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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LIANNA SARIBEKYAN, Plaintiff and Appellant, v. BANK OF AMERICA, N.A., Defendant and Respondent.	B285607 Los Angeles County Super. Ct. No. BC549374

APPEALS from a judgment and orders of the Superior Court of Los Angeles County. Rita Miller, Judge. Reversed.

Degani Law Offices, Orly Degani; Law Offices of Richard M. Foster and Richard M. Foster for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Mark I. Wraight for Defendant and Respondent.

INTRODUCTION

This is an appeal after a jury trial of a judgment in favor of Lianna Saribekyan (Saribekyan). Saribekyan sued Bank of America, N.A. (BANA), for drilling open her safe deposit box, taking possession of the box's contents, failing to inventory or secure the contents adequately such that millions of dollars in loose gold, a $10,000 and a $5,000 bill, U.S. gold coins, investment-grade diamonds, and family jewelry were lost or stolen, and later refusing to return the balance of the box's contents unless she signed a release exonerating the bank from all liability.

Saribekyan appeals several rulings made by the trial judge during and after trial. Saribekyan appeals the court's ruling that limited plaintiff's conversion claim to emotional distress damages relating to property that BANA ultimately returned. Saribekyan appeals the trial court's nonsuit of her negligence cause of action. Saribekyan challenges the trial judge's decision to submit a purely legal issue regarding the enforceability of the limitation of liability clause in the Safe Deposit Box Rental Agreement to the jury. Saribekyan appeals the trial court's posttrial reduction of the jury's award of over $2.5 million to $2,660 based on the limitation of liability in BANA's Safe Deposit Box Rental Agreement. Saribekyan appeals the trial court's grant of BANA's motion for a new trial, remitting the jury's punitive damages award from $2 million to $150,000. Finally, Saribekyan appeals the court's denial of her motion for attorney fees and costs.

BANA counters that the trial court committed no legal error, or, if the trial court erred, it was not prejudicial. Specifically, BANA argues that a bailee does not commit conversion when it fails to redeliver goods if redelivery is

impossible because the goods have been lost or destroyed without fault on the part of the bailee or because of his negligence. (*George v. Bekins Van & Storage* (1949) 33 Cal.2d 834, 837 (*George*).) BANA also asserts that the nonsuit was properly granted because a plaintiff cannot ordinarily recover in tort for the breach of duties that merely restate contractual obligations. (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 643.) BANA rejects plaintiff's objection to the submission of the question of whether plaintiff was "bound" by all provisions of the Safe Deposit Box Rental Agreement, including the Rules and Regulations, to the jury, as not having been made at trial, and thus waived on appeal. BANA also asserts that the trial court properly enforced the contractual limitation on liability to reduce the judgment and the punitive damages awarded. Finally, BANA finds no error in the trial court's determination that plaintiff was not the prevailing party and asserts that costs were properly denied.

We reverse the trial court's grant of nonsuit to limit Saribekyan's conversion cause of action to only the items that were returned to her. In so ruling, the trial court incorrectly applied the *George* case to the facts presented here. In addition, the trial court erred in granting a nonsuit on Saribekyan's negligence cause of action. The trial court also erred in submitting a purely legal issue as to the enforceability of the limitation of liability provisions in BANA's Safe Deposit Box Rental Agreement to the jury. Plaintiff timely objected to the form of the verdict and that issue is properly appealed. As to the legal question regarding the enforceability of BANA's contractual limitation of liability, the trial court erred in concluding that it was. Finally, as the judgment will be reversed and a new trial will be necessary, we need not reach the issue of whether the

jury's award of punitive damages was constitutional or the separate issues of attorney fees and costs.

BACKGROUND FACTS

The relevant facts are undisputed

Saribekyan and her husband are wealthy, and they kept substantial assets in the form of cash, gold, diamonds and collectibles in a home safe.

In September 2012, Saribekyan was starting construction on her home and needed a place to store temporarily the contents of her home safe.

