B212235

IN THE

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
Division 5

CINDY WIESE
Plaintiff & Respondent,

vs.

KELLY OWEN, et al.
Defendants & Appellants.

Appeal from the Superior Court of California, County of Los Angeles
The Hon. Susan Bryant-Deason, Judge (case number BC359050)

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF APPEALABILITY 2

PROCEDURAL HISTORY 2

STATEMENT OF FACTS 4

1. Owen and Wiese entered into a written contract in April 2003 4

2. The contract called for Owen to inventory, remove, and sell various equipment at Wiese's home 5

3. The contract called for Owen to archive on disk various photographs taken by Wiese's late husband 8

4. The contract called for Owen to arrange and supervise construction work at Wiese's home 10

5. The amount that Wiese paid Owen was approximately $65,000 12

6. Owen moved to reopen after Wiese's former attorney alleged that Wiese had planned to commit perjury and to encourage witnesses to do the same, and had also forged evidence 13

ARGUMENT 19

PART ONE:
THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING OWEN'S MOTION TO REOPEN 19

A. THE DENIAL OF A MOTION TO REOPEN IS REVIEWED FOR ABUSE OF DISCRETION 19

B. THE MOTION TO REOPEN WAS TIMELY 20

(i) The motion to reopen was timely filed after a tentative decision and before entry of judgment ... 20

(ii) Owen was diligent in trying to bring the evidence before the trial court 23

C. ASSUMING THE MOTION WAS TIMELY, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING IT ... 24

(i) It was an abuse of discretion to deny the motion, since new, material facts had arisen 24

(ii) The issue of Wiese's truthfulness was critical ... 25

(iii) The fact that the court had found Owen not to be credible is irrelevant... 27

(iv) The cited communications between Wiese and Little were not privileged 27

(v) Even if there was privilege initially, it was waived ... 30

(vi) The credibility of Little's testimony was not the issue, since it was sufficient for Owen to make a prima facie showing 31

(vii) Issues of evidentiary admissibility were not at issue 32

(viii) An adequate transcript of the related proceeding was provided to make the required prima facie showing 33

///
///
///
///
///

PART TWO:
WIESE'S TORT CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS 35

A. THE ISSUE OF THE STATUTE OF LIMITATIONS PRESENTS A MIXED QUESTION OF LAW AND FACT 35

B. WIESE'S TORT CLAIMS WERE SUBJECT TO A THREE-YEAR STATUTE OF LIMITATIONS 36

C. THE STATUTE OF LIMITATIONS FOR WIESE'S TORT CLAIMS HAD PASSED BY THE TIME HER COMPLAINT WAS FILED 36

(i) Any tort claim to do with the removal of the electronic items and the photographs was untimely 36

(ii) Any tort claim to do with the construction work was untimely 39

D. WITHOUT THE TORT CLAIMS, THE DAMAGES WOULD BE LOWER 40

(i) Wiese would not be entitled to punitive damages ... 40

(ii) Wiese could not recover for the value of the items that Owen allegedly took 40

PART THREE:
THE TRIAL COURT FAILED TO MAKE FINDINGS NECESSARY TO ENTER JUDGMENT ON THE TORT CLAIMS 42

A. IT IS REVERSIBLE ERROR FOR A TRIAL COURT, OVER OBJECTIONS, TO FAIL TO MAKE REQUESTED FINDINGS ON ESSENTIAL ELEMENTS OF A CLAIM 42

///

B. THE TRIAL COURT IGNORED OWEN'S REQUEST FOR FINDINGS ON THE ELEMENTS OF THE TORT CLAIMS AND HIS OBJECTIONS TO THE OMISSION ... 42

C. THE PROPER REMEDY IS A NEW TRIAL 45

PART FOUR:
THE DAMAGES AWARDED WERE EXCESSIVE 46

A. EVEN IF OWEN FACED LIABILITY, THE AWARD OF DAMAGES WAS EXCESSIVE BOTH AS A MATTER OF LAW AND FOR LACK OF SUBSTANTIAL EVIDENCE 46

B. DAMAGES FOR THE ITEMS OWEN ALLEGEDLY REMOVED AND SOLD SHOULD REFLECT THEIR VALUE AT THE TIME OF THE REMOVAL, NOT AT THE TIME OF PURCHASE 47

(i) The measure of damages for conversion is the value at the time that the tort was committed 47

(ii) The court improperly awarded damages based on the original invoice value 47

(iii) It was undisputed that many of the items were used or opened and bought over a period stretching back six years 49

(iv) The "alternative" measure of damages in Civil Code section 3336 is not applicable 51

(v) The numbers don't add up even if the proper damages amount were the sum of the invoice amounts 52

C. NO SUBSTANTIAL EVIDENCE SUPPORTED THE COURT'S ASSESSMENT OF DAMAGES FOR THE PHOTOGRAPHS 53

(i) After the parties submitted, the trial court said that it had “no way” to value the photographs 53

(ii) The court awarded damages of $400,000 after asking Wiese to state a number after both sides had rested and the case was submitted 54

(iii) No substantial evidence supports the award of $400,000 57

D. THE DAMAGES FOR THE CONSTRUCTION PROJECT WERE EXCESSIVE 59

(i) Wiese claimed damages for everything that she spent, not just the losses she claimed to have suffered on account of Owen 59

(ii) The construction damages were excessive whether reviewed for substantial evidence or de novo 61

E. THE COURT ERRED IN AWARDING THE SAME $50,000 IN DAMAGES TWICE 62

F. IF THE COMPENSATORY DAMAGES ARE REDUCED, ANY PUNITIVES MUST BE REASSESED 64

CONCLUSION 65

TABLE OF AUTHORITIES

CASES

Alliance Mortgage Co. v. Rothwell

(1995) 10 Cal.4th 1226 43

Broden v. Marin Humane Soc.

(1999) 70 Cal.App.4th 1212 23

City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.

(1998) 68 Cal.App.4th 445 43

City of Hope Nat. Medical Center v. Genentech, Inc.

(2008) 43 Cal.4th 375 40

Clark v. United States

(1933) 289 U.S. 1 28

Donovan v. Poway Unified School Dist.

(2008) 167 Cal.App.4th 567 57

Estate of Fama

(1952) 112 Cal.App.2d 309 24

Fladeboe v. American Isuzu Motors, Inc.

(2007) 150 Cal.App.4th 42 57

Frei v. Davey

(2004) 124 Cal.App.4th 1506 ... ... 58, 59

Fremont Indem. Co. v. Fremont General Corp.

(2007) 148 Cal.App.4th 97 ... ... 41, 43, 44

Gober v. Ralphs Grocery Co.

(2006) 137 Cal.App.4th 204 64

Gordon v. Wolfe

(1986) 179 Cal.App.3d 162 45

Hensler v. City of Glendale

(1994) 8 Cal.4th 1 40

Horning v. Shilberg

(2005) 130 Cal.App.4th 197 20

In re Guillory

(Bkrtcy.C.D.Cal.2002) 285 B.R. 307 47

Kuhn v. Department of General Services

(1994) 22 Cal.App.4th 1627 58

Lint v. Chisholm

(1981) 121 Cal.App.3d 615 ... ... 51, 52

Maheu v. CBS, Inc.

(1988) 201 Cal.App.3d 662 38

Markwell v. Sykes

(1959) 173 Cal.App.2d 642 31

Marriage of Arceneaux

(1990) 51 Cal.3d 1130 42

Marriage of Ditto

(1988) 206 Cal.App.3d 643 23

Marriage of Olson

(1980) 27 Cal.3d 414 25

McLeod v. Vista Unified School Dist.

(2008) 158 Cal.App.4th 1156 ... ... 35, 36

Monroy v. City of Los Angeles
(2008) 164 Cal.App.4th 248 ... ... 19, 24
Monterroso v. Moran
(2006) 135 Cal.App.4th 732 61
Myers v. Stephens
(1965) 233 Cal.App.2d 104 52
People v. Castillo
(2008)168 Cal.App.4th 364 36
People v. Clark
(1990) 50 Cal.3d 583 29
Ripani v. Liberty Loan Corp.
(1979) 95 Cal.App.3d 603 23
Rody v. Winn
(1958) 162 Cal.App.2d 35 31
Rosenfeld, Meyer & Susman v. Cohen
(1987) 191 Cal.App.3d 1035 ... ... 20, 23
State Farm Fire & Cas. Co. v. Sup.Ct. (Taylor)
(1997) 54 Cal.App.4th 625 29
Stewart v. Cox
(1961) 55 Cal.2d 857 23
Vega v. Jones, Day, Reavis & Pogue
(2004) 121 Cal.App.4th 282 38

STATUTES & RULES

California Rule of Court 3.1590 22

Civil Code § 3336 ... ... 47, 49, 51
Civil Code § 3358 61
Code of Civil Procedure § 128(a)(3) 20
Code of Civil Procedure § 170.6(a)(2) 45
Code of Civil Procedure § 337 35
Code of Civil Procedure § 338(c)/(d) 36
Code of Civil Procedure § 607 subd. (6) 19
Code of Civil Procedure § 634 42
Code of Civil Procedure § 904.1(a)(1) 2
Evidence Code § 320 20
Evidence Code § 780(h) 32
Evidence Code § 912(a) 30
Evidence Code § 956 28
Evidence Code § 1220 32

OTHER AUTHORITY

California Practice Guide:

Civil Appeals & Writs (Rutter) § 8:42 59

California Practice Guide:

Civil Trials and Evidence (Rutter) § 12:396 ... 19

California Practice Guide:

Civil Trials and Evidence (Rutter) § 12:400 ... 20

California Practice Guide:

Civil Trials and Evidence (Rutter) § 16:94 ... 23

Oxford American Dictionary, 2nd. Ed.... ... ... 56, 57

INTRODUCTION

This is an appeal of a judgment after a bench trial, which resulted in damages of approximately $1.35 million arising out of claims in contract and tort. Appellants make the following main arguments:

1. The trial court abused its discretion when it denied a motion to reopen after rendering a tentative decision but before the entry of judgment, in the light of new evidence from plaintiff's former lawyer that plaintiff had forged material evidence and committed perjury.
2. Plaintiff's tort claims were barred by the three-year statutes of limitations. Without them, her damages would be substantially lower, even if there were liability — for example, the punitive damages would go away.
3. The trial court's statement of decision failed to make findings on necessary elements of plaintiff's tort claims, despite a request and objections.
4. There were glaring flaws in the calculation of damages for both the tort and contract claims. For example, the damages for a conversion cause of action were assessed as the original invoice value of goods when purchased new. As a matter of law, the correct measure was their value at the time of conversion. Other numbers were arbitrary, double-counted, and/or not supported by substantial evidence.

