

Case No. B210502

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR**

Marvin Hur and Connie Hur,
Plaintiffs and Respondents,

v.

Byoung Woo Lee,
Defendant and Appellant.

Los Angeles Superior Court, Case No. BC 352132 (Related Case No. BC 361921)
Honorable John P. Shook

APPELLANT LEE'S OPENING BRIEF

TERRAN T. STEINHART, ESQ. (SBN #036196)
4311 Wilshire Boulevard, Suite 415
Los Angeles, California 90010-3713
(323) 933-8263 Fax (323) 933-2391

John Y. Song, Esq. (SBN #176292)
LAW OFFICES OF JOHN Y. SONG,
A PROFESSIONAL CORPORATION
3600 Wilshire Boulevard, Suite 1212
Los Angeles, California 90010
(213) 252-0808 Fax (213) 252-5260

Attorneys for Defendant and Appellant
BYOUNG WOO LEE

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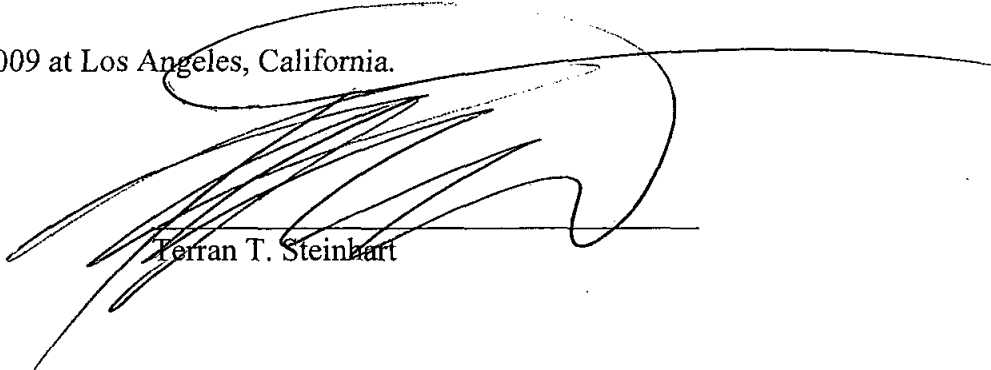
Attorneys for Defendant and Appellant
BYOUNG WOO LEE

CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

There are no interested entities or persons that must be listed in this certificate pursuant to CRC 8.208.

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

Executed on March 12, 2009 at Los Angeles, California.

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is highly cursive and loops around the line.

Terran T. Steinhart

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INTRODUCTION / SUMMARY OF ARGUMENT¹

Plaintiffs (the Hurs), purchased a restaurant from defendant Lee, represented by defendant Yoon, a real estate salesman employed by defendant Joy, a real estate brokerage firm. The Hurs obtained a judgment, jointly and severally, against all three defendants for compensatory damages in the amount of \$675,545.88, and punitive damages in the amount of \$100,000, against Lee for fraud, and against Yoon/Joy for fraud and breach of fiduciary duty. The fraudulent misrepresentation upon which the judgment was based was defendants' representation orally and pursuant to fabricated income statements that the restaurant was earning approximately \$20,000 per month in net income, whereas it was losing several thousand dollars per month.

The Hurs first learned that the representations regarding the net earnings of the restaurant were false a few weeks after the close of the purchase when the general manager of the restaurant advised them that the financial statements were fabricated and false, and that the restaurant had been suffering net losses for several years.

Several weeks before the close of the transaction, Lee arranged for Mr. Hur to personally meet with the aforesaid general manager, as well as other knowledgeable employees of the restaurant. During the meeting, which lasted a couple hours, Mr. Hur asked the general manager any questions he wanted about the restaurant operation, and the general manager cooperated by answering all of Mr. Hur's questions. Although the primary purpose of purchasing an income producing business such as a restaurant is to earn income by the operation of the business, inexplicably, Mr. Hur never inquired of the general manager about the net income of the

¹ Following is a summary of the argument relating to the merits of the fraud claim (Questions Presented 1 - 3). Because the argument regarding the award of attorney's fees (Question Presented 4) is a procedural matter which does not go to the merits of the fraud claim, that argument is not summarized in this section, but is set forth in its entirety under Argument IV, below.

restaurant, nor as to whether the allegedly fabricated income statements correctly reflected the restaurant's financial performance.

Under the above circumstance, the Hurs *failed to prove the essential fraud element of justifiable reliance*, because when a buyer makes an independent investigation which the seller does not hinder, the buyer is charged with knowledge of all facts he would have discovered had he pursued his inquiry with diligence and completeness, and therefore cannot claim that he did not learn the truth, nor that he was misled.

Furthermore, the Hurs *failed to prove the essential fraud element of damages resulting from justifiable reliance*. The Hurs closed the purchase on April 21, 2006. They operated the restaurant in substantially the same manner as it had been operated previously when it was allegedly suffering net losses for several years. The Hurs produced income statements of their operations for the balance of 2006 and the entirety of 2007 which reflected that their net earnings per month were substantially similar to the net earnings per month reflected in the alleged false financial statements, thereby demonstrating that they suffered no loss as result of any reliance on the alleged false financial statements.

Assuming that the Hurs produce sufficient evidence to establish all elements of their fraud claim, they were awarded excessive compensatory damages because the evidence was insufficient to support the award. The compensatory damages award of \$675,000 (rounded) consisted of out-of-pocket loss in the amount of \$505,000, and additional losses in the amount of \$170,000 (rounded).

The evidence supporting the out-of-pocket loss was that: 1) the Hurs paid \$705,000 to Lee for the restaurant; and 2) the opinion testimony of Mr Hur as the owner of the restaurant that the value of the restaurant at the time of purchase was only \$200,000. Mr. Hur's reasons in support of his valuation opinion were: 1) at the time of purchase, the restaurant had been

suffering net losses from operations for several years; and 2) the lease for the restaurant premises had a remaining term of only nine years and would not be renewed.

An opinion is only as valid as the reasons on which it is based. Mr. Hur's reasons were invalid because:

1. Since the restaurant under the Hurs' management had substantially similar monthly net earnings to those reflected on the alleged false financial statements, the premise that the restaurant had previously been suffering net losses is not persuasive.

2. Prior to the close of the purchase, the parties agreed to a \$145,000 reduction in the purchase price based upon the Hurs' discovery that the nine year remaining term on the lease would not be renewed. Since that factor had already resulted in a negotiated price reduction, it could not validly be used in Mr. Hur's \$200,000 valuation opinion.

Although both of Mr. Hur's reasons for his valuation opinion were unmeritorious, his opinion is subject to rejection if either of the reasons were invalid, because there is no evidence from which to determine what weight Mr. Hur gave to each reason in formulating his opinion.

Furthermore, Mr. Hur's valuation opinion lacks merit because it is negated by the uncontroverted evidence that several months before entering into the purchase agreement with the Hurs, Lee entered into an arm's length agreement to purchase the restaurant from a third party for \$550,000, and closed that transaction 10 days before closing the sale to the Hurs at \$705,000. The value of property is measured by the purchase price paid as between a willing seller and willing buyer. Thus, the restaurant should have been valued at \$550,000 at the time of the Hurs' purchase, thereby reducing the out-of-pocket loss element of damages to \$155,000 (\$705,000 minus \$550,000).

