

Case No. _____

IN THE SUPREME COURT OF CALIFORNIA

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

PETITION FOR REVIEW

(DEFENDANT AND APPELLANT BYOUNG WOO LEE)

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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ISSUE PRESENTED

In reviewing a judgment for insufficiency of the evidence to sustain an essential element of a cause of action, pursuant to CCP § 634, should an appellate court be required to conclude that there was insufficient evidence to prove that element when the statement of decision did not resolve that controverted issue, and the omission was timely brought to the trial court's attention?

WHY REVIEW SHOULD BE GRANTED

Review of the issue presented should be granted to settle an important issue of law with regard to the substantial evidence standard of review. Respectfully, the rule proposed in the Issue Presented seems readily apparent, but it does not appear to be appreciated nor applied by some courts of appeal.

The trial court has a mandatory duty to provide a statement of decision when properly requested. CCP § 632; *Espinoza vs. Calva* (2008) 169 C.A.4th 1393, 3197. It has a duty to explain the factual and legal basis for its decision as to each of the principal controverted issues at trial. CCP § 632; *In Re Marriage of Hargrave* (1985) 163 C.A.3d 346, 353-354. Findings are required on all material issues, but a judgment should not be reversed on appeal if the omitted finding can be implied from the express findings and conclusions. *Beason v. Griff* (1954) 127 C.A.2d 382, 388. However, a reviewing court may not imply a necessary finding unless it is clearly supported by the evidence. *Ibid.* CCP § 634 further limits the province of the appellate courts to imply findings as to controverted issues that were omitted from a statement of decision:

“When a statement of decision does not resolve a controverted issue . . . and the record shows that the omission . . . was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, ***it shall not be inferred on appeal*** . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue.” (Emphasis added).

No citation of authority is required support the proposition that in order to prevail on a particular cause of action, the plaintiff must sustain the burden of proving each essential element of the cause of action. Pursuant to the above well-established rules, in a court trial in which a statement of decision is requested, the court must render a statement of decision that contains findings on all material issues, explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial. Although a reviewing court is permitted to imply findings that are supported by substantial evidence, it is statutorily prohibited from inferring a finding on a controverted issue that was omitted from the statement of decision when the omission was timely brought the trial court's attention.

Thus, if the circumstances described in CCP § 634 are present, an appellate court is prohibited from inferring in favor of a prevailing party an omitted finding as to an essential element of that party's cause of action. Therefore, if insufficiency of the evidence to establish that element is raised on appeal, the reviewing court should be required to conclude that there was insufficient evidence.

STATEMENT OF THE CASE

Procedural History

This case was commenced in May 2006, and went to trial in March 2008 upon the Hurs Second Amended Complaint and an answer thereto by defendant Lee, and a joint answer thereto by defendants Yoon and Joy Realty. 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 Realty), 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 of

several thousands of dollars per month; and that defendants presented fabricated financial statements to the Hurs that falsely corroborated this misrepresentation.¹ The case was tried to the court sitting without a jury. The court found in favor of the Hurs and against all three defendants, on June 27, 2008, filing a Statement of Decision and Judgment 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 Realty 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 timely requested preparation of a statement of decision, filed objections to the proposed statement of decision, and a proposal as to the content of the statement of decision. Thereafter, Lee filed a motion for new trial, and a motion to set aside judgment and enter a different judgment, both of which were denied.

Lee timely filed a notice of appeal. Lee presented four questions on appeal: (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; and (4) whether the award of attorney's fees as costs solely against Lee should have been apportioned between the legal

¹ Various subsidiary misrepresentations were also alleged. However, the Hurs ultimately obtained judgment based solely upon the allegation with respect to the net income misrepresentation.

services relating to Lee and those relating to Yoon/Joy Realty.

The Court of Appeal, Second Appellate District, Division Four, issued its written opinion on September 9, 2009, a copy of which is attached hereto (“Opinion”). The Opinion reversed a portion of the compensatory damages award as against all three defendants, namely, the award of \$170,545.88 to the Hurs to compensate for out-of-pocket operating losses; and reversed the award to the Hurs for punitive damages in the amount of \$100,000 as to defendant Joy Realty only. It affirmed the trial court’s judgment in all other respects. Opinion, p. 21. Thereafter, Lee timely filed a Petition for Rehearing, which was denied.

Relevant Evidence²

For many years prior to October 2005, Asakuma USA, Inc. (“Asakuma”) owned and operated a fine dining Japanese food restaurant 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”). On October 27, 2005, Lee entered into a written agreement with Asakuma wherein Asakuma agreed to sell and Lee agreed to buy the four restaurants for a purchase price of \$850,000.