STATEMENT OF APPEALABILITY

This appeal is taken pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1), from a final judgment following a trial.

PROCEDURAL HISTORY

Plaintiff and respondent Cindy Wiese filed a complaint on September 25, 2006, against defendant and appellant Kelly Owen.[1] (Appellant's Appendix ("App.") at 1.) Also named as defendants were Owens [sic] Consulting, described as a "dba" of Owen, and an individual named Manny Ojeda. (*Ibid*.) A first amended complaint followed on July 27, 2007. (App. 34.) Various causes of action in contract and tort were asserted. (*Ibid*.)

The matter proceeded to a bench trial. (Reporter's Transcript ("RT") at 1 et seq.) At the start of trial, a default was entered against Ojeda. (RT 15:9-10.) The causes of action that survived demurrer against Owen were: Intentional misrepresentation, conversion, breach of contract, accounting, and negligent misrepresentation. (RT 23:13-17, App. 34.)

At the conclusion of the first phase of trial, the court found in favor of Wiese on the contract and tort claims. It announced that it intended to award compensatory damages of approximately $1,099,572. (RT 2209:11-13.) This comprised: $338,313.30 for the invoice value of equipment allegedly taken

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[1] The pleading initially incorrectly referred to "Owens" — with an "s" — but this was subsequently corrected. (App. 644.)

by Owen; $400,000 for the loss of digital photographs; $246,000 for claims relating to a construction project; $65,259.88 for payments made to Owen; and $50,000 for money allegedly paid for an offshore investment. (App. 637:14-23.)

After the first phase of trial, but before the second dealing with punitive damages, Owen moved to reopen following statements by Wiese's previous lawyer in the case to the effect that Wiese had planned to lie and introduce fabricated evidence to support her claims against Owen. (App. 494, 496:22-26.) The court denied this motion. (App. 609.)

At the conclusion of the second phase of trial, the court awarded $250,000 in punitive damages. (App. 610.)

A statement of decision was issued on September 4, 2008. (App. 628.) On the same day, judgment was entered. (App. 639.)

Owen filed a notice of intention to move for a new trial on September 19, 2008. (App. 646.) The court denied the motion on November 12, 2008. (App. 754.)

On November 14, 2008, Owen filed a notice of appeal. (App. 756.)

STATEMENT OF FACTS

1. Owen and Wiese entered into a written contract in April 2003

On April 23, 2003, Kelly Owen and Cindy Wiese entered into a written contract.[2] (App. 233 [trial exhibit 1, also attached to first amended complaint at App. 58]; RT 302:16-303:13, 1343:11-15.) The contract called for Owen to perform or arrange a variety of services for Wiese's benefit, ranging from sorting out various things in her household to providing advice on matters such as her career, emotional well-being, and investments. (App. 233-234.) The contract was unusual in its scope — and, perhaps, naiively ambitious from both sides' points of view.

Owen understood that the agreement did not require him personally to do all of the things that were listed, but, rather, that he would either handle them or refer Wiese to others qualified to do so. (RT 40:16-41:10, 41:28-42:2.) Wiese agreed that Owen never claimed to be a therapist, an accountant, or an attorney — all of which were among the professional roles

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[2] The trial court found that both Owen and Owen Consulting LLC entered into the contract. (App. 629:10-12.) Owen Consulting LLC is owned by Owen and his wife. (RT 31:15-20.) Wiese's complaint named Owen Consulting as a "dba" of Owen individually and did not mention the LLC. (App. 34-56.) However, in closing argument, Owen appeared to stipulate to add the LLC as a defendant. (RT 2171:25-2172:17.) Judgment was subsequently entered against both Owen personally and the LLC. (App. 639.) In this brief, references to Owen embrace both him individually (and as a dba) and the LLC unless otherwise indicated. All arguments advanced on behalf of Owen are also stated on behalf of the LLC.

that would seem to have been called for in meeting needs covered by the contract. (RT 951:5-19.)

The three "big ticket" items in the contract — in terms of the damages that ended up being awarded — involved: (1) Making an inventory and disposing of various things in Wiese's house; (2) archiving digital photographs; and (3) work in connection with the remodeling of her house. (App. 233-234.) This narrative will focus on those areas.

2. The contract called for Owen to inventory, remove, and sell various equipment at Wiese's home

The first item on the agreement was: "Inventory all excess equipment which I will then remove from your home to be sold at a reasonable profit." (App. 233.) As shown below, the "equipment" mentioned in this provision referred to various electronic gadgetry in Wiese's house.

Owen testified that he did not, in fact, perform an inventory. (RT 47:4-5.) The reason was that the agreement also provided him to "work as directed" and he and Wiese ended up deciding that there were too many things of no or little value, and/or broken, to make the inventory practical. (RT 47:6-16, 1317:17-1318:6.)

Owen did, however, remove various items and arranged for a sale, as called for in the contract. He testified that the items concerned were "yard sale based quality stuff" and that the roughly $1,100-$1,200 realized at such

a sale was a “pretty high number.” (RT 47:21-28, 1308:18-27.) That money was applied to storage fees and similar expenses. (RT 48:1-12, 1309:8-16.) Describing the items in more detail, he painted a picture of a lot of junk of little or no value and not much else. (RT 1320:1-1326:25.)

Wiese confirmed that the inventory was not done, adding that she did not know if Owen had sold the items that were taken from the house and that, regardless, she did not receive any money for them. (RT 304:14-23, 346:9-18, 357:15-23.) She did not recall authorizing a yard sale and saying that the proceeds could cover Owen’s expenses. (RT 304:24-28.) She said that she did not know what happened to the money raised, which — she said — Owen had told her amounted to only $600. (RT 357:19-358:3.)

Wiese described the items in terms very different from Owen. She described a large number of mostly electronic devices — some very expensive — a lot of which were still in sealed boxes. (RT 349:22-352:3.) But Wiese also acknowledged that many of the items removed were used. (RT 742:1-745:18.)

Wiese testified that the reasons she had all this equipment in the house were that her late husband — a photographer — had closed two studios and that he also had a habit of buying new things when they came out even if he had only recently bought older models. (RT 356:15-22.)

At trial, Wiese went through numerous invoices, identifying items that

— she said — were taken by Owen and prices that had been paid for the equipment. (RT 382-690; App. 241-465 [trial exhibits 13-104].) She also identified a partial list that was — she said — signed by Owen in her presence indicating what he was taking. (RT 352:18-354:11; App. 235-240 [trial exhibit 12].) However, Owen denied signing that document. (RT 1311:5-26.) (As is shown later in this narrative, Wiese's first lawyer in the case was subsequently to testify in a related proceeding that Wiese had told him that the list was a forgery.)

Referring to both the used and unused items, Wiese testified that she did not have any opinion about their market value at the time of their removal. (RT 1260:13-1261:5; see also RT 1236:13-1237:9 [similar testimony referring to printers in particular].) No other witness testified as to their value.

Wiese said it took Owen between four and seven trips to remove all of these items, using trailers, a large truck, vans, and other vehicles. (RT 354:12-22.) She testified that the last time Owen was on her property was in July 2003. (RT 942:26-943:3.)

Wiese testified that she started to ask Owen about "precious" things that had been removed almost immediately after their removal. (RT 953:13-22.) She said this would have been in April or early May 2003. (RT 954:14-22.)

A witness named Thomas O'Connell described himself as "a good friend" of Wiese. (RT 1801:23-1802:12.) He testified that Owen told him that he had sold the "low dollar stuff" and kept back the "high dollar stuff" in storage, but that he — Owen — didn't say what he was going to do with that. (RT 1807:9-1808:12.) (As shown later in this narrative, Wiese's first attorney in the lawsuit was later to state that O'Connell was one of a number of witnesses whom Wiese had said she could get to testify to anything she wanted.)

3. The contract called for Owen to archive on disk various photographs taken by Wiese's late husband

The second item in the contract was: "Remove all personal and professional photographs taken by Robert Wiese and all other files and put on disks." (App. 233.) Robert Wiese — Wiese's late husband — died about a month before she entered into the contract with Owen. (RT 303:14-16.) They had been married for eight months and together for about five years. (RT 311:18-28, 375:3-7.) Mr. Wiese was a photographer who did a variety of types of work. (RT 305:19-307:13.) This included taking pictures of celebrities. (RT 307:14-307:23.)

Wiese testified that her husband had put all of his photography on computers that were among the things that Owen removed. (RT

952:21-953:9.) The photographs were all digital — there were no prints or negatives. (RT 49:8-24.)

Owen testified that he made copies on CDs and gave these to Wiese. (RT 48:19-24.) Wiese, however, denied having received them. (RT 305:1-8.)

Wiese testified that her husband had been paid $50,000 by Robert Downey, Jr. — presumably the actor of that name — for the rights to photographs of him. (RT 375:17-376:3.) She mentioned the names of seven other celebrities of whom her husband had at some unspecified time taken photographs. (RT 307:10-23.) However, neither she nor anyone else testified as to what, if anything, he had been paid for *those* photographs or, indeed, whether he had ever owned or sold the rights.

Over the time they were together, Wiese recalled her husband selling photo rights to unspecified people — and of unspecified subjects — about 55-60 times in unspecified years and that she deposited checks of unspecified amounts 40-50 times. (RT 377:7-378:4.) Wiese said that she did not have invoices showing the amounts her husband charged, because Owen had removed the computers containing them. (RT 691:3-11.)

There was no testimony by Wiese or anyone else as to whether, when the rights were "sold," Wiese's late husband retained any residual rights.