With respect to the \$170,000 portion of compensatory damages, neither the Statement of

Decision nor the record evidence contain any factual or legal basis for the award. Being unsupported by any such basis, that portion of the award should be eliminated.

If the compensatory damages are reduced, the case should be remanded to the trial court for a determination as to whether the amount of the punitive damages award should be proportionally reduced.

STATEMENT OF THE CASE

Appealability and Timeliness

This is an appeal by defendant Byong Woo Lee (“Lee”) from a final Judgment after a trial by the court sitting without a jury, awarding to plaintiffs Marvin Hur and Connie Hur (“the Hurs”): 1) compensatory damages in the amount of \$675,545.88, jointly and severally, against defendant Lee for fraud, and against defendants Ted Yoon (“Yoon”) and Joy Investment and Realty, Inc. (“Joy”) for fraud and breach of fiduciary duty; and 2) punitive damages in the amount of \$100,000 against all three defendants. The judgment further ordered that Lee take nothing on his cross-complaint against the Hurs. AA 199. Lee also appeals from the Order denying his motion for new trial (AA 352), and the Order denying his motion to set aside judgment and enter a different judgment (AA 349).

The Judgment is appealable pursuant to CCP § 904.1(a)(1). The Orders denying Lee’s post-trial motions are appealable pursuant to CCP § 904.1(a)(2). The appeal was timely filed. The Judgment was entered on June 27, 2008. AA 199. Notice of denial of Lee’s motion for new trial was served on August 14, 2008. AA 352. Notice of Appeal was filed on August 27, 2008 (AA 361), within the 30-day extension provided in CRC 8.108(b).

Standards of Review

Lee respectfully submits that the applicable standard of review with respect to each of the Questions Presented is as follows:

As to Question 1, whether there was sufficient evidence to support the Hurs' claim of fraud against Lee: Substantial evidence.

As to Question 2, whether the amount of compensatory damages awarded was excessive: Substantial evidence.

As to Question 3, whether the case should be remanded for a determination of whether the amount of punitive damages awarded was excessive in proportion to the amount of properly awardable compensatory damages: Independent.

As to Question 4, whether the award of attorney's fees as costs solely against Lee should have been apportioned between services relating to Lee and those relating to Yoon/Joy: Independent.

Procedural History

This case was commenced in May 2006, and went to trial in March 2008 upon the Hurs Second Amended Complaint (AA 1) and an answer thereto by defendants Lee (AA 18), and a joint answer thereto by defendants Yoon and Joy (AA 26). Lee filed a cross-complaint against the Hurs which is not a subject of this appeal.

The complaint alleged that Lee, in concert with real estate salesman Yoon (an employee of real estate broker Joy), defrauded the Hurs in their purchase of a restaurant from Lee, the primary misrepresentation being that the restaurant earned net income from operations in the amount of approximately \$20,000 per month, when in fact it had a net loss from operations in approximately that amount; and that defendants presented fabricated financial statements to the Hurs that falsely corroborated this misrepresentation.² The case was tried to the court sitting

² Various subsidiary misrepresentations were also alleged. However, the Hurs ultimately obtained judgment based solely upon the allegation with respect to the net income misrepresentation.

without a jury commencing in March 2008. AA 48. The court found in favor of the Hurs and against all three defendants, on June 27, 2008, filing a Statement of Decision (AA 175) and Judgment (AA 199) awarding to the Hurs: 1) compensatory damages in the amount of \$675,545.88, jointly and severally, against Lee for fraud, and against defendants Yoon and Joy for fraud and breach of fiduciary duty; and 2) punitive damages in the amount of \$100,000 against all three defendants. The judgment further ordered that Lee take nothing on his cross-complaint against the Hurs.

Lee filed a motion for new trial (AA 315), and a motion to set aside judgment and enter a different judgment (AA 307), both of which were denied. AA 349, 352.

The Hurs filed a memorandum of costs (AA 202) and concomitantly a motion for order awarding attorney's fees solely against Lee in the amount of \$211,130 pursuant to the contractual attorney's fees provision. AA 209. Lee filed opposition to the motion, contending that: 1) the amount of fees sought was excessive; and 2) the award of attorney's fees should properly be apportioned between Lee and Yoon/Joy, rather than awarded solely against Lee. AA 338, 343. The motion was granted, however the fees requested were reduced to \$206,025, and were awarded solely against Lee. (AA 358).³

Lee filed a Notice of Appeal, specifying as issues on appeal the issues addressed by this Brief. AA 361.

STATEMENT OF FACTS

For several years prior to October 2005, both the Hurs and Lee owned and operated restaurants; but Lee had never previously owned or operated a sushi restaurant (Statement of Decision ("SOD"), ¶ 3, AA 175, 178). During the transactions and occurrences which are the

³ Because the facts pertaining to the motion for award of attorney's fees do not pertain to the merits of the case, they are presented separately under Argument IV, below.

subject of this case, Yoon was a licensed real estate agent employed by defendant Joy, a real estate brokerage company. SOD ¶ 1, AA 175, 178.

For many years prior to October 2005, Asakuma USA, Inc. (“Asakuma”) owned and operated four sushi restaurants, consisting of a fine dining location on Wilshire Boulevard in Los Angeles (“Wilshire”) and three sushi delivery stores located respectively in Beverly Hills, Santa Monica, and Marina del Rey (“Delivery Stores”). SOD ¶ 4, AA 175, 178, 190, fn. 1. On October 27, 2005, Lee entered into a written agreement with Asakuma (“Asakuma/Lee Agreement”) wherein Asakuma agreed to sell and Lee agreed to buy the four sushi restaurants for a purchase price of \$850,000 (although the Asakuma/Lee Agreement reflected a purchase price of \$900,000). Exhibit 31; SOD ¶¶ 4-5, AA 175, 178.

Prior to January 19, 2006, Lee decided to attempt to “flip” the four restaurants, i.e., immediately resell them to one or more buyers after his purchase of the same from Asakuma, perhaps in simultaneous escrows. From that point in time, an agency relationship existed between Lee and Yoon (and Joy, as Yoon’s employer) for the performance of real estate brokerage services on behalf of Lee with respect to flipping the four restaurants. SOD ¶ 9, AA 175, 179.

Pursuant to the agency, on January 19, 2006, Yoon intentionally placed false advertising in the Korean Central Daily News on behalf of Lee, and for Yoon’s benefit as a commissioned sales representative, for Lee’s sale of the three Delivery Stores, reflecting false income figures for the Delivery Stores. Exhibit 200; SOD ¶¶ 6-8, AA 175, 178-179. The false advertisement induced the Hurs to contact and meet with Yoon. At the meeting, Yoon made the following oral representations: 1) he verified all of the information that had appeared in the advertisement; 2) he told the Hurs about Wilshire, and that it was producing net income of approximately \$20,000 per month, and that there were potential savings in its operation described by Mr. Kondo (the sole shareholder of Asakuma) that would result in additional income to a buyer; and 3) that Lee was

purchasing the restaurants for \$1.1 million, of which \$250,000 was to be paid outside of escrow. SOD ¶¶ 9-10, AA 175, 179.

