT 721:17-20.)

Guzik was right about that. He did *not* have standing then. And he does not have standing *now*, either. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1137-1138 [defendant could not "vicariously" assert attorney-

[11] Accompanying this brief is a motion for sanctions for raising a frivolous issue. The motion points out that Guzik was already sanctioned $2,000 by the Superior Court when he made the same privilege argument through his motion for a new trial. Guzik has not appealed that sanction.

client privilege on behalf of witness for purposes of defendant's claim on appeal that witness's waiver of privilege was invalid].)

Having already conceded that he did not have standing to assert privilege, Guzik tries to suggest that Nolte was "denied the opportunity to claim the privilege during trial." (Guzik brief at 26; italics in original omitted.) That sounds as though he *is* trying to assert the privilege on Nolte's behalf — something that he has already stated he cannot do. There is no meaningful distinction between trying to assert someone else's privilege and demanding relief for oneself because the privilege holder did not — supposedly — have an opportunity to assert the privilege herself.

H. SINCE GUZIK DOES NOT HAVE STANDING TO ASSERT THE PRIVILEGE ISSUE, THIS COURT LACKS JURISDICTION TO HEAR THIS PART OF THE APPEAL

Code of Civil Procedure § 902 sets forth the statutory basis for standing to appeal: "Any party aggrieved may appeal in the cases prescribed in this title." The Supreme Court has explained the test of whether a party is "aggrieved" as follows: "One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. [Citations.] Appellant's interest 'must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment.' [Citation.]" (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.)

The test of who is "aggrieved" for standing purposes has been framed thus: *"Would the party have had the thing, if the erroneous judgment had not been given?"* (*Crook v. Contreras* (2002) 95 Cal.App.4th 1194, 1201, citing to *Adams v. Woods* (1857) 8 Cal. 306, 315; original italics.)

On this test, Guzik lacks standing to appeal the privilege issue. The "thing," here, is the privilege. And but for the "error" — assuming, arguendo, that there was any — Guzik would not have "had" that "thing." He cannot thus be "aggrieved" in order to have standing to appeal this issue, even if he was aggrieved by the judgment in the case as a whole.

The standing requirement in an appeal is jurisdictional. (*United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1304.) Hence, the proper course would be for the Court to dismiss this part of the appeal rather than to affirm. (*In re Pacific Standard Life Ins. Co.* (1992) 9 Cal.App.4th 1197, 1203-1204.)

That said, it really makes no difference to the "bottom line" whether one takes the view that this portion of the appeal should be dismissed on jurisdictional grounds for lack of standing, or whether the Court assumes jurisdiction but then affirms on the merits on the basis that Guzik cannot assert someone else's privilege. Putting aside concerns about doctrinal correctness, the result is, effectively, the same.

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I. EVEN IF THERE WERE ERROR ON THE PRIVILEGE ISSUE, IT WAS INVITED BY GUZIK

Even if Guzik did have standing to raise the privilege issue, his arguments would lack any merit. For a start, King's testimony to which exception is taken came in response to a question by Guzik's attorney during his case in chief. (RT 4/7/06 at 12:27-13:4.) Guzik *knew* the answer that this question would elicit, because *his own* trial brief had already referred to King's deposition testimony about the "curbside consultation" relating to Guzik's treatment. (CT 669:12-13.) The answer given at trial cannot, therefore, have come as a surprise. So what Guzik is effectively arguing is that his own question should not have been allowed.

Thus, *even if* there were error, it would have been invited by Guzik himself. And it is well settled that one whose conduct induces or invites the commission of error by the trial court is estopped from asserting it as a ground for reversal on appeal. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

J. NOLTE HERSELF HAD THE OPPORTUNITY TO ASSERT MARITAL PRIVILEGE BEFORE TRIAL, BUT CHOSE NOT TO DO SO

Moreover, Guzik's claim that Nolte was "denied the opportunity" to claim the privilege herself is incorrect. The record shows that Nolte *did* have

the opportunity to assert marital privilege during in limine proceedings but *did not* avail herself of it. So even if Guzik could — in theory — argue for reversal based on Nolte having been denied the opportunity to assert privilege, he would still fail under the facts of what happened in this case.