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4. The contract called for Owen to arrange and supervise construction work at Wiese's home

Another item on the contract was: "Hire a licensed contractor to remodel and make necessary repairs to your home under my personal guidance and direction to be completed within a four to five week period at a cost of no more than $50,000.00." (App. 233.) Owen was not a licensed contractor. (RT 83:18-20.) Nowhere in the record is there a suggestion that he held himself out to be one.

Owen testified that he did not hire a licensed contractor to remodel and make repairs, because — after further discussions with Wiese — it was agreed that this would exceed her budget and that she would instead hire a handyman named Manny Ojeda. (RT 75:14-26, 1881:16-1882:14.)

Wiese, by contrast, said that she did not recall having rethought her position or asking for an unlicensed person to do the work. (RT 322:9-12.)

Wiese acknowledged entering into an agreement with Ojeda, but said it was Owen who arranged the terms and presented them to her. (RT 935:17-936:15.) She testified that she paid Ojeda about $196,000. (RT 322:20-22.)

Wiese testified that the money she paid to Ojeda was passed through Owen. (RT 1263:2-8.) She also testified that Owen had received a portion of Ojeda's profits. (RT 336:18-21.) Owen denied handling cash between Wiese

and Ojeda. (RT 1880:28-1881:4.) He also denied receiving any "kickback" or other payment from Ojeda. (RT 98:14-19, 101:25-103:14.)

Ojeda had, apparently, prepared a written contract relating to his work. (App. 468 [trial exhibit 130; also attached to first amended complaint at App. 60].) There were signature lines for both Owen and Wiese, but neither of them signed. (App. 469.) This contract contained a representation that Ojeda "has no license of any kind" relating to the work. (App. 468.)

Wiese testified that the first time that she saw the Ojeda contract was in late June or early July 2003, after Ojeda had started work. (RT 937:14-938:25) Owen testified that he never saw it until the start of the lawsuit and that he would not have agreed to it. (RT 102:11-13, 1879:15-1880:27, 1881:5-10.)

Things did not go well with Ojeda. Wiese testified that she fired him by early July 2003 and immediately replaced him with a contractor named Ken Bass. (RT 339:13-18, 937:27-938:6.) She did so because her house had become a "wreck." (RT 339:19-20; see also RT 339:19-340:3 [description of defects].)

Wiese first began to have concerns about what Owen himself was or was not doing with regard to the construction work in late June or early July 2003. (RT 962:22-963:9.) She testified that she challenged him about it in

the first part of July 2003 and that he offered to pay half of her "losses." (RT 962:10-21.)

Owen agreed that he did not supervise all phases of the work done by Ojeda, because it would not have been cost-effective. (RT 89:18-20, 90:12-22.) Rather, he supervised the initial phase where materials and payment were discussed. (RT 90:4-11.) Owen testified that the direction for this came from Wiese herself. (RT 91:4-15.)

Wiese testified that she paid Bass — the person who took over from Ojeda — in the region of $40,000-$50,000. (RT 340:4-7.) She said that the entire construction project ended up taking about 18 months. (RT 322:13-16.)

5. The amount that Wiese paid Owen was approximately $65,000

Wiese gave Owen a cashier's check for $50,000 payable to Owen Consulting dated May 28, 2003. (RT 943:8-17; App. 234a [trial exhibit 4].) She said that this was to be invested on her behalf in offshore money markets. (RT 343:10-344:16.)

Owen denied receiving $50,000 from Wiese for that purpose. (RT 112:11-13.) He claimed that the $50,000 payment was a deposit against work on his contract. (RT 112:17-113:7.) That contract provided for hourly billing at $150. (App. 234.) He testified that the total amount he had received from Wiese was $64,000 or $65,259. (RT 121:10-13, 123:9-12.)

6. Owen moved to reopen after Wiese's former attorney alleged that Wiese had planned to commit perjury and to encourage witnesses to do the same, and had also forged evidence

The focus of this narrative now switches to what happened after the first phase of trial — at the conclusion of which the court said that it would find Owen liable under Wiese's contract and tort claims — but before the case moved into the second phase dealing with punitive damages.

On June 23, 2008 — during the intervening period between the two phases of trial and more than two months before judgment was entered — Owen filed a motion to reopen the first phase in the light of some extraordinary revelations by Wiese's former attorney. (App. 494, 496:22-27.)

That attorney, James J. Little, had represented Wiese at the start of her lawsuit against Owen and was still her attorney when the first amended complaint was filed. (App. 1:1-2, 34:1-2.) On August 23, 2007 — approximately six months before trial — Little filed a motion to withdraw. (App. 76.) In a supporting declaration, he wrote: "There has been a breakdown in the attorney-client relationship and, accordingly, attorney is no longer able to represent client. Due to the exact nature of the breakdown and conflict, attorney is precluded from providing any more details in this declaration but will discuss such information with the court in camera if so required." (App. 78.)

The reason for Little's withdrawal only became clear *after* the first phase of trial. The circumstances were revealed in Owen's motion to reopen, which referred to a separate lawsuit between Little and Wiese over fees (Los Angeles Superior Court case number 07C03845). (App. 496:25-27, 500:8-18.)

Accompanying the motion were extracts from the reporter's transcript of the trial in that proceeding. (App. 500:16-18, 509.) The transcript shows Little testifying about his relationship with Wiese in her claim against Owen and how, at first, it proceeded in a normal way. (App. 511:1-19.) Little then got on to how the relationship broke down:

LITTLE:	What happened is that there came a point where Miss Wiese — and let me say preliminarily and I should have asked this first. It is true and I would like to get a specific ruling on this point that because the nature and the details of my attorney-client relationship with Miss Wiese are at issue and she is contesting them, that there is a waiver of my attorney-client privilege with respect to that issue, correct?
THE COURT:	Only as it relates to what might be relevant for the claim, which is a financial claim.
LITTLE:	Understood. Thank you, and that is your ruling?
THE COURT:	Yes.
LITTLE:	Thank you. So I got to a point in August — the evidence will show that I got to a point in August 2007 where I believe that I was ethically required to withdraw from

> Miss Wiese's representation for cause.... [T]he reason I had to withdraw... is that *Miss Wiese... began herself to take and began to insist that I take with respect to her claims against Kelly Owen a position, legal and strategic positions, factual positions which were — which ran the gamut of being unsupported by fact, were just plain fabricated* or just weren't supported by law. And I have documented in correspondence which I will produce to the court where I basically tell her that I am not going to continue representing her and she is insisting I take positions which I am ethically prohibited from taking.
> (App. 511:20-513:6, emphasis added.)

Little went on to testify: "The claim that there is some problem with my work is really designed to take the court's focus off the issue, which is that *Miss Wiese wanted me to lie, wanted me to participate and conspire with her in fabricating evidence against Kelly Owen*." (App. 515:14-18, emphasis added.)

The issue then turned to the statute of limitations. Little referred to Wiese's contentions that Owen took electronic equipment of hers, sold it and kept the money. (App. 516:1-9.) He then stated: "[S]he admitted to us when we were going over her responses to discovery that she had been told by her brother-in-law almost immediately upon signing the agreement with Kelly Owen that she knew that Kelly Owen was going to rip her off, that he was not to be trusted and that she should not enter into a business arrangement....

Now, if that's true and that's what she said, and I told Miss Wiese... at that time that she had significant and perhaps fatal statute of limitation problems, and I also told Miss Wiese that she would need to correct her sworn deposition testimony where she gives prior inconsistent responses." (App. 516:16-517:5.)

He continued: "A second issue came up. Obviously because one of the principal claims in Miss Wiese's lawsuit against Kelly Owen was that he allegedly took all this equipment, I asked her do you have any proof, any witnesses that anybody ever saw him taking this equipment[?] And in my notes are the people that Miss Wiese told me who she saw taking this equipment. Now, at the eleventh hour she then comes up with the names Sharon Lesker [misspelling of "Letzelter"], Mary Lou Murphy and Tommy O'Connell who are now new witnesses who she claims are now going to say that they saw Kelly Owen taking the equipment out of the house, and when I confronted Miss Wiese about the fact that these witnesses were not previously disclosed to me and I am hearing these people for the first time, *she in essence tells me, well, I can get these people to say anything I want*. Okay. So I told her she can't do that." (App. 517:6-23, emphasis added.) Two of the three witnesses named above did testify in Wiese's favor at trial. (RT 1566 [Letzelter], 1802 [O'Connell].)

Little then related how he had told Wiese that she needed more evidence of her claims, such as “anything signed by Kelly Owen that says he took this equipment out.” (App. 517:23-518:15.) He continued: “This was the crowning blow. Then she comes to my office and she’s got a two-page or three-page piece of paper with all this equipment listed on it, and there is this alleged mark, initials by some — that looks like a Kelly Owen, and I said what is this[?]. *She admitted to me that she had made this up and that she was going to claim that her boyfriend Tommy O’Connell found this, and that was it.* I said I’m not doing this. I cannot represent you.” (App. 517:17-25, emphasis added.) This referred to the list that was admitted at trial as Exhibit 12. (App. 235.)

Also accompanying the motion was a copy of a letter that Little wrote on May 28, 2008, to both Wiese’s new attorney and to Owen’s attorney. (App. 500:12-15, 504.) In this letter, he stated: “I have formally withdrawn... any claim to a portion of the Wiese v. Owen judgment to which I might otherwise be entitled, *given that it appears that the judgment might have been obtained by fraud*.... Normally, any communications between myself and [Wiese’s new counsel] with regard to my prior representation of Ms. Wiese might otherwise be attorney-client privileged; however, Judge Tillmon specifically ruled that any such attorney-client privilege has been

waived by Ms. Wiese by reason of her having put the details and facts of my representation of her at issue." (App. 504-505, emphasis added.)

As stated earlier in the procedural history, the court denied the motion to reopen. (App. 609.)