Based upon the false advertising and the oral representations of the false net income numbers by Yoon during the meeting, the Hurs made an offer to Lee to purchase all four restaurants for \$1,450,000. This offer was accepted by Lee on January 27, 2006, which resulted in a written purchase agreement between Lee and the Hurs. Exhibit 201; SOD ¶ 11, AA 175, 179.

Approximately two weeks after January 27, 2006, Lee repeated to the Hurs the verification of the false net income figures for the Delivery Stores, and the representation that Wilshire was producing net income of approximately \$20,000 per month. SOD ¶ 10, AA 175, 179.

During escrow, the restaurant sale and purchase transaction morphed into a transfer of the stock of Soobi, Inc., through which corporation Lee was purchasing the restaurants from Asakuma. Yoon acted as a dual agent for Lee and the Hurs with respect to the stock transfer transaction. SOD ¶ 12, AA 175, 179.

The Lee-Hur Agreement (Exhibit 201) provided that the Hurs had the right to review books and records prior to being obligated to proceed with the purchase. SOD ¶ 20, AA 175, 182. About two weeks after formation of said purchase agreement, in about mid-February 2006, Yoon provided the Hurs with false financial statements which were prepared by Lee's accountant to look as if they were bona fide Asakuma financial statements for the fiscal years ending June 30, 2003, June 30, 2004, and June 30, 2005. Exhibits 1, 2 and 3, respectively. SOD ¶ 15, AA 175, 182. Lee's accountant testified at trial that he prepared the false financials at Lee's direction in approximately mid-February 2006, and that he never intended for them to be circulated to anyone else, especially not to a banking institution. Yoon told the Hurs that Exhibits 1 through 3

were the actual financial statements of Asakuma, and had been submitted to Hanmi Bank as part of Lee's purchase money loan application. SOD ¶ 17, AA 175, 182.

In about April 2006, the Hurs were provided with the true tax returns of Asakuma for tax years 2002 through 2004. Exhibits 12-13; SOD ¶ 18, AA 175, 182. The Hurs noticed a discrepancy between the Exhibit 12 tax return and the Exhibits 1 through 3 financial statements and asked Yoon for an explanation. Yoon misrepresented to the Hurs that the tax returns deliberately understated income, which he stated was a common practice in the restaurant industry; but that the Exhibits 1 through 3 financial statements reflected the true financial performance of the restaurants. SOD ¶ 19, AA 175, 182.

Approximately 10 days before the close of the sale of Wilshire as between Lee and the Hurs, Lee (through Soobi, Inc.) closed his purchase of Wilshire from Asakuma at a price of \$550,000. Exhibit 21, AA 430.

In reliance upon the false statements by Yoon and Lee concerning the aforesaid false financial statements, the profitability of the restaurants, and that the Asakuma tax returns did not truly reflect the financial performance of the restaurants, the Hurs completed the purchase of Wilshire on April 21, 2000. On May 8, 2006, the Hurs discovered the falsity of the financial statements with respect to their request to Mr. Watanabe aka Aki-san for verification of the false financial statements. SOD ¶ 21, AA 175, 183. Watanabe was the general manager of the restaurants for Asakuma, and remained on as the general manager of Wilshire for the Hurs for a period of time. RT 121:6-10. When asked by the Hurs to verify the Exhibits 1 through 3 financial statements, Watanabe advised them that the statements were false because the restaurants had not obtained net earnings since 2002 (RT 134:21-135:5, 35:1-26); and that the cost figures in the false financial statements were entirely unrealistic. RT 163:21-173:5.

In the Lee-Hur escrow, different portions of the total purchase price of \$1,450,000 were

allocated to each of the four restaurants, originally: Wilshire, \$1,000,000, and each of the Delivery Stores, \$150,000. Second Amended Complaint, ¶ 17, AA 1, 5. Shortly before the close of escrow, the Hurs learned that the lease for Wilshire, which had a remaining term of nine years, would not be renewed, whereupon the parties agreed to a reduction in the purchase price to \$1,305,000, allocated as between the four restaurants as follows: Wilshire, \$705,000, and each of the four Delivery Stores, \$200,000. Second Amended Complaint, ¶ 21, AA 1, 5.

When the Hurs learned that the Exhibits 1 through 3 financial statements contained false information as to the net earnings of all four restaurant locations, they refused to close the escrow with respect to purchase of the Delivery Stores, effectively rescinding the transaction as to the Delivery Stores.⁴

At all relevant times, Lee and Yoon knew that the restaurants were losing money, and that therefore, the advertising and representations by Yoon and Lee as to the net earnings of the restaurants were false and fraudulent. SOD pp. 11:12-14; 13:22-25, AA 175, 185, 187.

The Exhibits 1 through 3 false financial statements were given to the Hurs with the intent to fraudulently induce them to complete the transaction. Had the Hurs known the falsity of the financial statements, they would not have purchased Wilshire, but could have harmlessly terminated the transaction, and received the return of their earnest money deposit. SOD ¶ 20, AA 175, 182.

The Statement of Decision recites that the only credible evidence concerning the restaurant's financial performance is contained in Exhibit 11, 23-1 through 23-6, recognized by all to be the original restaurant books of Asakuma; and that these financial statements were

⁴ As a result of the Hurs effective rescission of their purchase of the Delivery Stores, Lee did not close his purchase of the Delivery Stores from Asakuma, which was a subject of Lee's cross-complaint against the Hurs. The cross-complaint raises no issue on appeal.

supported by the testimony of Aki-san against his self interest concerning the operation of the restaurant during his tenure.⁵ Aki-san served as the president of Asakuma from its inception, and operated the restaurants on behalf of its sole shareholder, Kondo, for approximately 20 years before the Asakuma-Lee Purchase Agreement was executed. SOD pp: 15:21-16:2, including fn. 1, AA 175, 189-190. The Asakuma financial statements for Wilshire contained in Exhibit 11 reflected the following information, in summary:

⁵ The finding that the Exhibit 11 Asakuma financial statements are accurate is subject to legitimate debate because they do not line up with the income and expense scenario actually experienced by the Hurs in their operation of Wilshire in 2006 and 2007, after they acquired ownership on April 21, 2006. See Exhibit 19, and the summary of the Hurs 2006 and 2007 income statements, discussed below. However, rather than launch into a head-on substantial evidence argument that the allegedly false Exhibits 1, 2 and 3 financial statements are not false, and the Exhibit 11 Asakuma financial statements are false, for the purposes of this appeal, the following explanation should suffice:

Lee testified that he was advised by representatives of Asakuma that the restaurants were garnering substantial net operating income, but that Asakuma's financial statements and tax returns reflected net operating losses in order to avoid income taxes; and that net operating loss figures were obtained by improperly including substantial non-operating expenses in the operating expenses of the restaurants, including airplane fares, condominium payments, etc. In an attempt to ascertain the actual net operating income of the restaurants, Lee took the income statements of Asakuma and other documentation reflecting the non-operating expenses included therein, and asked his accountant to prepare the Exhibits 1, 2 and 3 financial statements by removing the non-operating expenses from the Asakuma statements. RT 742:22-744:20.