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 Realty, as Yoon’s employer) for the performance of real estate brokerage services on behalf of Lee with respect to flipping the four restaurants.

Ultimately, Lee purchased only the Wilshire restaurant from Asakuma for \$550,000,

² Because this Petition for Review focuses solely on the issue of whether there was sufficient evidence to support the essential element of justifiable reliance in the Hur’s claim of fraud, only the evidence relevant to that the issue is set forth here.

closing escrow on April 11, 2006, and resold it to the Hurs for \$705,000, closing escrow on April 21, 2006. The evidence relating to the three Delivery Stores is omitted as being irrelevant to the issue raised in the instant Petition.

In the sale of Wilshire from Lee to the Hurs, Lee and Yoon misrepresented to the Hurs both 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.

In reliance upon the false statements by Yoon and Lee, the Hurs completed the purchase of Wilshire on April 21, 2006. On May 8, 2006, the Hurs discovered the falsity of the aforesaid financial statements with respect to their request to Mr. Watanabe aka Aki-san for verification of the false financial statements. Watanabe was the general manager and president of the restaurants for Asakuma, and remained on as the general manager of Wilshire for the Hurs for a period of time. When asked by the Hurs to verify the financial statements, Watanabe advised them that the statements were false because the restaurants had not obtained net earnings since 2002; and that the cost figures in the false financial statements were entirely unrealistic.

On April 8, 2006, three days before the close of the Asakuma - Lee escrow, Lee arranged for the Hurs to personally meet with Watanabe, the aforesaid general manager, falsely introducing the Hurs to Watanabe as Lee's partners in the purchase of Wilshire from Asakuma. Watanabe, whom the trial court expressly found to be a credible, independent witness, testified that:

The primary purpose of the meeting was to obtain the Hur's signatures on various vendor agreements pertaining to the restaurant operation. However, during the meeting, which lasted about two hours, the Hurs and Watanabe had a general restaurant conversation, discussing pretty much everything about how the restaurant made profits,

cut food costs and made more sales, including what the profit of the business was in April 2006. Included in their conversation was information about the lease for the Wilshire restaurant, how the restaurant was managed up to that point, the potential investment that Mr. Hur was going to make, and the costs and expenses. They did not, however, discuss the aforesaid false financial statements.

Mr. Hur testified:

During the aforesaid conversation with Watanabe, Mr. Hur had the opportunity to ask Watanabe questions about the restaurant. Watanabe did not refuse to answer any questions that he asked. However, Mr. Hur did not ask Watanabe any questions about the false financial statements nor the income or expenses of the restaurant.

At some point during the negotiations between Lee and the Hurs, the Hurs were informed by Lee and Yoon that they would not experience any difficulty if they wished to extend the lease on the Wilshire restaurant which had approximately nine more years to run. However, the Hurs learned from Watanabe during the aforesaid meeting that the landlord had indicated he might choose to develop the property rather than extend any of the tenants' leases. The Hurs confronted Yoon with this information, threatening to cancel the deal, as a result of which Yoon subsequently agreed to forego his commission, lowering the overall purchase price by \$145,000. Opinion, fn. 12, p. 5.

The content of the April 8 discussion between the Hurs and Watanabe is the primary evidence upon which Lee relied in support of his contention that there was insufficient evidence of justifiable reliance by the Hurs.³ See Opinion, pp. 8-9.

³ With regard to proof of justifiable reliance, 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

With regard to the issue of justifiable reliance, an important finding in the Statement of Decision (“SOD”) was in ¶ 13:

“Yoon told Plaintiffs, and Lee later confirmed, that because the Restaurants were being flipped at an astonishingly low price (given the financial figures cited by Yoon and Lee, which were, unbeknownst to Plaintiffs, false), that Plaintiffs could not approach the seller, Mr. Kondo, the sole shareholder of Asakuma USA, Inc., or its president, Aki-san, because it would result in derailment of the Asakuma/Lee Purchase, due to Mr. Kondo learning that he had sold the Restaurants at a bargain price. Yoon and Lee also told Plaintiffs that they could not speak with the Restaurants’ employees, and the Wilshire landlord, Tony Yeh, for the same reason.