ARGUMENT

PART ONE:

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING OWEN'S MOTION TO REOPEN

A. THE DENIAL OF A MOTION TO REOPEN IS REVIEWED FOR ABUSE OF DISCRETION

"Under certain circumstances, a party may move to reopen its case-in-chief to introduce new evidence on elements of a cause of action or defense." (California Practice Guide: Civil Trials and Evidence (Rutter) § 12:396 citing to Code Civ. Proc., § 607 subd. (6) [governing order of proceedings during trial].)

Here, Owen moved to reopen after Wiese's previous attorney testified in another proceeding that she — Wiese — had fabricated evidence and planned to lie in her lawsuit against Owen. (App. 494, 496:22-27.) The first issue on appeal is whether the trial court erred in denying that motion.

The denial of a motion to reopen is reviewed for abuse of discretion. (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 265.)

The argument on this issue falls into two parts: The first is whether the motion to reopen was timely; the second is whether — assuming it was

timely — there was an abuse of discretion in denying it. The issue was preserved with the filing and arguing of the motion itself. It was further preserved when Owen challenged the denial in his subsequent motion for a new trial. (App. 665:27-667:23.)

B. THE MOTION TO REOPEN WAS TIMELY

(i) The motion to reopen was timely filed after a tentative decision and before entry of judgment

"A party may move to reopen its case to offer additional evidence after the court announces its tentative decision in a nonjury trial. So long as no judgment has been entered, the court may allow additional evidence under its inherent power to control the order of proof and the conduct of proceedings." (California Practice Guide: Civil Trials and Evidence (Rutter) § 12:400 citing: Evid. Code, § 320; Code Civ. Proc., § 128 subd. (a)(3); *Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d 1035, 1052, fn. 7; *Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208.)

Applying that rule, the motion to reopen was timely, as the following review of the relevant dates shows:

- Closing arguments in the first phase of trial concluded on February 14, 2008. (RT 2101:3, 2198:27.)
- The court immediately stated that it was "going to rule." (RT 2199.5.) And it proceeded to do so orally from the bench. (RT

2199:9-2208:11.) For reasons argued below, this "ruling" was — as a matter of law — necessarily a *tentative* one, no matter how it was styled. This was the ruling in the *first* phase of trial, before the court moved on to the punitive damages phase.

- The separate proceeding in which Little — Wiese's former attorney — testified took place on May 22, 2008. (App. 509.) That proceeding triggered the motion to reopen.
- The motion to reopen was filed about a month later, on June 23, 2008, together with a request for judicial notice relating to the transcript of the Little testimony. (App. 494, 507.) That was *before* the punitive damages phase of trial, which took place on July 23, 2008. (App. 610.) It was before the statement of decision was issued on September 4, 2008. (App. 628.) And, of course, it was before the judgment was entered, also on September 4, 2008. (App. 639.)

In opposing the motion to reopen, Wiese argued that it was untimely, because it was made after a "final" decision and not after a "tentative" one. (See, e.g., App. 531:5-14.) According to her, there was no tentative decision in this case. (App. 531:10-11.) The trial court also reasoned that there had not been a "tentative" decision. (RT 3006:14-16.)

However, that contention revealed a misunderstanding of how decisions are reached in bench trials. California Rule of Court 3.1590 — "Announcement of tentative decision, statement of decision, and judgment" — provides for the following sequence of events following a bench trial in which there are questions of fact:

1. The court issues a nonbinding, *tentative* decision.
2. The parties then have an opportunity to request a statement of decision.
3. There is then a process in which the parties have an opportunity to provide input and make objections to the statement of decision.
4. The statement of decision is filed.
5. A final judgment is then entered.

Here, the "decision" stated orally on the record can *only* have been a "tentative" decision as provided for by Rule of Court 3.1590(a)-(c), even though it was not identified as such. There is no other way to explain the fact that the court proceeded — some months later — to issue a statement of decision that covered the same subject matter.

There is no provision in the Rules of Court or the Code of Civil Procedure for the issuance of a statement of decision addressing that which has already been made final. To the contrary, "[o]ne purpose of the statement of decision is to allow the trial court to reconsider and modify its tentative

decision, and to make whatever findings are necessary to support its intended judgment." (California Practice Guide: Civil Trials and Evidence (Rutter) § 16:94 citing to *Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647.)

By necessity, therefore, a statement of decision *precedes*, and does not follow, the issuance of a final order or judgment. Thus, the "ruling" that was made orally on February 14, 2008, *must*, as a matter of law, have been a tentative one — whether or not the court used that term in delivering it. Any ruling that is not final is necessarily tentative. (See, e.g., *Ripani v. Liberty Loan Corp.* (1979) 95 Cal.App.3d 603, 614 [court's announcement of intended decision not a judgment and, therefore, not binding on the court].) Even if the trial judge had, subjectively, appeared to have closed her mind at the end of the first phase, that would be irrelevant to the procedural analysis of the timeliness of the motion to reopen.

(ii) Owen was diligent in trying to bring the evidence before the trial court

A motion to reopen is subject to a diligence requirement. (*Broden v. Marin Humane Soc.* (1999) 70 Cal.App.4th 1212, 1222.) Lack of diligence in procuring evidence or lack of a satisfactory explanation for not introducing it earlier justifies denial. (*Stewart v. Cox* (1961) 55 Cal.2d 857, 866; *Rosenfeld, Meyer & Susman v. Cohen*, *supra*, 191 Cal.App.3d at 1052

[no “good cause” where omission was a “product of knowing and informed choice of trial tactics”].)

Here, Owen passed the “diligence” test handily. He could not have presented the evidence he sought to offer during the first phase of trial that ended on February 14, 2008, for the simple reason that Little’s testimony revealing Wiese’s intention to commit perjury did not occur until roughly three months *after* that. (App. 509.) Before then, the reasons for Little’s withdrawal had not been revealed. (App. 78.)

As the sequence of dates outlined above shows, there was a gap of about a month between the triggering event and the filing of the motion. No reasonable argument could be made that there was a lack of diligence.

C. ASSUMING THE MOTION WAS TIMELY, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING IT

(i) It was an abuse of discretion to deny the motion, since new, material facts had arisen

A trial court must exercise its discretion “reasonably” if it denies a motion to reopen. (*Monroy v. City of Los Angeles*, *supra*, 164 Cal.App.4th at 265.) And it is an abuse of discretion to deny such a motion where a moving party offers material testimony on a key issue of a case and a satisfactory explanation for the failure to offer it previously is provided. (*Estate of Fama* (1952) 112 Cal.App.2d 309, 313-314.) In particular, it can be an abuse of

discretion to deny leave to reopen where, as here, important new facts occurred *after* the court announced the tentative decision in a bench trial. (*Marriage of Olson* (1980) 27 Cal.3d 414, 422.)

(ii) The issue of Wiese's truthfulness was critical

A large part of the defense argument at trial came down to challenging Wiese's credibility. (See, e.g., RT 2151:27 et seq. [portion of closing argument].) This was a classic "he says, she says" dispute, in which adverse parties offered diametrically opposite contentions about the facts.

Someone in the case had to be lying. The question of who was lying was the central issue in the trial. And the motion to reopen went directly to that issue.

Even though Little's testimony went to the heart of Wiese's credibility on issues of material fact, the court appeared to consider that it was not very relevant. It said that it was convinced that all the receipts that Wiese had produced at trial were genuine. (RT 3305:19-26.)

But that was not the point. Even assuming that all those receipts *were* genuine, that did not mean that Owen had taken all of those items. According to Little, Wiese had told him that she had forged the *list* of what was taken, *not* the receipts. (App. 518:17-25.)

What is especially significant is the *source* of the evidence concerning Wiese's plan to commit perjury and to present fabricated evidence. The

source was not some obscure character who had appeared from nowhere to cast doubt on Wiese's honesty. It was her own former lawyer who had been *attorney of record in this very same case before this very same judge*. For a trial judge simply to disregard such statements by a lawyer who has appeared before her in the same case crosses the line into an unreasonable use of discretion.

The fact is that one of two things *must* have happened:

- *Either Little was committing an outrageous act of moral turpitude by lying to the detriment of his former client.*
- *Or Wiese had told Little she had fabricated evidence and was planning to perjure herself and encourage others to do so.*

There was no other possibility. And either of the above was shocking and required the attention of the court.

It is also significant that even before Little's statements emerged, the trial court had already expressed some doubt about whether Wiese was being wholly truthful: "[M]ind you, I don't think Ms. Wiese is any wilting lily or any innocent bystander here. I mean, I can tell from what I've heard that she has certainly seen a lot in her life and experienced a lot and *she hasn't been totally truthful with the Court*, but what small inconsistencies they might be pale next to Mr. Owen." (RT 2201:26-2202:4, emphasis added.) Given that the court already had some doubts about Wiese's truthfulness, it made it all

the more untenable to deny the motion to reopen once it knew of Little's testimony.

(iii) The fact that the court had found Owen not to be credible is irrelevant

There is no doubt that the trial court had formed a very low opinion of Owen's credibility. (See, e.g., App. 629:3-4 [strongly negative credibility assessment in statement of decision]; RT 3672:14 [Owen's "credibility is in the toilet"], 3675:10-11 [his credibility "is just zero with the court"].) However, that did not mean that the issue of Wiese's truthfulness was moot.

Even putting aside the possibility that the court might have reassessed Owen's credibility had it allowed the case to be reopened, the fact that it did not find Owen to be credible did not mean that Wiese was telling the truth. It is possible for both sides in a case to be untruthful. For example, even if Wiese was being truthful on issues that proved some liability by Owen, and even if Owen was being untruthful on those items (and no such concession is made), that would not have precluded Wiese from being untruthful when testifying as to the scale of her damages or from forging the list in an effort to inflate those damages.

(iv) The cited communications between Wiese and Little were not privileged

In denying the motion to reopen, the trial court stated that there had,

in its opinion, been no waiver of attorney-client privilege with respect to the case that was before it (as opposed to the separate fee proceeding) and that this barred consideration of the communications between Wiese and Little. (RT 3307:25-3308:14.)

The other court in the related proceeding stated that there was a waiver of attorney-client privilege "[o]nly as it relates to what might be relevant for the claim, which is a financial claim." (App. 511:22-512:8.) Those words — although perhaps ambiguous — appear to say that the waiver applied to the *facts* that related to the financial claim, not that the waiver applied only to *proceeding* to resolve that claim.