Nolte — although not a party — did, through her own attorney, file a pretrial motion asking for a protective order to limit the questions that could be asked about any sexual relationship between her and Guzik. (CT 677.) However, that motion did *not* ask for any protective order about matters relating to marital privilege. (*Ibid*.; see also CT 679-683 [no mention of marital privilege issue in Nolte's memorandum of points and authorities].) Nolte's *only* interest was in protecting information about her sexual activity *outside of her marriage*.

Nolte *did* get a hearing on that motion and her papers *were* considered. (CT 685 [court minutes].) The Reporter's Transcript of the hearing is hard to follow because — as Guzik points out — the court reporter appears to have confused Nolte's attorney (Ms. Druch) with King's attorney (Ms. Landry) and so it is difficult to determine who is speaking at certain points. In any event, the transcript contains no record of *anyone* referring to marital privilege. (RT 4/5/06 at 47-51 [this being the portion where, as best as one can tell given the mistaken identities, the court is engaged in a colloquy with Nolte's attorney].)

It would not be plausible for Guzik to argue that Nolte did not know at that point that supposedly privileged communications would come up in testimony. As pointed out above, it was no surprise that King would testify about the "curbside consultation." In fact, the trial briefs on *both* sides had referred to this. (CT 660:22-24, 669:12-15.)

Furthermore, the record shows that Nolte was being represented as a witness during the litigation not only by the attorney who made the motion in limine on her behalf, but *also* by Guzik's attorney. (CT 435-437 [letter by Steven Finley, Guzik's attorney, to court reporter seeking to make correction to deposition transcript on Nolte's behalf].) Therefore, if that attorney knew about King's testimony about the curbside consultation (as he *did* because he wrote the trial brief referring to it), then, as a matter of law, Nolte knew it too. (*Bennet v. Shahhal* (1999) 75 Cal.App.4th 384, 391, fn. 3 ["an attorney's knowledge is imputed to the client"].)

Likewise, Nolte's motion referred to her deposition and portions of that deposition in the record show that the issue of whether she had had a consultation with King about Guzik was at issue. (See, e.g., CT 432:11-21.)

Therefore, there is no plausible argument to be made that the reason that Nolte did not raise the privilege issue before trial was because she had no inkling that the subject of her communications with her then-husband would even arise. Rather, there was a knowing waiver.

K. NOLTE ALSO WAIVED ANY PRIVILEGE BY CHOOSING TO TESTIFY IN THE SUMMARY JUDGMENT PROCEEDINGS ABOUT COMMUNICATIONS WITH KING CONCERNING HER TREATMENT OF GUZIK

In fact, Nolte had waived the marital privilege even before she chose not to assert it during in limine proceedings. On July 20, 2005 — some nine months before trial — she executed a declaration that was used by Guzik in the summary judgment proceedings, in which she testified about the substance of a communication between her and King concerning Guzik's status as a patient that occurred while they were married. (CT 778:¶ 6 ["In or about January 2004, I told defendant King that plaintiff Guzik was a patient of mine and that he was the president of a large high-tech company in Silicon Valley with many employees"], cited to in King opposition to motion to new trial at CT 747:4-6, 751:12-15.)

If a married person chooses to testify in a proceeding in which his or her spouse is a party, that person waives the privilege. (*People v. Lucas* (1995) 12 Cal.4th 415, 490; see also Evid. Code § 973 ["Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given."].)

Here, Nolte *chose* to testify against King in the summary judgment proceedings on the subject of a conversation that concerned Guzik being a patient. Therefore, she was in no position to assert the privilege at trial — even if she had tried to do so.

L. NOLTE NEEDED TO HAVE RAISED THE PRIVILEGE ISSUE AT OR BEFORE TRIAL, NOT AFTERWARD

Guzik states in his brief that Nolte wrote in a declaration in support of a motion for a new trial that "given the opportunity she would have exercised her right to prevent Dr. King from testifying to confidential marital communications." (Guzik brief at 27 citing to CT 786 ¶¶ 4 and 5.)