A comparison between the Exhibit 11 Asakuma statements, the Exhibits 1, 2 and 3 income statements, and the Hurs' Exhibit 19 income statements for 2006 and 2007, as properly adjusted (see below), reflects that the Asakuma statements show operating expenses that range between 65 to 69% of Sales, whereas the Lee and Hur statements show operating expenses at 60% of Sales.

It is also interesting to note that the Asakuma income statements reflect the cost of goods sold at 35 to 38% of Sales whereas the Lee and Hur statements reflect the cost of goods sold at 30 to 31%.

If the cost of goods sold and operating expenses reflected in the Asakuma statements were in line with the actual operating experience of the Hurs, the Asakuma statements would have reflected net operating income of approximately 10% of Sales, which would have been substantially similar to what is reflected on Lee's allegedly false income statements, as well as the Hurs adjusted income statements.

Fiscal year ending June 30, 2003		Percentages⁶
Revenues	2,210,412	100%
Cost of Sales	763,771	34.6%
Selling Expenses	1,164,798	52.7%
Gen'l & Adm. Expenses	360,388	16.3% (total expenses = 69%)
Net Operating Income	(78,545)	(3.6%)

Fiscal year ending June 30, 2004		
Revenues	2,167,430	100%
Cost of Sales	783,952	36.2%
Selling Expenses	1,097,111	50.6%
Gen'l & Adm. Expenses	352,399	16.3% (total expenses = 66.9%)
Net Operating Income	(66,033)	(3.10%)

Fiscal year ending June 30, 2005		
Revenues	2,056,449	100%
Cost of Sales	790,229	38.4%
Selling Expenses	989,578	48.1%
Gen'l & Adm. Expenses	356,513	17.3% (total expenses = 65.4%)
Net Operating Income	(79,872)	(3.80%)

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⁶ were not contained in Asakuma's original financial statements, but have been added here for purposes of analysis.

Regarding the aforesaid potential cost savings described by Kondo, Watanabe testified that they were merely suggestions for changes, rather than accomplished fact as reflected in Lee's false financial statements; mentioning further that Lee had no experience operating a Japanese sushi restaurant, and Lee's spontaneous thoughts on cost-cutting were not grounded in any realistic experience to make them credible. SOD p. 17:3-10, AA 175, 191.

For the purposes of financial analysis, the relevant information from Exhibits 1, 2 and 3 is summarized as follows:⁷

Exhibit 1 (Fiscal year ending June 30, 2003)

Sales or Income	2,210,411	100%
Cost of Sales	660,717	29.9%
Operating Expenses	1,324,665	59.9%
Net Operating Income	225,029	10.2%

Exhibit 2 (Fiscal year ending June 30, 2004)

Sales or Income	2,167,430	100%
Cost of Sales	660,802	30.5%
Operating Expenses	1,290,208	59.5%
Net Operating Income	216,420	10.0%

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⁷ Exhibits 1, 2 and 3 include for each fiscal year ending 2003, 2004 and 2005, financial statements for each of the four restaurants. However, because the Hurs did not purchase the three Delivery Stores, only the financial statements with respect to Wilshire are relevant to their claim of fraud.

Exhibit 3 (Fiscal year ending June 30, 2005)

Sales or Income	2,056,450	100%
Cost of Sales	606,416	29.5%
Operating Expenses	1,236,617	60.1%
Net Operating Income	213,417	10.4%

The final set of relevant income statements are contained in Exhibit 19, prepared by the Hurs to reflect their operation of Wilshire after they acquired ownership on April 21, 2006, consisting of the statement for operations during the last 8.33 months of 2006 (19-1 through 19-2), and the statement for the full calendar year of 2007 (19-3 through 19-4). As demonstrated by the record, each of these statements is incorrect because each understates Sales or Income and overstates Operating Expenses. To make them correctly reflect the Hurs' 2006 and 2007 operations of the restaurant, the statements must be adjusted. The adjustments made are shown in the "Adjustments" column, and the adjusted totals are shown in the "Adj. Totals" column. The 2007 income statement requires two levels of adjustments: 1) one equivalent to the adjustments to the 2006 income statement, relating to inserting items of income and expenses that were incorrectly stated; and 2) the other relating to the fact that in 2007, the operating expenses of the restaurant were significantly increased from 60% to 72% of Income, because of an increase in the minimum wage, landlord charges, etc.

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April 21 - December 31, 2006.			Adjustment	Adj.Totals	
Sales or Income	1,514,128	100%	+37,000 ⁸	1,551,128	100%
Cost of Sales	482,211	31.8%		482,211	31%
Operating Expenses	964,367	63.7%	-35,000 ⁹	929,367	60%
Net Operating Income	67,550	4.5%		139,550	9%

January - December of 2007

(Level 1 Adjustments)			Adjustment	Adj.Totals	
Sales or Income	2,102,176	100%	+52,000 ¹⁰	2,154,176	100%
Cost of Sales	657,837	31.3%		657,837	30.5%
Operating Expenses	1,518,686	72.2%	-65,000 ¹¹	1,453,686	67.4%
Net Operating Income	(74,347)	(3.5%)		42,653	2.10%

⁸ The sales on the Hur's 2006 income statement improperly failed to include income from Saturday luncheons which averaged \$1,000 per week. RT 1011:5-7, 1012:15-16. In 2006, from April 21 through December 31, there were 37 Saturdays, which equates to \$37,000 in unreported income.

⁹ The Hur's 2006 income statement improperly included two items that are not ordinary operating expenses: 1) officers payroll of \$30,000 (which Ms. Hur attributed to herself); and 2) litigation attorney's fees of \$5,000. RT 957:28-958:5, 962:27-963:6. The Exhibits 1, 2 and 3 income statements did not contain an item for officers payroll, since the premise of those statements was that the restaurant would be owner-operated without attribution of salaries to the owners.

¹⁰ The sales on the Hur's 2007 income statement improperly failed to include income from Saturday luncheons which averaged \$1,000 per week. RT 1011:5-7, 1012:15-16. In 2007, there were 52 Saturdays, which equates to \$52,000 in unreported income.

¹¹ The Hur's 2007 income statement improperly included two items that are not ordinary operating expenses: 1) officers payroll of \$37,000 (which Ms. Hur attributed to herself); and 2) litigation attorney's fees of \$28,000. RT 957:28-958:5, 916:27-917:4. The Exhibits 1, 2 and 3 income statements did not contain an item for officers payroll, since the premise of those statements was that the restaurant would be owner-operated without attribution of salaries to the owners.