But regardless of the position the trial court in that proceeding took about the scope of the waiver, the alleged communications between Little and Wiese were anyway *not privileged to begin with*. The reason is that *there is no attorney-client privilege where an attorney's services are sought or obtained "to enable or aid anyone" — client or third person — in the commission of a crime or fraud*. (Evid. Code, § 956.) The crime/fraud exception protects against abuse of the attorney-client relationship. (*Clark v. United States* (1933) 289 U.S. 1, 15.) "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." (*Ibid*.)

More specifically, an attempted fraud on the court — such as

knowingly giving false testimony — can be sufficient to invoke the crime/ fraud exception to the attorney-client privilege. (*State Farm Fire & Cas. Co. v. Sup.Ct. (Taylor)* (1997) 54 Cal.App.4th 625, 648-649.)

It is true that communications with counsel that *simply* reveal the client's plan to commit a crime or fraud remain fully protected by the privilege. The section 956 exception applies only where the client seeks legal assistance to plan or perpetrate a crime or fraud. (*People v. Clark* (1990) 50 Cal.3d 583, 621-623.) But that is precisely what took place here, if Little's testimony is believed. What Wiese was doing was asking Little to help her by pursuing a lawsuit on her behalf in which she would fabricate evidence. This was not a case where the client simply told a lawyer about a crime or fraud that she planned to commit independently.

As blatant as the fraud on the court would have been if Little were believed, the court apparently did not "get" what that fraud would have involved. Well into the argument on the motion to reopen, and after having reviewed the papers, the court inquired of Owen's counsel: *"And the fraud on this court — the fraud on this court would be what?"* (RT 3309:8-9, emphasis added.)

The fact that this question was even asked at this stage suggests that the trial court seemed, despite the evidence before it, not to have grasped the significance of what Little had testified. The court was taking a remarkably

relaxed approach to an allegation that a party before it in a matter on which judgment had not been entered had been engaged in an orchestrated effort to lie for monetary gain. *If it was not an abuse of discretion to deny a motion to reopen in these circumstances, then it is hard to see how a trial court's decision not to reopen a case could ever be reversed under that standard of review.*

(v) Even if there was privilege initially, it was waived

Even if the Wiese-Little communications were privileged at the outset, the privilege was waived. Evidence Code section 912, subdivision (a), provides: "[Privilege is waived] if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, *including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege*." (Emphasis added.)

Here, the transcript of the Little hearing shows no objection by Wiese on privilege grounds. And nowhere in the written or oral argument on Owen's motion to reopen did Wiese claim that there had been an objection or attempt to claim privilege in the Little proceeding. (App. 529-564; RT 3301-3315.)

So the genie was out of the bottle. It is settled that once the privilege of a communication is waived, it is "gone for good." (*Markwell v. Sykes* (1959) 173 Cal.App.2d 642, 648.)

(vi) The credibility of Little's testimony was not the issue, since it was sufficient for Owen to make a prima facie showing

The issue of whether Little's testimony *was* true is not the point. It would certainly have been possible for the trial court to have considered Little's testimony had the case been reopened and then to have disbelieved it and for it to have found Wiese to be more credible. That is what trials are for — resolving factual disputes.

But the motion to reopen was not the occasion to weigh Little's credibility. Nor, plainly, is this appeal. What mattered for the purposes of the motion was whether Owen presented *prima facie* evidence, which, *if it were believed*, would have been material to the case. (See, e.g., *Rody v. Winn* (1958) 162 Cal.App.2d 35, 39, disapproved on other grounds by *Cooke v. Tsipouroglou* (1963) 59 Cal.2d 660 [motion to reopen improperly denied after it provided *prima facie* evidence to support movant's claim].)

Plainly, the testimony of Wiese's former attorney of record that she — Wiese — planned to lie and to get others to commit perjury was prima facie evidence that was material to the case. It could hardly have been more material.

(vii) Issues of evidentiary admissibility were not at issue

In opposing the motion, Wiese argued that the transcript offered of Little's testimony was hearsay. (RT 3307:1-4.) But that, again, misses the point. The time to make evidentiary objections would have been at the reopened trial when the new evidence was actually offered.

Furthermore, the new evidence could have been offered in a variety of ways. It need not have simply been the transcript of Little's testimony in the other proceeding. That was produced by way of an offer of proof. At a reopened trial, the evidence could have been produced by the live testimony of Little and, indeed, by renewed cross-examination of Wiese and others.

It is premature to speculate on what evidentiary objections might have been made to such evidence had the case been reopened. But to the extent that Wiese did try to do just that in opposing the motion, her arguments were anyway flawed. What Wiese was alleged to have told Little would not be hearsay for at least two reasons:

- It would be a party admission and, therefore, not inadmissible as hearsay. (Evid. Code, § 1220.)
- It would also be admissible as a prior inconsistent statement. (Evid. Code, § 780 subd. (h).)

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(viii) An adequate transcript of the related proceeding was provided to make the required prima facie showing

As well as focusing on the issue of privilege, the trial court seemed concerned that it had not been provided with an adequate transcript of the Little-Wiese proceeding. (RT 3303:8-11.) It had only been provided with excerpts of the first day and did not have anything relating to the second day. (RT 3311:27-3312:14.)

Neither of those concerns justified denying the motion. The court was told that the reason there was no transcript covering the second day was that no court reporter had been present. (RT 3311:28-3312:1.) The court appeared concerned that this meant that it could not see the judge's ruling. (RT 3312:11-14.) But it did not need to do so. Little's testimony spoke for itself regardless of how the court ruled in the underlying fee dispute between him and Wiese. And, as pointed out above, the motion to reopen was not the time to make decisions about the weight of the evidence — it was simply the proceeding to decide whether there were prima facie grounds to reopen the case so that a weighing could take place. Furthermore, the court *was* informed at the hearing by Wiese's lawyer that Little received half of the fees he was seeking. (RT 3308:4-8.)

As for the fact that a complete copy of even the first day's proceeding had not been lodged, there was, it seemed, some confusion about what the

court wanted. At a previous hearing on June 25, 2008, when the court was first made aware of the planned motion to reopen and set a date for it to be heard, counsel for Wiese inquired: "Would you like me to lodge the transcript, Your Honor?" (RT 3008:11-12.) The court replied: "No." (RT 3008:13.)

Then, when the motion was heard on July 18, 2008, the court complained that it had not been given an entire transcript. (RT 3303:8-11.) When counsel pointed out that the court had previously stated that it did *not* want one lodged, the court replied: "Well that was at the time.... That day, I didn't need it, but you needed to lodge it with this." (RT 3303:17-22.)

But regardless of what confusion there might have been on that issue on the part of the court and/or Owen, there was no need for the entire transcript to be lodged. The excerpts made clear that Little had testified about Wiese's fabrication of evidence, her wish to commit perjury, and her plan to encourage others to commit perjury. That was enough to satisfy the requirement for a prima facie showing.

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PART TWO:

WIESE'S TORT CLAIMS WERE BARRED BY

THE STATUTE OF LIMITATIONS

A. THE ISSUE OF THE STATUTE OF LIMITATIONS PRESENTS A MIXED QUESTION OF LAW AND FACT

Owen acknowledges that Wiese's contract claim was brought within the applicable four-year statute of limitation. (Code Civ. Proc., § 337.) However, the tort claims — for misrepresentation and conversion — were outside of the applicable statute of limitations. This has a significant impact on the amount of damages Wiese could recover from Owen even if there were liability for breach of contract.

Owen preserved these issues for appeal by raising them in his motion for a new trial. (App. 647:15 [notice of intention to move], 662-664 [points and authorities].) The issue was raised in closing argument. (RT 2163:6-23.) And the statute of limitations was pled as an affirmative defense. (App. 105:25-106:1.)

This issue involves a mixed standard of review: (1) The determination of the statute of limitations applicable to a cause of action is a question of law that this Court reviews independently. (*McLeod v. Vista Unified School*

Dist. (2008) 158 Cal.App.4th 1156, 1164.) (2) When an issue involving the statute of limitations has been tried, the Court reviews the record to determine whether substantial evidence supports the findings of the trier of fact. (*People v. Castillo* (2008) 168 Cal.App.4th 364, 369.)

B. WIESE'S TORT CLAIMS WERE SUBJECT TO A THREE-YEAR STATUTE OF LIMITATIONS

The tort claims that went to trial were: Intentional misrepresentation, conversion, and negligent misrepresentation. (RT 23:13-17; App. 34.) A three-year statute of limitations applies to each. (Code Civ. Proc., § 338 subds. (c) and (d).)

C. THE STATUTE OF LIMITATIONS FOR WIESE'S TORT CLAIMS HAD PASSED BY THE TIME HER COMPLAINT WAS FILED

(i) Any tort claim to do with the removal of the electronic items and the photographs was untimely

Here, Wiese's first amended verified complaint alleged that Owen removed the items that were the subject of her conversion cause of action on or around April 26, 2003.[3] (App. 37:24-28.) At trial, Wiese testified that it took Owen between four and seven trips to remove all of them. (RT

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[3] The complaint actually listed 2006 as the year, but that, clearly, was in error as it was undisputed at trial that all the events took place in 2003.

354:12-15.) Even if those trips took place on more than one day — which is contrary to what is indicated in the complaint — Wiese also testified that the last time that Owen was on her property was in July 2003. (RT 942:26-943:3.) Thus, Owen's removal of the items *must* have been complete by then.

Wiese testified at trial: "[I]mmediately after some of the first items were removed I asked for things to be returned." (RT 954:17-19.) She said that this would have been somewhere in April or early May 2003. (RT 954:20-22.)

Wiese testified that Owen then returned some items and promised to return others and that such a promise was made "numerous" times going beyond May of that year. (RT 954:23-955:2.) She did not testify when those promises stopped being made. But her testimony makes clear that the promises could not have continued all that much longer. This is because at trial, she did not recall having *any* conversation with Owen from August 2003 onward. (RT 964:8-20.) And there was no evidence of any other communications in that timeframe.