But Nolte was *too late* in bringing this up *after* trial. The California Supreme Court has made clear: "[A] spouse's privilege, if it is to be relied upon, *must* be raised *at the trial*." (*People v. Kroeger* (1964) 61 Cal.2d 236, 246, emphasis added.) It cannot, therefore, be raised for the first time in a post-trial motion — let alone in one brought by someone other than the holder of the privilege. In addition, as noted above, the premise in Nolte's post-trial declaration was false because she *did* have the opportunity that she claims was denied.

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M. GUZIK HAS NOT CHALLENGED THE COURT'S SUSTAINING OF KING'S OBJECTION THAT THE NOLTE DECLARATION WAS UNTIMELY EVEN IF THE ISSUE COULD BE RAISED FOR THE FIRST TIME AFTER TRIAL

In fact, the Nolte declaration was late in two senses. Not only was it late in the sense that the issue could not be raised after trial, *but it was late even within the context of the post-trial proceedings*. The declaration was not submitted with the motion for a new trial but, rather, with Guzik's reply papers. (CT 786 [file stamp shows September 13, 2006, the same as the reply at CT 780].)

King filed an objection arguing that, in order to be considered, the declaration should have been included with the moving papers. (CT 788-789.) At the hearing on the motion, the court agreed and indicated that it would not consider the declaration for that reason.[12] (RT 9/20/06 at 4:21-23 ["I think that objection is well taken. However, even if I were to consider Dr. Nolte's declaration, my conclusion would not be altered."].)

The Reporter's Transcript shows that Guzik did not try to argue that King's objection should not have been sustained. (RT 9/20/06 at 4-5.) The

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[12] Lest Guzik will try to argue that there was a "double standard" when it came to evidence submitted with reply papers, in the sense that the court considered it in the summary adjudication proceedings but not in the post-trial proceedings, there was an important difference: King objected; Guzik did not.

only thing of substance that his attorney said at the hearing was that he had nothing to add to the papers that had been filed. (RT 9/20/06 at 4:14.) And the Clerk's Transcript includes no written argument by Guzik on the subject of King's objection.

Likewise, Guzik has not argued on appeal that the trial court erred in sustaining the objection. Guzik has, therefore, waived that issue entirely. (*Katelaris v. County of Orange*, 92 Cal.App.4th at 1216, fn. 4.) Accordingly, it must be presumed on appeal that the trial court was *correct* in not considering the declaration. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [the judgment is presumptively correct and it is the appellant's burden to show error].)

Thus, to have a *theoretical* chance of prevailing on the privilege issue, Guzik needs to argue that there was error *even* on the basis of Nolte *never* — even during post-trial proceedings — having raised the marital privilege issue. That was essentially the argument he tried to make when first moving for a new trial, since — at that point — the Nolte declaration had not yet been produced.

It is unclear whether Guzik is trying to make such an argument on appeal. If he is, this part of his appeal becomes *even more* frivolous. If he is not, then he is essentially conceding defeat in light of the non-consideration of the Nolte declaration and his waiver of that issue.

N. THE COMMUNICATIONS AT ISSUE WERE NOT EVEN SUBJECT TO MARITAL PRIVILEGE

Finally, a further flaw in Guzik's appeal is that the testimony at issue would not have been subject to the marital privilege *even if* that privilege had been properly asserted. The privilege does not bar evidence of the act of communicating between spouses, only the content of the communication. (*People v. Bradford* (1969) 70 Cal.2d 333, 342, fn. 2.) Here, the content of the curbside consultation was not at issue. King did not testify about what was said about Guzik's treatment. He only testified about the fact that the consultation had occurred.

CONCLUSION

For the reasons stated above, the Court is urged to affirm with regard to the summary adjudication of the defamation claim and to either dismiss or affirm with regard to the privacy portion of this appeal. Costs should be awarded to Respondent.

January 30, 2008

THE LAW OFFICE OF
JOHN DERRICK

____
by John Derrick
Attorney for Respondent
Wing K. King

CERTIFICATE OF WORD COUNT

I certify that the text of this brief, as counted by Microsoft Word, consists of 12,257 words (including footnotes but excluding the tables of contents and authorities, this certificate, and the attached proof of service).

January 30, 2008

THE LAW OFFICE OF
JOHN DERRICK

____
By John Derrick
Attorney for Respondent

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