January - December of 2007

(Level 2 Adjustments)			Adjustment	Adj.Totals	
Sales or Income	2,102,176	100%	+52,000 ¹²	2,154,176	100%
Cost of Sales	657,837	31.3%		657,837	30.5%
Operating Expenses	1,518,686	72.2%	-861,670 ¹³	1,292,506	60%
Net Operating Income	(74,347)	(3.5%)		203,833	9.5%

The Statement of Decision states:

During the pendency of the Lee - Hur purchase escrow, Yoon told the Hurs, and Lee later confirmed, that because the restaurants were being flipped at an astonishingly low price, the Hurs could not approach Kondo, the sole shareholder of Asakuma, nor Watanabe/Aki-san, the general manager of the restaurants, because it would result in derailment of the Asakuma/Lee Purchase Agreement due to Kondo's learning that he had sold the restaurants at a bargain price; and that the Hurs could not speak with the restaurant employees, nor the landlord for the restaurant site for the same reason. The true purpose of this concealment was to prevent the Hurs from learning of the true financial operation of the restaurants from Watanabe/Aki-san, or Andrew-san, another knowledgeable employee. SOD ¶ 13, AA 175, 180.

The findings in the Statement of Decision set forth in the preceding paragraph were

¹² Same as Level 1 adjustment to the 2007 income statement.

¹³ Because of a significant rise in various categories of expenses in 2007, the operating expenses for 2007 were 72% of the Income or Sales, whereas in 2006, they were only 60%. This adjustment is to bring the 2007 expenses into the same ratio as the 2006 expenses in order to achieve a fair comparison, because the significant rise in 2007 operating expenses cannot be attributed to the alleged misrepresentation by Lee.

directly controverted by the testimony of Messrs. Hur and Watanabe at trial. Watanabe testified that prior to the close of the Lee-Hur escrow on April 21, 2006, after the Hurs had received the false financial statements (RT 398:11-18), under the guise that Mr. Hur was a co-partner with Lee, Mr. Hur was introduced to the employees of Wilshire and had a two hour meeting with Watanabe/Aki-san. During the meeting, Mr. Hur asked Watanabe about the restaurant, the restaurant lease, and many other topics; but he does not recall any discussion about the income or expenses of Wilshire. RT 518:11-521:27. Hur testified that Watanabe was cooperative with Mr. Hur and shared with him all pertinent information about which Mr. Hur inquired. RT 663:24-664:21.

The compensatory damages award of \$675,000 (rounded) consisted of out-of-pocket loss in the amount of \$505,000, and additional losses in the amount of \$170,000.

The evidence supporting the out-of-pocket loss was that: 1) the Hurs paid \$705,000 to Lee for the restaurant; and 2) per the opinion testimony of Mr Hur as the owner of the restaurant, the value of the restaurant at the time of purchase was only \$200,000. Mr. Hur's reasons in support of his valuation opinion were that: 1) at the time of purchase, the restaurant had been continuously suffering net losses from operations; and 2) the lease for the restaurant premises had a remaining term of nine years which would not be renewed. RT 350:26-353:21.

There was a conflict in the testimony as to the value of the restaurant at the close of escrow. Mr. Hur's lay opinion was refuted by expert testimony that opined that a restaurant is customarily valued at 7 times its monthly gross income, not just upon its net operating income; the SBA requires two methods of valuation, which in this case yielded a value of \$1,678,430 for the entire transaction. RT 83:6-84:6. Mr. Hur himself admitted that he had recently sold one of his restaurants at a price based upon on the 7 times gross monthly income premise. RT 930:19-931:12.

With respect to the \$170,000 portion of compensatory damages, neither the Statement of Decision nor the record evidence contain any factual or legal basis for the award.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support the Hurs' claim of fraud against Lee as to the following essential elements: a) justifiable reliance; and/or b) damage resulting from justifiable reliance.

2. Assuming that there was sufficient evidence to support the Hurs' claim of fraud against Lee, whether the amount of compensatory damages awarded was excessive.

3. If the amount of compensatory damages was excessive, whether the case should be remanded to the trial court for a determination of whether the amount of punitive damages awarded was excessive in proportion to the amount of properly awardable compensatory damages.

4. Whether the award of attorney's fees as costs solely against Lee should have been apportioned between legal services relating to Lee and those relating to Yoon/Joy.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE HURS' CLAIM OF FRAUD AGAINST LEE AS TO THE FOLLOWING ESSENTIAL ELEMENTS: (A) JUSTIFIABLE RELIANCE; AND/OR (B) DAMAGE RESULTING FROM JUSTIFIABLE RELIANCE.

A. Introduction.

The Statement of Decision and Judgment adjudge that Lee is liable for fraudulent misrepresentation, the elements of which are: (a) false representation of fact; (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. Civil Code § 1709; *Seeger v. Odell* (1940) 18 C.2d 409, 414.

Lee respectfully submits that the record does not contain sufficient evidence of the following two essential elements: 1) justifiable reliance; and/or 2) damages resulting from justifiable reliance.

Lee was tempted also to argue on appeal that there was insufficient evidence to support the essential elements of: 1) false representation of fact; and 2) knowledge of falsity. As to insufficient evidence of false representation of fact, the court's attention is respectfully invited to the analysis contained in footnote 5, on page 11, above, in which a cogent argument is presented to the effect that with respect to the actual financial performance of Wilshire, the Asakuma income statements contained in Exhibit 11 are false, whereas Lee's allegedly false income statements contained in Exhibits 1, 2, and 3 are true.

As to insufficient evidence of knowledge of falsity, the record reflects that in October 2005, several months before Lee entered into the agreement to sell the four restaurants to the Hurs, he entered into an arm's length agreement to purchase the four restaurants from Asakuma; and 10 days before the close of the sale of Wilshire to the Hurs for \$705,000, Lee closed his purchase of Wilshire from Asakuma for \$550,000.¹⁴ Mr. Hur rendered the opinion that at the time of his purchase of Wilshire, it was worth only \$200,000. If Lee had knowledge that his representations as to the net income of Wilshire were false, by inference, he would have had knowledge that Wilshire was worth only \$200,000. However, his arm's length agreement to purchase Wilshire for \$550,000 several months before he agreed to flip it to the Hurs for

¹⁴ Incidentally, the Hurs again no traction by the fact that Lee was flipping the restaurant to them for a profit, because they were well-aware at all times that he was doing so. Before entering into the agreement to purchase the restaurant from Lee, the Hurs were advised that Lee was purchasing all four restaurants for \$1,100,000, and knowing this, the Hurs agreed to purchase the restaurants from Lee for \$1,450,000, a 32% markup. Ultimately, the only restaurant purchased and sold was Wilshire, which Lee purchased for \$550,000 and resold to the Hurs for \$705,000, a 28% markup.

\$705,000, controverts the contention that he knew his representations as to net income were false.

Notwithstanding the arguable persuasiveness of these arguments, Lee has decided not to stand on them in order to avoid a head-on wrestling match with regard to the application of the substantial evidence rule as to these points, agreeing with Shakespeare that discretion is the better part of valor.

Respectfully, grappling with the substantial evidence rule in regard to the element of justifiable reliance is relatively simple in this case, because pursuant to applicable law, the undisputed evidence clearly demonstrates that justifiable reliance was not established. Grappling with the substantial evidence rule with regard to the element of damages resulting from justifiable reliance is somewhat more involved. However, if one reviews the subject income statements with reasonable discernment, they clearly demonstrate that the Hurs suffered no resulting damage.