The complaint in this action was filed on September 25, 2006. (App. 1.) Normally, the statute of limitations for conversion begins to run from the date of the conversion, even if the injured person was ignorant of his or her

rights, except where there was a fraudulent concealment. (*Maheu v. CBS, Inc.* (1988) 201 Cal.App.3d 662, 673.)

Here, Wiese's own theory of the case was that there was no concealment of the removal of the goods. As noted earlier, she propounded a list she contended Owen had signed *in her presence* recording what was being removed. (RT 352:18-354:11; App. 235-240.) And even if Owen's alleged promises to return the items were viewed as somehow fraudulently concealing the conversion, that stopped by August 2003 — because that was when the conversations between Wiese and Owen ceased.

So before September 25, 2003 — i.e., more than three years before the complaint was filed — Wiese knew that the items had been taken, she was no longer receiving promises about the return of any of them, she was not getting the items back, she had not received any money, and she was no longer in communication with Owen. All of this is based on Wiese's *own* testimony. Logically, the statute of limitations on the conversion claim must have begun to run before September 25, 2003.

The same applies to misrepresentation. There, the statute begins to run when the plaintiff has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him or her on inquiry. (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 298.) Here,

Wiese's repeated inquires about wanting the return of the items shows that she was "on inquiry."

Any tort claim with respect to the photographs must fail for similar reasons. The computers containing the digital files would have been taken with the rest of the items. It should have been immediately obvious to Wiese that she had not been given CDs, if that were the case. So whether the grievance about photographs is part of the conversion claim, or part of the misrepresentation one, or both, it was late in being asserted.

(ii) Any tort claim to do with the construction work was untimely

The dates are also against Wiese for tort claims when one looks at those having to do with the construction work. By early July 2003, Wiese had already fired Ojeda — the person whom she alleged Owen brought in to do the work — and replaced him with Bass, a contractor of her own choice. (RT 339:13-18, 935:17-936:15, 937:27-938:6.) Wiese said that she first began to have concerns about what Owen was or was not doing with regard to the construction in late June or early July 2003. (RT 961:22-962:9.) She testified that she challenged him about it in the first part of July 2003 and that he then offered to pay half of her "losses." (RT 962:10-21.) *Again, all of this is based on Wiese's own testimony.*

D. WITHOUT THE TORT CLAIMS, THE DAMAGES WOULD BE LOWER

(i) Wiese would not be entitled to punitive damages

The removal of the tort claims would affect the amount of damages that Wiese could recover. In particular, if she were restricted to damages under her contract cause of action, she would not have been able to recover punitive damages. (*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 392 [no recovery of punitive damages for contract causes of action].) That, alone, would reduce the judgment by $250,000. (App. 640.)

(ii) Wiese could not recover for the value of the items that Owen allegedly took

The removal of the tort claims also affects the compensatory damages. In determining which statute of limitations is applicable in a particular cause of action, it is necessary to identify the nature or gravamen of the cause of action. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22.) The nature of the right sued on — not the form of action or the relief demanded — determines the applicability of the statute of limitations. (*Id*. at 23.)

Here the gravamen of any cause of action relating to the taking and disposal of Wiese's property by Owen was conversion. That tort is generally described as "the wrongful exercise of dominion over the personal property

of another." (*Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) Its elements are "(1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages." *(Ibid.)* That description fits what Wiese was alleging about the taking and disposal of the equipment.

So the claims that Wiese was making with respect to the items of her property that Owen allegedly took were covered by the conversion claim — and, hence, the conversion statute of limitations — and *not* by her written contract claim with its longer statute of limitations.

Therefore, if Wiese's conversion claim was barred by the statute of limitations, the entire damages award arising out of the taking of that equipment — i.e., $338,313.30 — goes away. (App. 637:18-20.) That cannot be "dressed up" as a contract claim, because that was not the right that Wiese was, in actuality, suing on with respect to that issue.

The same logic also applies to the photographs. There, the claim supporting the $400,000 damages awarded was not simply that Owen broke a promise by failing to archive the photographs, but that he took away the computers on which they were stored and, hence, took the digital files. That was, in essence, a conversion claim and not a contract one.

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PART THREE:

THE TRIAL COURT FAILED TO MAKE FINDINGS NECESSARY TO ENTER JUDGMENT ON THE TORT CLAIMS

A. IT IS REVERSIBLE ERROR FOR A TRIAL COURT, OVER OBJECTIONS, TO FAIL TO MAKE REQUESTED FINDINGS ON ESSENTIAL ELEMENTS OF A CLAIM

A judgment may be reversed where the trial court furnished a statement of decision that omits critical findings and where, despite appropriate objection, the court refused to adequately explain the factual and legal basis for its decision. (*Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134.) If a timely objection has been made, "it shall not be inferred on appeal" that the trial court decided the facts in question in favor of the prevailing party. (Code Civ. Proc., § 634.)

B. THE TRIAL COURT IGNORED OWEN'S REQUEST FOR FINDINGS ON THE ELEMENTS OF THE TORT CLAIMS AND HIS OBJECTIONS TO THE OMISSION

Here, Owen filed a request for a statement of decision one day after the second phase of trial on punitive damages. (App. 610, 611.) The court found it timely filed and instructed Wiese's attorney to prepare a proposed one. (App. 616.)

The request for a statement of decision asked for findings on each of the elements of the tort claims (as well as the contract one). (App. 611-614; cf.: *Fremont Indem. Co. v. Fremont General Corp.* , supra, 148 Cal.App.4th at 119 [conversion elements], *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 481 [intentional misrepresentation elements], *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, fn. 4 [negligent misrepresentation elements].)

After reviewing a proposed statement of decision, Owen filed objections stating, among other things, that it did not cover the elements of the tort claims. (App. 618, 621:25-625:2.) Despite that, the trial court signed a statement of decision that barely mentioned misrepresentation and made no mention of conversion. (App. 628-638.)

For example, an essential element of the torts of intentional and negligent misrepresentation is reasonable reliance. (*City of Atascadero v. Merrill Lynch, et al.*, *supra*, 68 Cal.App.4th at 481 [intentional], *Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at 1239, fn. 4 [negligent].)

At trial, Owen argued that there was no reasonable reliance. (See, e.g., RT 2163:24-26.) His request for a statement of decision specifically asked for findings on reliance. (App. 613:5 [intentional], 613:20 [negligent].) His objections to the proposed statement of decision specifically objected to the

absence of such findings. (App. 622:19-20 [intentional], 623:25-26 [negligent].)

But the statement of decision only found that Wiese had justifiably relied on representations concerning: (1) The construction project; (2) a promise to provide investment advice; (3) a promise to negotiate some checks from an escrow account; and (4) one to help sort out some debt/credit issues.[4] (App. 633:17-19, 634:12-14, 634:25-635:2, 635:17-19.) There were *no* findings of reasonable reliance on any misrepresentations relating to the missing photographs or the removal and sale of the electronics — which, combined, accounted for the bulk of the damages. (App. 628-638.)

Likewise, an element of the tort of conversion is the plaintiff's ownership or right to possession of personal property. (*Fremont Indem. Co. v. Fremont General Corp.*, supra, 148 Cal.App.4th at 119.) At trial, Owen argued that Wiese had not shown that she did own all of the items. (See, e.g., RT 2152:22-23, 2154:2-3 [closing argument pointing out that some of the receipts bore the names of other people], 2153:8-16 [argument that a quantity of the items were purchased by Wiese's husband before she met him].)

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[4] There was also a finding that Owen had intended to induce reliance on a sub-plot concerning the acquisition of a Mercedes car. (App. 632:11-13.) But there was no finding that Wiese did rely on that representation — which, anyway, did *not* feature in the explanation of damages. (App. 637:14-23.)

Owen's request for a statement of decision specifically asked for a finding on that element. (App. 614:3.) His objections to the proposed statement of decision specifically objected to the absence of such a finding. (App. 624:8-9.) But the statement of decision that was issued contained no such finding.[5] (App. 628-638.)

C. THE PROPER REMEDY IS A NEW TRIAL

At a minimum, the failure to make required findings requires reversal to allow them to be made on remand. (*Gordon v. Wolfe* (1986) 179 Cal.App. 3d 162, 168.) However, the combination of this error with others identified in this brief requires that the omitted findings should follow a new trial. If a new trial is ordered on any of the other grounds argued in this brief, Owen would have a right to a peremptory challenge to the trial judge. (Code Civ. Proc., § 170.6 subd. (a)(2).) The new trial judge would then issue a new statement of decision — there is no authority for having two judges issue different statements of decision on different parts of the same case. So that judge should hear the evidence on the tort claims.

Furthermore, the passage of time since trial would make it unreliable to have new findings of fact so long after the relevant evidence was heard.

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[5] There were passing references to the selling of "Wiese's belongings." (App. 630:6-13.) But this was in an anaylsis of Wiese's contract claim and it left unaddressed the issue of *which* of the items actually were her "belongings." (*Ibid*.)

PART FOUR:

THE DAMAGES AWARDED WERE EXCESSIVE

A. EVEN IF OWEN FACED LIABILITY, THE AWARD OF DAMAGES WAS EXCESSIVE BOTH AS A MATTER OF LAW AND FOR LACK OF SUBSTANTIAL EVIDENCE

Even if Owen faced liability, the *amount* of damages awarded was erroneous both as a matter of law and, separately, owing to a lack of substantial evidence. The argument on damages will be broken out into four categories corresponding to those in the court's decision: (1) The damages for the items allegedly removed and sold by Owen; (2) the damages for the "lost" photographs; (3) the damages arising out of the construction project; and (4) the damages arising out of the payments made by Wiese to Owen.

Owen preserved his damages arguments for appeal by including them in his motion for a new trial. (App. 647:13 [notice of intention to move], 656-661 [points and authorities].)