“The Court finds that the true purpose of this concealment was to prevent Plaintiffs learning of the true financial operation of the Restaurants from Aki-san, Andrew-san, or any other knowledgeable employee, and in Tony Yeh’s case, to prevent the Hurs from learning about the true status of the Wilshire lease. Namely, that the Wilshire landlord was not promising to extend any leases into beyond 2015, because the Wilshire landlord was reserving its option for high-rise development of the Wilshire location.”

Based upon the above finding in ¶ 13 of the SOD, in discussing the April 8 meeting, the Opinion contains the following observation at page 9:

“The evidence does not indicate that Watanabe - - whose employer, Kondo, had no dealings with the Hurs - - was given instructions to cooperate fully with Mr. Hur or to answer questions concerning confidential financial matters. Mr. Hur himself had been

C.A. 323, 326. See Legal Discussion, below at p. 9.

warned by Lee and Yoon to avoid discussing the details of the transaction with Kondo or his employees.”

The vast majority of the SOD is concerned with discussing the evidence regarding the falsity of the financial representations made by Lee and Yoon. It contains a brief finding of actual reliance by the Hurs on the false representations. However, it contains no finding that said reliance was justifiable or reasonable. Furthermore, it contains no mention of the April 8 meeting, nor does it make any findings as to what was or was not discussed between Watanabe and the Hurs at that meeting.

In Lee’s objections to the Hurs proposed statement of decision, he objected on the ground that the SOD failed to contain any findings about Lee’s introducing the Hurs to Asakuma employees as Lee’s partner, and that the Hurs were free to meet with Asakuma managers and employees; and failed to contain any findings that the April 8, 2006 meeting occurred, nor the content of what was discussed at that meeting.

In Lee’s proposal as to content of SOD, he proposed that it should contain a recitation as to the occurrence of the April 8 meeting and the content of what was discussed; because based on that information, the Hurs were charged with all information they would have obtained by making proper inquiry of Watanabe, and therefore could not claim that they justifiably relied on the misrepresentations of fact.

In Lee’s motion for new trial, he again directed the trial court’s attention to the occurrence and content of the aforesaid April 8 meeting, arguing why that evidence demonstrated lack of justifiable reliance on the part of the Hurs.

LEGAL DISCUSSION

In its discussion of the cause of action of fraud and deceit, Witkin makes the following scholarly observation:

“The causation aspect of actions for damages for fraud and deceit is confusing because of its multiple nature. It appears to involve three distinct elements: Actual reliance, damage resulting from reliance . . . , and right to rely or justifiable reliance

“The first of these, actual reliance, is a combination of the plaintiff’s belief in the truth of the representations and his or her action in response to the belief.” 5 Witkin, Cal. Prac. 5th (2008) Plead, § 730.

With regard to the justifiable reliance element of the causation aspect, Witkin observes:

“The plaintiff must be able to prove that his or her actual reliance on the false representations was justifiable. . . . The essential element of causation is lacking unless the plaintiff sets forth facts to show that his or her actual reliance on the representations was justifiable so that the cause of the damage was the defendant’s wrong and not the plaintiff’s fault.” 5 Witkin, Cal. Prac. 5th (2008) Plead, § 732 (citing *Lingsch v. Savage* (1963) 213 C.A.2d 729, 739).

With regard to proof of justifiable reliance, 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.

Respectfully, despite its importance in regard to the issue of justifiable reliance, the SOD contains no mention of the April 8 meeting, nor does it make any findings as to what was or was not discussed between Watanabe and the Hurs at that meeting. Because this omission was brought to the attention of the trial court both prior to and after entry of judgment, this case comes squarely within the provisions of CCP § 634. Despite the provision in CCP § 634 prohibiting an appellate court from inferring that the trial court decided in favor of the prevailing party as to the omitted facts relating to the April 8 meeting, or on the issue of justifiable reliance to which those facts pertain, the Opinion appears to disregard this prohibition:

“ . . . ***The court was free to conclude***, based on all the evidence relating to the Hurs’ knowledge and experience and their perception of Yoon’s knowledge and experience, ***that the Hurs’ continued reliance on the false financial statements and representations of Yoon and Lee concerning the restaurants profitability was reasonable.***

“ . . . On this record, ***whether the Hurs were justified in relying on the***

representations and false financial documents rather than the tax returns and any other records given to them *was one of fact. The court's finding in favor of the Hurs was supported by substantial evidence.*" (Emphasis supplied). Opinion, p. 9.

Because the above inferences drawn in the Opinion are prohibited by CCP § 634, the Court of Appeal should have reversed the judgment on the ground that the Hurs failed to adduce sufficient evidence to prove fraud by failing to establish the essential element of justifiable reliance.⁴

⁴ Respectfully, in addition to failing to comply with CCP § 634, the impermissible inferences drawn in the Opinion are not reasonable nor supported by substantial evidence.