B. Insufficient Evidence of Justifiable Reliance.

To establish fraud, it must be shown that the plaintiff actually relied on the misrepresentation. *Schroeder v. Auto Driveaway Co.* (1974) 11 C.3d 908, 917. However, a plaintiff who has access to the necessary information and actually makes an independent investigation that the defendant does not hinder, will be charged with knowledge of the facts reasonable diligence would have disclosed and cannot claim reliance on the misrepresentations. *Hackleman v. Lyman* (1920) 50 C.A. 323, 326; *Carpenter v. Hamilton* (1936) 18 C.A.2d 69; *Ostayan v. Serrano Reconveyance Co.* (2000) 77 C.A.4th 1411, 1418; 5 Witkin, Summary 10th (2008) Torts, § 809.

“If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining

information, and actually learns of the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him sufficient opportunity of examining into the real facts, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled. . . .’

“‘If a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or his advisors he cannot be heard to say he was deceived by the vendor's misrepresentations.’” *Hackleman v. Lyman* (1920) 50 C.A. 323, 326-328.

In an apparent attempt to evade the devastating effect of the above rule on plaintiff's proof of justifiable reliance, the Statement of Decision recites:

During the pendency of the Lee - Hur purchase escrow, Yoon told the Hurs, and Lee later confirmed, that because the restaurants were being flipped at an astonishingly low price, the Hurs could not approach Kondo, the sole shareholder of Asakuma, nor Watanabe/Aki-san, the general manager of the restaurants, because it would result in derailment of the Asakuma/Lee Purchase Agreement due to Kondo's learning that he had sold the restaurants at a bargain price; and that the Hurs could not speak with the restaurant employees, nor the landlord for the restaurant site for the same reason. The true purpose of this concealment was to prevent the Hurs from learning of the true financial operation of the restaurants from Watanabe/Aki-san, or Andrew-san, another

knowledgeable employee. SOD ¶ 13, AA 175, 180.

However, the above Statement of Decision findings were directly controverted by the testimony of Messrs. Hur and Watanabe. Prior to the close of the Lee-Hur escrow on April 21, 2006, after the Hurs had received the false financial statements, under the guise that Mr. Hur was a co-partner with Lee, Mr. Hur was introduced to the employees of Wilshire and had a two hour meeting with Watanabe/Aki-san, during which Mr. Hur asked about the restaurant, the restaurant lease, and many other topics. Watanabe was cooperative with Mr. Hur and shared with him all pertinent information about which Mr. Hur inquired; but they had no discussion about the income and expenses of Wilshire.

The primary purpose of purchasing an income producing business such as a restaurant is to earn income by the operation of the business. Therefore, it is difficult to believe that Mr. Hur did not ask Watanabe about the net operating income of the restaurants, nor whether Lee's alleged false income statements were correct. One could cynically speculate that Mr. Hur indeed made such inquiry and was told by Watanabe what Lee had previously been told by the Asakuma personnel: that Wilshire had net operating income in the neighborhood of what was reflected on those income statements, but that for tax reasons, Asakuma reflected a net operating loss on its income statements and tax returns. Mr. Hur and Watanabe then conspired to tell a different story in their trial testimony.

However, the law does not require such cynical speculation. Rather, Lee is entitled to accept the testimony of Mr. Hur and Watanabe that Mr. Hur did not make the aforesaid inquiry and thus Watanabe did not tell Hur what Watanabe testified at trial: that Wilshire had experienced net operating losses for the previous several years. However, since elementary prudence required Mr. Hur to make such inquiry, he is charged with knowledge of such net operating losses, because reasonable diligence would have disclosed them; and thus the Hurs

cannot claim justifiable reliance on the misrepresentations.

C. Insufficient Evidence of Damage Resulting from Justifiable Reliance.

The final element in actionable fraud is damage resulting from reliance on the misrepresentation. To recover for fraud, the plaintiff must prove detriment proximately caused by the defendant's tortious conduct. Deception without resulting loss is not actionable fraud. Whatever form it takes, the injury or damage must not only be distinctly alleged, but its causal connection with the reliance on the representations must be shown. *OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 C.A.4th 835, 870.

Lee's Exhibits 1, 2 and 3 income statements showed declining annual net income from operation of Wilshire for the fiscal years ending June 30, 2003, 2004 and 2005, namely: \$225,000, \$216,000 and \$213,000, respectively. Reflected on a monthly basis, they showed declining monthly income of \$18,750, \$18,000, and \$17,750, respectively. The Hurs' adjusted 2006 income statement reflected monthly income of \$16,752 for the Hurs operation of the restaurant from April 21 through the end of 2006 (i.e., 8.33 months); and \$16,986 for the 12 months in which they operated the restaurant in 2007.

The net income of fiscal 2004 was 96% of the net income of fiscal 2003. The net income of fiscal 2005 was 98.6% of the net income of 2004. The net income for 2006 under that the management of the Hurs was 94% of the net income reflected on Lee's fiscal 2005 income statement. The net income for 2007 under the management of the Hurs was 96% of the net income reflected on Lee's fiscal 2005 income statement.

The percentages of the different primary elements of Lee's three income statements for 2003, 2004 and 2005, and the Hurs adjusted income statements for 2006 and 2007, are substantially similar: cost of goods sold at approximately 30%, operating expenses at approximately 60%, and net profits at approximately 10%.

Lee's income statements reflected a 4% drop in net income between 2003 and 2004. A comparison between Lee's 2005 statement and the Hurs' 2006 income statement shows a drop in net income of 6%. Lee respectfully submits that the net income earned from April through December 2006 at 94% of the net income earned from July 2004 through June 2005 reflects substantially similar net incomes for those periods. An electronic search of statutory and case law disclosed no statute or case in which the concept of "substantial similarity" was expressed by a percentage. However, there are two Revenue & Taxation Code sections that express the concept of "substantially all" by a percentage:

Revenue & Taxation Code § 107 – 85%

Revenue & Taxation Code § 6010.30 – 80%

By this reckoning, 94% would be substantially all of 100%.¹⁵

The above comparison of the net operating income results as between those reflected on Lee's allegedly false income statements and the Hurs' properly adjusted income statements demonstrates that the Hurs substantially got what they paid for in terms of a business garnering net profits from operations at a stated amount per month. Since the Hurs substantially got what

¹⁵ Watanabe was a witness called by the Hurs. RT 1:13. Contrary to the testimony of Mrs. Hur that the average weekly income from the Saturday luncheons was \$1,000, Watanabe testified that the annual income from the Saturday luncheons was between \$70,000 and \$80,000, which would equate to average weekly income of approximately \$1,400. If the \$1,400 figure is used rather than the \$1,000 figure: 1) The Income or Sales on the Hurs' 2006 income statement would be increased by \$14,800 (37 x \$400), and the net income on that statement would concomitantly be increased to \$151,350, or \$18,529 per month; and 2) the Income or Sales on the 2007 income statement would be increased by \$20,800 (52 x \$400), and the net income concomitantly increased to \$224,633 (pursuant to the level 2 adjustments), or monthly income of \$18,719. By this reckoning, the adjusted income statements of the Hurs for both 2006 and 2007 would show monthly income substantially in excess of the income shown on both of the Exhibits 2 and 3 income statements, and 99% of the income shown on the Exhibit 1 income statement. Because Watanabe was plaintiff's witness, Lee could have used the weekly luncheon income testified to by Watanabe. However, for purpose of conservativeness, the adjusted income statements were based upon the lower weekly average contained in Mrs. Hur's testimony.

they paid for, they failed to prove damage resulting from justifiable reliance.