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B. DAMAGES FOR THE ITEMS OWEN ALLEGEDLY REMOVED AND SOLD SHOULD REFLECT THEIR VALUE AT THE TIME OF THE REMOVAL, NOT AT THE TIME OF PURCHASE

(i) The measure of damages for conversion is the value at the time that the tort was committed

Civil Code section 3336 governs the value of damages for conversion:

> The detriment caused by the wrongful conversion of personal property is presumed to be:
> First — The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and
> Second — A fair compensation for the time and money properly expended in pursuit of the property.

Thus, under California law, the measure of damages for conversion is the fair market value of property at time of the conversion, plus interest from that date; in addition, plaintiff may recover fair compensation for time and monies properly expended in pursuit of property. (*In re Guillory* (Bkrtcy.C.D.Cal.2002) 285 B.R. 307, 315.)

(ii) The court improperly awarded damages based on the original invoice value

Disregarding that rule, Wiese argued to the trial court that she should

be compensated for the original invoice value of the items that she claimed Owen converted. Her lawyer told the court: "The value of the conversion of the property is supposed to be valued at the time of the conversion. Okay. Yes, that's what the law says. Most of the stuff was in factory sealed boxes and not crated.... Brand-new, top of the line. Newest, greatest thing that was out, the value is the same as the invoice." (RT 2182:18-24.)

So, while acknowledging "that's what the law says," Wiese's lawyer argued that — in this case — the invoice value was the proper amount. His point seemed to be that the two came down to the same thing.

Counsel for Owen argued that "[t]he time for assessing the value of the goods is not at the purchase point but at the point that they are taken, when wrongfully taken." (RT 2146:10-12.) The argument was further stated in his motion for a new trial. (App. 658:1-23.)

Adjudicating this issue, the court came down on the side of Wiese. It said in rendering its decision: "And in terms of the receipts, the receipts which were admitted into evidence which appear to be in the time frame which would be consistent with Ms. Wiese's relationship with Mr. Wiese, I accept your total of $338,313.30." (RT 2207:18-22.) And that was the amount it did award for this component of the damages. (App. 637:18-20.) The statement of decision confirmed that this was the amount that the court found to be the "value of the invoices." (*Ibid*.)

(iii) It was undisputed that many of the items were used or opened and bought over a period stretching back six years

Wiese's argument — and the court's decision accepting that argument — were wrong as a matter of both law and fact. As a matter of law, Civil Code section 3336 speaks for itself. Wiese needed to present evidence of the value at the time of conversion.

Wiese's argument that invoice value amounted to the same thing made no sense. Even she did not contend that *all* of the items were brand new and unused. To the contrary, her own testimony was that many of the items removed were *used*. (RT 742:1-745:18.) Even her lawyer's argument — which was not evidence — was that only "*most* of the stuff was in factory sealed boxes." (RT 2182:18-24, emphasis added.)

So it was undisputed that a sizeable part of the items were in some way used or opened. And it is a fact beyond reasonable dispute that electronic items — once bought, opened, and used — lose some of their value. That is quite apart from the further erosion of value caused by the passage of time.

In this case, the passage of time that would have further eroded the items' value was lengthy. An analysis of the invoices that were admitted into evidence shows that the invoice value breaks down by the year of purchase

as follows (keeping in mind that the conversion was alleged to have occurred in 2003):

- 1997: $26,715.02
- 1998: $56,129.24
- 1999: $59,387.71
- 2000: $84,377.81
- 2001: $67,832.38
- 2002: $6,732.28
- No date: $10,877

Those yearly totals are obtained from analyzing the invoices that were offered and admitted into evidence (not double-counting duplicates). (RT 382-690; App. 241-465 [trial exhibits 13-104].) (The totals do not add up exactly to the amount of damages awarded, because — as pointed out shortly — the amount awarded was actually greater than the invoice total, even though it purported to be based on it.)

In other words, the equipment concerned was acquired over a *six-year period*. Only a small percentage was acquired in the year preceding the alleged conversion. It is absurd to argue that five- or six-year-old computer and other electronic equipment is worth the original invoice price when — according to undisputed evidence — many items were opened and/or used.

Furthermore, the erosion of value caused by the passage of time would have affected the items that were unused and in factory-sealed boxes as well as those that were opened and used. It is a matter of common knowledge beyond reasonable dispute that innovation in technology means

that electronic items lose value over time, even if not opened or used, because newer items — which are improved — replace them in manufacturers' product lines.

So the argument that the value at the time of the alleged conversion was the invoice value was fanciful. Moreover, that argument is not even consistent with Wiese's testimony. Wiese actually testified that *she did not have any opinion as to the items' market value at the time of their removal*. (RT 1260:13-1261:5.) If she believed the market value to be the same as the invoice value, then she *would* have had an opinion of the market value, because she claimed to know the invoice value. And no other witness testified as to their market value.

(iv) The "alternative" measure of damages in Civil Code section 3336 is not applicable

Civil Code section 3336 alternatively allows the damages to reflect "an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted." However, that alternative formulation also does not support simply taking the invoice amounts. That approach only applies in "special circumstances." (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 624.) It is applicable "where proof establishes an injury beyond that which would be adequately

compensated by the value of the property and interest." (*Id*. at 624-625.)

As the Court of Appeal has explained: "Although the first part of section 3336 appears to provide for alternative measures of recovery, the first of the two measures, namely the value of the property converted at the time and place of conversion with interest from that time, is generally considered to be the appropriate measure of damages in a conversion action. The determination of damages under the alternative provision is resorted to *only* where the determination on the basis of value at the time of conversion would be manifestly unjust." (*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116, internal citations omitted, emphasis added.)

Here, there is no reason why adequate compensation could not simply have reflected the value of the items that were found to have been converted had evidence of that value been offered by Wiese.

(v) The numbers don't add up even if the proper damages amount were the sum of the invoice amounts

Even if the invoice value were the proper basis for assessing damages, the addition of the invoices by Wiese, and accepted by the court, was wrong. Wiese argued that the invoices totaled $338,313.30. However, if one goes through the process of analyzing all of the invoices that were actually admitted into evidence — and which appear in the Appendix at pages 241-465 — the total, after removing some that are duplicates (and taking out

certain non-equipment charges, such as labor), actually works out to $276,838.55 (without tax & shipping) and $301,092.45 (with tax & shipping). (See also RT 382-690 [testimony about each invoice as it is admitted into evidence or rejected by the court].)

The figure of $338,313.30 is a mystery. So even if one indulges the legal fantasy that invoice value was the proper measure of damage, there was no substantial evidence that $338,313.30 *was* that value.[6]

C. NO SUBSTANTIAL EVIDENCE SUPPORTED THE COURT'S ASSESSMENT OF DAMAGES FOR THE PHOTOGRAPHS

(i) After the parties submitted, the trial court said that it had "no way" to value the photographs

With respect to the missing photographs, the trial court arrived at a damages amount — $400,000 — that came out of nowhere and was not supported by substantial evidence. (RT 637:20-22.)

After the two sides had rested, and during closing argument, the court acknowledged that it did not have a basis to value the photographs. It said: "I also have a concern with the value of the photographs.... [T]he value of the photographs is really an issue. You didn't bring one photograph in to show me the quality of the work or anything. I don't — I mean, the Court has no

[6] Counsel for Owen has a spreadsheet analyzing the invoices at pages 241-465 of the Appendix by year, amount, and various other criteria. If it would assist the Court, he could file it as a supplemental brief.

way to value this." (RT 2178:20-27.) But despite stating — correctly — that it had no way to value the photographs, the court proceeded to do precisely that.

(ii) The court awarded damages of $400,000 after asking Wiese to state a number after both sides had rested and the case was submitted

After closing argument, and in the process of rendering its decision, the court said the following:

THE COURT:	In terms of the photographs, I don't have any reason to disbelieve Ms. Wiese. I, however, have to have something to base it on. I understand that you had — there were at least eight celebrities that you indicated who had each paid — was it — how much was it that each one had paid, without me — making me go back through it?
MS. WIESE:	50,000.
THE COURT:	50,000. That was what I thought. And so in terms of putting a value on things, the only thing I could actually put — that there is evidence of that I could accept and itemize would be eight times 50,000. Beyond that, whoever else may have been photographed or whatever, the Court has no way of knowing and I can't just accept, oh, there was lots. (RT 2206:25-2207:11.)

In the above colloquy, which took place *after* the parties had rested and closing arguments had concluded, the court asked Wiese herself — not her lawyer — to state the value of the photographs of eight celebrities. Wiese answered by saying it was $50,000 apiece. The court accepted that, indicating that this was what it had thought.

But this interchange was rife with error. For a start, it was improper for the court to have extracted evidence from Wiese after the parties had rested — it actually amounted to reopening the case, but without giving Owen the opportunity to cross-examine.

Second, the court accepted the figure of "eight-times-$50,000" for celebrity photographs as though that were simply a reminder of what had earlier been testified. But it was most certainly *not* what had been testified earlier.

Wiese had testified about her late husband having been paid $50,000 by Robert Downey Jr. for the rights to photographs of him. (RT 375:17-376:3.) But there was *no* testimony about the amount paid by any other celebrities or about the value of their photographs. There was only testimony about the identity and number of other celebrities. The names that were mentioned in addition to Downey were Elton John, Melissa Etheridge, Richard Pryor, Mel Gibson, Pamela Anderson, Bob Dylan, and Kenny Wayne Sheppard. (RT 307:10-23.) There was testimony by Wiese about the

sales of rights to a rather larger number of unspecified people or companies — 55 or 60 — but these were not identified as celebrities. (RT 377:7-378:4.)

Numbers aside, there was, as noted above, *no* testimony or other evidence as to the *value* of the photos taken of *anyone* — celebrity or otherwise — other than Downey. Wiese's lawyer actually *tried* to elicit testimony from her about the value of other sales, but — after evidentiary objections — *failed* to do so. (RT 376:21-378:4.) He then moved on and never returned to the subject.

Indeed, there was no testimony or other evidence that Wiese's husband or Wiese herself had at any point owned the "rights" to photographs of all of these particular celebrities — only that he had taken pictures of them. The person who operates a camera shutter is not necessarily the owner of the rights to the image that is created. He could have been working for someone else. Testimony by Wiese as to what "would happen with these photos" was struck by the court. (RT 307:24-308:21.)