The above-quoted finding in ¶ 13 of the SOD and the above concomitant quote from the Opinion fail take into account that Lee and Hur figured out a method of giving the Hurs access to Watanabe without risking disclosure to Kondo that Lee was flipping the restaurant to Hur at an astonishingly low price. They simply fibbed to Watanabe, advising him that the Hurs were Lee's partners in the purchase of the restaurant from Asakuma.

The primary premise of the finding of fraud against Lee is that Lee was well aware that the Wilshire restaurant had been unprofitable for the previous several years, and that he obtained this knowledge by disclosure from Asakuma as to the financial condition of the restaurant. Since Asakuma had made disclosure of the restaurant's adverse financial condition to Lee, and Watanabe believed that the Hurs were Lee's partners, there would be no reason why Watanabe would be reluctant to cooperate with the Hurs in freely discussing the restaurant's financial condition, which had already been disclosed to the Hurs' (purported) partner, Lee. Respectfully, in this context, the above observation in the Opinion that, "The evidence does not indicate that Watanabe - - whose employer, Kondo, had no dealings with the Hurs - - was given instructions to cooperate fully with Mr. Hur or to answer questions concerning confidential financial matters," simply does not make sense. At the April 8 meeting, it is not true that Watanabe would have been under the impression that Kondo had no dealings with the Hurs, in that since Kondo had dealings with Lee, and the Hurs were introduced as Lee's partners, Watanabe would have been under the impression that Kondo did have dealings with the Hurs.

Based on this record, respectfully, reasonable minds can only come to one conclusion: That at the April 8 meeting, there was absolutely no impediment to the Hur's conferring with Watanabe about every detail of the restaurant's operation and financial condition; and as mentioned above, there would be no reason to find that Watanabe would be anything but cooperative and truthful in responding to Mr. Hur's inquiries. Indeed, any innuendo that Watanabe would not have disclosed to the Hurs "confidential financial matters" about the restaurant is soundly refuted by the fact that during the April 8 meeting, Watanabe disclosed to the Hurs adverse information about the landlord's attitude toward extending the lease.

Regardless of what the full extent of the discussion between Watanabe and the Hurs was on April 8, it is clear that: (1) they discussed financial information relating to the operation of the restaurant; (2) Mr. Hur admitted that Watanabe cooperatively answered every question he asked;

CONCLUSION

Lee understands that a Petition for Review is supposed to discuss the reasons why this Court should accept review of the judgment of the Court of Appeal, and not discuss the reasons why that judgment is in error. Nonetheless, Lee has chosen to discuss why the judgment below is in error to illustrate how easy it is for a reviewing court to unwittingly disregard the inference-drawing prohibition of CCP § 634.

The issue presented in this Petition is important with respect to the application of the substantial evidence standard of review. Lee respectfully contends that CCP § 634 is inadvertently violated by reviewing courts from time to time. A pronouncement by this Court emphasizing the impropriety of doing so will give proper deference to the Legislature, and will make reviewing courts conscious of this statutory inference-drawing prohibition.

Respectfully submitted,

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

(3) Watanabe had no motive to be anything but cooperative and truthful with the Hurs; and (4) there was no reason why Mr. Hur could not have made as full inquiry of Watanabe as he pleased as to the operations and finances of the restaurant. Therefore, pursuant to the authority of the *Hackleman* line of cases, having been given unhindered access to Watanabe, and having embarked upon an inquiry as to the restaurant operation, the Hurs are charged with all information that reasonable diligence would have disclosed, and thus cannot claim that they justifiably relied upon the financial misrepresentations.

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

Counsel for defendant and appellant Lee hereby certifies that the number of words in
PETITION FOR REVIEW BY APPELLANT BYOUNG WOO LEE is 3,931 words.

Date: October 15, 2009

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

COURT OF APPEAL OPINION

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 **PETITION FOR REVIEW BY APPELLANT BYOUNG WOO LEE** 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 October 15, 2009 at Los Angeles, California.

Terran T. Steinhart

SERVICE LIST⁵

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

CLERK OF THE COURT
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION FOUR
300 S SPRING ST 2ND FLOOR
LOS ANGELES CA 90013

CLERK OF THE COURT
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LOS ANGELES SUPERIOR COURT
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⁵ No copy was served upon the Hurs because they did not appear in the appellate proceedings.