II. ASSUMING THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CLAIM OF FRAUD AGAINST LEE, THE AMOUNT OF COMPENSATORY DAMAGES AWARDED WAS EXCESSIVE.

Assuming that the Hurs produced sufficient evidence to establish all elements of their fraud claim, they were awarded excessive compensatory damages because the evidence was insufficient to support the award. The compensatory damages award of \$675,000 (rounded) consisted of out-of-pocket loss in the amount of \$505,000, and additional loss in the amount of \$170,000 (rounded).

There was a conflict in the testimony as to the value of the restaurant at the close of escrow. Mr. Hur opined that the restaurant was worth \$200,000 at close of escrow. His lay opinion was refuted by expert testimony which opined that a restaurant is customarily valued at 7 times its monthly gross income, not merely upon its net operating income. Mr. Hur himself admitted that he had recently sold one of his restaurants at a price based upon the 7 times gross monthly income premise. Therefore, his own conduct gives credence to the expert valuation opinion.

According to the Hur's 2006 and 2007 adjusted income statements, the average monthly gross income of Wilshire under their management was \$178,475. Based upon the opinion of the experts, using that average monthly gross income figure, the value of the restaurant at the close of escrow would be \$1,249,322 (i.e., 7 times \$178,475). This amount is far in excess of the \$705,000 paid by the Hurs.

With respect to expert testimony, the trier of fact may reject the opinion of an expert even though it is uncontradicted. See, e.g., *Barker v. Gould* (1898) 122 C. 240, 243. This does not mean, however, that the uncontradicted and unimpeached opinion testimony of an expert may be

arbitrarily disregarded; the rule in this respect is the same as that which applies to uncontradicted testimony of an ordinary witness. *Wirz v. Wirz* (1950) 96 C.A.2d 171, 176. Unless a statute requires additional evidence, the direct evidence of one witness is entitled to full credit and is sufficient to prove any fact. Evidence Code § 411. In other words, the uncontradicted testimony of a witness normally cannot be disregarded. Unless impeached or contradicted by other testimony or by an inference deducible from the facts proved, or unless it is inherently improbable, the trier of fact must accept it as true. See, e.g., *Sweeney v. Metropolitan Life Ins. Co.* (1937) 30 C.A. Supp 767, 771.

Evidence of the value of another's property may be received only from one familiar with property values in the area, i.e., an expert. However, the owner of real or personal property may testify to its value without showing any special qualifications. *Willard v. Valley Gas & Fuel Co.* (1915) 171 C. 9, 14. "It is also well settled that, having given an opinion as to value, the owner should be permitted to give his reasons for such opinion since it is a general rule that an opinion is worth no more than the reasons on which it is based." *City of Gilroy v. Filice* (1963) 221 C.A.2d 259, 268. In this connection, it has been held that a summary judgment cannot be granted upon an expert opinion that is not based on a reasoned explanation. *Powell v. Kleinman* (2007) 151 C.A.4th 112, 123. In reversing a summary judgment that was based on an expert opinion, *Powell* stated at 123:

"Moreover, an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based."

Both the opinion of a layperson as to the value of his property and the opinion of an expert on the same issue are worth no more than the reasons and facts upon which they are based. Thus, the opinion of a layperson as to the value of his property that is rendered without a

reasoned explanation as to why the underlying facts lead to the ultimate conclusion should be deemed to have no evidentiary value.

The evidence supporting the out-of-pocket loss was that: 1) the Hurs paid \$705,000 to Lee for the restaurant; and 2) the opinion testimony of Mr Hur as the owner of the restaurant that the value of the restaurant at the time of purchase was only \$200,000. Mr. Hur's reasons in support of his valuation opinion were: 1) at the time of purchase, the restaurant had been suffering net losses from operations for several years; and 2) the lease for the restaurant premises had a remaining term of only nine years which would not be renewed.

Mr. Hur's reasons lacked merit because:

1. Since the restaurant under the Hurs' management had substantially similar monthly net earnings to those reflected on the allegedly false income statements, the premise that the restaurant had previously been suffering net losses appears to be without merit.

2. Prior to the close of the purchase, the parties agreed to a \$145,000 reduction in the purchase price based upon the Hurs' discovery that the nine year remaining term on the lease for the Wilshire premises would not be renewed. Since that factor had already resulted in a negotiated price reduction, it could not validly be used in Mr. Hur's \$200,000 valuation opinion.

Although both of Mr. Hur's reasons for his valuation opinion were unmeritorious, his opinion is subject to rejection if either of the reasons were invalid, because there is no evidence from which to determine what weight Mr. Hur gave to each reason in formulating his opinion.

Also, Hur's lay valuation opinion was contradicted by the aforesaid expert testimony to which Mr. Hur gave credence by admitting that he had sold one of his other restaurants based on the 7 to 9 times monthly gross income method of valuation.

Furthermore, Mr. Hur's valuation opinion lacks merit because it is negated by the uncontroverted evidence that several months before entering into the purchase agreement with

relation rule is typically applied in reference to the amount of compensatory damages because that is seen as a convenient measure of plaintiff's injury or harm. *Gagnon v. Continental Cas. Co.* (1989) 211 C.A.3d 1589, 1602. However, no fixed ratio between the amount of compensatory and punitive damages is prescribed. *State Farm Mut. Auto. Ins. v. Campbell* (2003) 538 U.S. 408, 425. Thus, an order reducing the amount of compensatory damages awarded does not necessarily compel a corresponding reduction of punitive damages awarded, because the punitive-compensatory damages ratio is not the sole criterion by which punitive damages are assessed, and there is no requirement that the original ratio be maintained, because it may be determined that other factors justify that the punitive damages award remain unchanged. *McGee v. Tucoemas Fed'l Credit Union* (2007) 153 C.A.4th 1351, 1362.

Given the interplay of the above rules, if this court rules that the compensatory damages award was excessive and must be reduced, the case should be remanded to the trial court for a determination of whether the punitive damage award should be proportionally reduced.

IV. THE AWARD OF ATTORNEY'S FEES AS COSTS SOLELY AGAINST LEE SHOULD HAVE BEEN APPORTIONED BETWEEN THE LEGAL SERVICES RELATING TO LEE AND THOSE RELATING TO YOON/JOY.

The Hurs filed a post-trial motion for an order determining the amount of attorney's fees awardable to them under the attorneys fees provision in the subject purchase contract, seeking an award of \$211,130. The motion was granted in substantial part, pursuant to an order that reduced the amount of fees awarded to \$206,025.