Furthermore, Wiese specifically testified about the sales being for "rights" — or, as she put it, "photo rights for everything." (RT 378:3-4.) But if someone *sells* a "right," as opposed to licensing the right, that means that *ownership* of that right *transfers* to the buyer. That interpretation is consistent with the plain English meaning of the word "sell." (*Oxford American Dictionary*, 2nd. Ed. ["sell" means to "give or hand over

(something) in exchange for money"].) Thus, if the rights to photographs had been sold, as Wiese alleged, Wiese's husband would not have retained them.

To put it another way, if the photographs had been sold for $50,000 per celebrity (not that there was any evidence of that), Wiese's husband had already been paid. Thus, Wiese could not have suffered damage from the photographs' loss. Wiese was, figuratively, trying to have her cake after her late husband had eaten it.

(iii) No substantial evidence supports the award of $400,000

The amount of an award of damages — where the contentions involve matters of fact — is reviewed for substantial evidence. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 65.) In applying the substantial evidence rule, this Court views the record in the light most favorable to the plaintiff and resolves all evidentiary conflicts and indulges all reasonable inferences in support of the judgment. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 612.) If the record contains substantial evidence in support of the judgment, it must affirm. (*Ibid*.)

Here, the question is not so much whether evidence of $400,000 counts as "substantial." Rather, there was a *complete absence of any evidence* that Wiese had suffered $400,000 in damages from anything that

Owen had or had not done with respect to the photographs.

Wiese's testimony that her husband had at some point in his career taken pictures of eight celebrities, that one of them (Downey) had paid $50,000 for the "rights," and that 55-60 other unspecified people or companies had purchased unspecified rights from her late husband for unspecified amounts of money does not provide *any* evidence of a loss of $400,000.

Even if those pieces of evidence were viewed as marginally supportive of her claim — and no such concession is made — they would not amount to "substantial" evidence. "Substantial" evidence is not synonymous with "any" evidence. (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512.) "[T]he appellate court does not merely rubber-stamp the trial court's decision. Our search for substantial evidence in support of the judgment does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal was not created... merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review." (*Ibid*., citing to and quoting from *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; internal quotation marks omitted; ellipses in original.) And while substantial evidence may consist of inferences, those that are the result of mere speculation or conjecture cannot

support a finding. (*Frei v. Davey*, 124 Cal.App.4th at 1512.)

Therefore, "the substantial evidence rule does not mandate total deference to the trial court." (California Practice Guide: Civil Appeals & Writs (Rutter) § 8:42.) "While the actual resolution of fact questions is within the sole province of the trial court, the question whether 'substantial evidence' supports the judgment is one of law within the province of the appellate court." (*Ibid*.)

Here, the figure of $400,000 was conjured up out of nowhere. As deferential as the "substantial evidence" standard of review may be, this is one instance where the record surely compels reversal.

The arguments above concerning the photographs were preserved for appeal in Owen's motion for a new trial. (App. 658:24-659:26.)

D. THE DAMAGES FOR THE CONSTRUCTION PROJECT WERE EXCESSIVE

(i) Wiese claimed damages for everything that she spent, not just the losses she claimed to have suffered on account of Owen

The argument now shifts to the damages awarded for the construction work. Referring to those damages, the court inquired of counsel during closing argument:

THE COURT:	I wrote down, and maybe I wrote it down wrong, I haven't looked at the transcript, but I wrote down that when Ken Bass came in that she paid him 40 to $50,000.
WIESE LAWYER:	Correct.
THE COURT:	I was just wondering where you got to $250,000? Was there testimony on this?
WIESE LAWYER:	196, approximately from Manny Ojeda and the 40 to $50,000 you just spoke of.
THE COURT:	Oh, I see. That's how you got there. Okay.
	(RT 2195:8-18.)

Based on this, the trial court awarded $246,000 in damages for the construction. (App. 637:16-18.)

The problem with this was that the court awarded Wiese *all* the money that she claimed to have spent on the construction project, not simply all that she had claimed to have incurred as a result of Owen's breach. Under her contract with Owen, *Wiese was already committed to paying $50,000 to get the work done*. (App. 233.) So if Owen's breach was the proximate cause of her having to pay more, the measure of damages would have been $246,000 minus $50,000, or $196,000. To put it another way, even if there were a breach of contract by Owen, or some liability in tort, there is no reason why Wiese should, in effect, have gotten a construction project for *free*.

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(ii) The construction damages were excessive whether reviewed for substantial evidence or de novo

In terms of the standard of review, one could look at this issue in two ways. One is that there was an incorrect application of the law in assessing damages. Civil Code section 3358 provides that "no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides." This outlaws a "windfall" damages award, such as occurred here. To the extent that the issue is viewed as the application of an incorrect legal standard, the issue is one of law. Issues of law are subject to de novo review. (*Monterroso v. Moran* (2006) 135 Cal.App.4th 732, 736.)

The other way to look at this issue is that there was no substantial evidence that Wiese suffered damages of $246,000, since her own testimony revealed that to be the total amount she claimed to have paid for the construction, *not* the damage she suffered through Owen's breach.

Whichever approach one takes to the standard of review, the result is the same — if there was liability at all relating to the construction project, it could not be for more than $196,000 and the judgment for the higher amount must, therefore, be reversed.

Owen argued in his new-trial motion that the damages had to be net of the contract price. (App. 657:6-28.) That issue was, therefore, preserved.

E. THE COURT ERRED IN AWARDING THE SAME $50,000 IN DAMAGES TWICE

Both sides agreed that Wiese had made a $50,000 payment to Owen, although they disagreed what it was for (Wiese saying that it was money that was to be invested offshore on her behalf, Owen saying that it was an advance against his fees). (RT 123:9-12, 343:10-344:16, 943:8-17; App. 234a [trial exhibit 4].) Owen testified that in addition to that $50,000, Wiese paid him a further $14,000 or $15,259, making the total he received $64,000 or $65,259. (RT 121:10-13, 123:9-12.) Wiese calculated that there was a further $15,259.88, which, added to the $50,000, produced a total of $65,259.88 — less than a dollar different from Owen's number. (RT 347:8:18.)

Regardless of the purpose of the $50,000, Owen will concede for the purposes of this appeal that there was substantial evidence, which, if believed, would support a damages award of $65,259.88 under Wiese's contract claim (assuming, arguendo, that one puts aside the issue of whether the whole trial should have been reopened). And the trial court did, indeed, make an award of precisely that amount as one component of its overall damages award, calling it the "cash money taken by Defendants." (App. 637:15-16.)

However, the court erred because, in addition to the $65,259.88, it

then awarded $50,000 on top for what it called "the alleged offshore investment." (App. 637:22-23.) But the error here was that this was the *same* $50,000 that made up the bulk of the $65,259.88 — *in other words, the $50,000 was double-counted*.

This is illustrated by Wiese's testimony when asked on direct examination about the amount of money that she had paid Owen in total:

WIESE LAWYER:	Other than the $50,000 that you testified to already with respect to the cash that you have given to Mr. Owen, what else have you given him as far as cash? How much more?
WIESE:	Cash or checks?
WIESE LAWYER:	Either way.
WIESE:	I gave him initially a check for $2,500, and then a second check for the amount of $12 — I think $12,759.88, and then the $50,000 check.
WIESE LAWYER:	So 65,259.88?
WIESE:	Yes, that's correct. (RT 347:8-18.)

In the above colloquy, it appears that the reference toward the end to "the $50,000 check" was to the cashier's check for that amount that Wiese contended had been for investment and that Owen contended had been for his services (i.e., the check that was admitted as Exhibit 4 and that is in the Appendix at page 234a). *There was no other check of $50,000 to which the phrase — "the $50,000 check" using the definite article — could have referred.*

So the figure of $65,259.88 *must* have referred to the *total* amount of money that Wiese claimed to have received, *not* to the total amount exclusive of the $50,000. And if that was the case, the amount awarded was excessive — the court misunderstood the evidence.

This interpretation is borne out by other parts of the record, where Wiese — and indeed the court — talked about "the $50,000," in the singular, not about about "the $50,000 payments" in the plural. (See, e.g., RT 962:25-28.)

F. IF THE COMPENSATORY DAMAGES ARE REDUCED, ANY PUNITIVES MUST BE REASSESED

If the amount of compensatory damages is reduced, the amount of punitive damages should be reduced, too (assuming, arguendo, that the tort claims survive). Punitive damages must be proportionate to compensatory damages. (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 212-213.) There is no reason why the trial court's assessment of what is an appropriate ratio should, effectively, be increased if it turns out that the compensatory damages were incorrectly assessed.

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CONCLUSION

For the reasons stated above, the Court is respectfully urged to reverse and remand.

June 20, 2009

Respectfully submitted,

THE LAW OFFICE OF JOHN DERRICK,
a professional corporation

by ________________________
John Derrick
Attorney for Appellants

CERTIFICATE OF WORD COUNT

I certify that the text of this brief, as counted by Microsoft Word, consists of 13,985 words (including footnotes but excluding the tables of contents and authorities, this certificate, and the attached proof of service).

June 20, 2009

THE LAW OFFICE OF JOHN DERRICK,
a professional corporation

by ___________________________
John Derrick
Attorney for Appellants

PROOF OF SERVICE

I am over 18 years of age and not a party to this action. I am a resident of the county where the mailing described herein took place. My business address is 21 E. Pedregosa Street, Santa Barbara, CA 93101.

On June 20, 2009, I sent from Santa Barbara, California, the following documents:

APPELLANTS' OPENING BRIEF

APPELLANTS' APPENDIX (VOLS. I, II, III)

I served the document by enclosing copies in envelopes and depositing the sealed envelopes with Fedex in one of its regularly maintained drop-boxes, prior to the last pick-up from that box on the day of deposit, using Fedex's Express Package Service with delivery charges fully prepaid (except that the copy for the California Supreme Court was served electronically pursuant to Rule of Court 8.212(c)(2)(A)). The envelopes were addressed and sent as follows:

SEE SERVICE LIST ATTACHED

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

June 20, 2009

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John Derrick

SERVICE LIST

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