In his opposition to the motion, Lee submitted an attorney declaration that recited the following facts (AA 343):

The action was filed on May 9, 2006, and a multi-day bench trial concluded in June 2008. Lee's attorney represented him throughout the action, whereas the Hurs' trial

attorney, Fu, substituted in on February 26, 2007. Defendants Yoon and Joy were brought in by amended complaint at that juncture.

The Hurs sought fees for the services of Fu's firm based on 1036.5 billable hours. The billable hours of Lee's attorney, who had represented him from the inception of the case, were 593; and the billable hours of the attorney for Yoon/Joy from June 2007, were 217.

The essential claim against Lee was fraud, whereas the Hurs proceeded against Yoon/Joy for negligence, breach of fiduciary duty, including negligent management by the principal, and ultimately fraud. Therefore, the preparation and prosecution against Yoon/Joy required different strategy and effort than as against Lee. Yoon/Joy independently engaged in their own defensive activities, such as bringing a motion for summary judgment, and engaging in depositions and other discovery activities unique to those parties. There were also attempts by the Hurs to amend their complaint against Yoon/Joy that did not relate Lee. Finally, because of addition of defendants Yoon/Joy, the trial easily took about one third more time than it would have taken if Lee were the only defendant.

The Hurs did not have a written contract between themselves and Yoon/Joy, and thus were not entitled to an award contractual attorney's fees against Yoon/Joy, but only against Lee. Nonetheless, the Hurs prosecuted their claims against Yoon/Joy, succeeding in obtaining a joint and several judgment against Lee and Yoon/Joy, but only with the expenditure of substantially more time and effort than would have been expended if the Hurs had proceeded solely against Lee. Fundamental fairness dictates that Lee should not have to pay the additional fees incurred by the choice of the Hurs in seeking a joint and several judgment against several parties, ostensibly to make the Hurs' efforts at collecting the judgment easier.

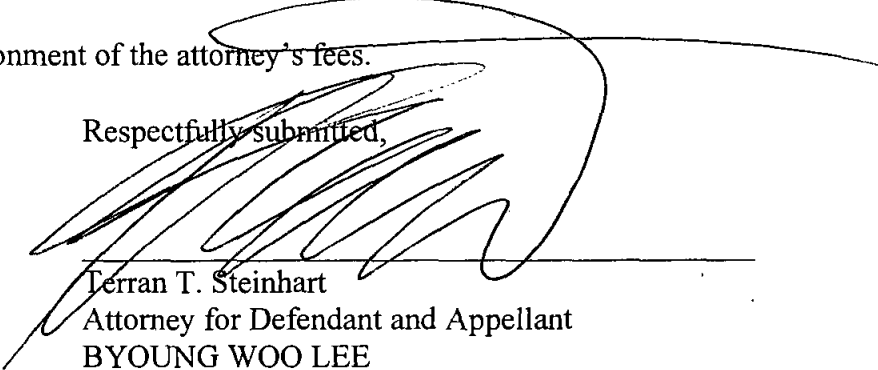
If the Hurs had obtained a joint and several judgment against all three defendants for attorney's fees, the law does not require the court to apportion the fees awarded as between the defendants. See *Friends of the Trails v. Blasius* (2000) 78 C.A.4th 810, 837-838. However, as noted above, the attorney's fees were awarded solely against Lee, and the amount of the award included the cost of substantial attorney's services on behalf of the Hurs that related only to prosecuting their claim against Yoon/Joy. Under the circumstances, it is an abuse of discretion not to apportion the attorney's fee award as between the time spent prosecuting the claim against Lee and the time spent prosecuting the claim against Yoon/Joy, including calculating the extra time spent in trial because of the prosecution of the claims against Yoon/Joy. See *Heppler v. J.M. Peters Company, Inc.* (1999) 73 C.A.4th 1265, 1297.

If judgment is affirmed on the insufficient evidence grounds of appeal, it should nonetheless be reversed on this ground and remanded for consideration of such apportionment.

CONCLUSION

For all the reasons set forth above, the judgment should be reversed as to Lee because there was insufficient evidence to establish the claim of fraud against him. If not reversed on that ground, it should be reversed the ground that the compensatory damages awarded were excessive, and thereupon remanded to the court below to determine whether the amount of punitive damages awarded was excessive in proportion to the amount of properly awardable compensatory damages. Finally, even if not reversed on any of the other grounds, it should be remanded for consideration of apportionment of the attorney's fees.

Respectfully submitted,

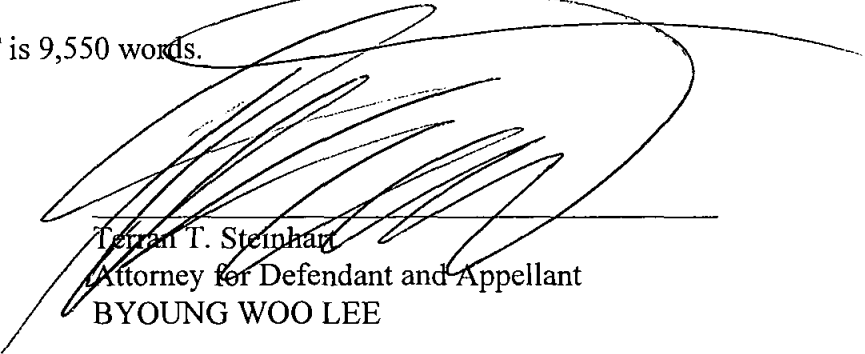


Terran T. Steinhart
Attorney for Defendant and Appellant
BYOUNG WOO LEE

ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH CRC 14(c)

Counsel for petitioner and appellant hereby certifies that the number of words in
APPELLANT'S OPENING BRIEF is 9,550 words.

Date: March 12, 2009



Terran T. Steinhan
Attorney for Defendant and Appellant
BYOUNG WOO LEE

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4311 Wilshire Boulevard, Suite 415, Los Angeles, California 90010-3713, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On the date set forth below, at the aforesaid place of business, one copy each of the document described as **APPELLANT LEE'S OPENING BRIEF** was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully pre-paid, addressed as set forth in the attached Service List to opposing counsel and the Superior Court judge care of the court clerk, and four copies to the California Supreme Court per said Service List; and said envelopes were placed for collection and mailing on said date following ordinary business practices.

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

Executed on March 12, 2009 at Los Angeles, California.


Terran T. Steinhart

SERVICE LIST

MARVIN HUR
CONNIE HUR
4715 HAYMAN AVE
LA CANADA CA 91011
[Plaintiffs and Respondents In Pro Per]

JAMES MORTENSEN ESQ
3700 WILSHIRE BLVD STE 520
LOS ANGELES CA 90010
[Attorney for Defendants and Appellants YOON and JOY]

CALIFORNIA SUPREME COURT
300 S SPRING ST
LOS ANGELES CA 90017

CLERK OF THE COURT
HON JOHN P SHOOK
LOS ANGELES SUPERIOR COURT
111 N HILL ST
LOS ANGELES CA 90012

890\Appellant Lee's Opening Brief