Saribekyan investigated which banks in her area would have a safe deposit box large enough to store her valuables and finally settled on BANA's Universal City branch. Saribekyan went to the bank with her husband, Halajyan, to open the safe deposit box and brought in a large duffle bag the property that she wanted to store. The property included expensive jewelry, designer watches, investment-grade diamonds, gold, rare collectible bills and coins. Saribekyan's valuables filled the large safe deposit box up to the top and were worth millions of dollars.

Saribekyan completed the paperwork to open the safe deposit box with BANA employee Julia Olivia. Saribekyan signed a one-page Safe Deposit Box Rental Agreement. The Safe Deposit Box Rental Agreement stated that "[s]ubject to the Safe Deposit Rules and Regulations furnished on separate copy and incorporated by reference into this Safe Deposit Box Rental Agreement, Bank of America N.A. hereby rents the above indicated Safe Deposit Box." And, the one-page rental agreement expressly noted that by "signing this Rental Agreement," Saribekyan acknowledged receipt of "a copy of the Safe Deposit Box Rules and Regulations."

Despite these form-written assurances in the contract, neither Saribekyan nor her husband was given the Safe Deposit Box Rules and Regulations.[1] Corroborating their testimony was the handwritten notation on the bottom of the Safe Deposit Box Rental Agreement by Julia Olivia that the one-page agreement was page 1 of 1.

An exemplar of the Rules and Regulations purportedly in effect when Saribekyan opened her safe deposit box was introduced at trial. The Rules and Regulations inform the customer of a number of things. Significantly, they remind the customer that during the pendency of the box rental relationship, only the customer knows what is in the box and that the box's contents should be privately insured. Further, the consumer is warned that because the bank cannot verify the contents of the box, the bank's liability "for any loss in connection with the Box for whatever reason," shall not exceed 10 times the annual rent charged.[2]

In the Rules and Regulations, the bank expressly repudiates any relation of "bailor and bailee" and the renter assumes "all risks arising out of the deposit of property in the Box," except that the bank is not exempt from its own willful injury to such property. "Renter agrees that the Bank shall

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[1] Although BANA employees testified that not giving the customer the Rules and Regulations did not comply with policy and procedure, no BANA witness testified that he or she gave Saribekyan or her husband a copy of the Rules and Regulations, or that this document was even available at the bank on the day that they rented the safe deposit box.

[2] Saribekyan's annual box rental fee was $246.

not be liable for any loss sustained by Renter, unless such loss is caused by some specific and clearly proven willful act of the Bank."

In the Rules and Regulations, the bank "reserves the right to terminate this Rental Agreement at any time and require Renter to surrender the Box . . . by providing written notice by mail . . . . If Renter fails to do so, the Bank has the right to forcibly open the Box and inventory and secure the contents." The Rules and Regulations also state that "[a]ny notice sent to your most recent address as shown in the Bank's Safe Deposit Box records will be proper notification for all purposes and will be effective when mailed, even if returned to Bank undelivered."

The Rules and Regulations further allow the bank, in its sole discretion, to withhold access to all persons to the contents of the box if any dispute or question arises relating to the right of access to the contents of the box. And, the bank is allowed to "relocate the Box to another banking center of the Bank's choosing" if the safe deposit facility closes upon prior notice to the renter. If the bank sends notice to the renter but the renter does not remove the contents, the bank shall not be liable for loss, damage or breakage to the contents of the box during relocation.

In early 2013, BANA decided to close its Universal City branch. Although written notice to boxholders is required throughout the Rules and Regulations regarding the Safe Deposit Box Rental Agreement, and BANA claimed to have sent four written notices, Saribekyan did not receive written notice from BANA. And, although BANA claimed to have sent four written notices to Saribekyan, it did not produce copies of the letters that it had sent. No BANA witness testified to having prepared and/or mailed notice to Saribekyan.

And, although BANA claimed that, per its written procedures, its employees called renters of the safe deposit boxes to inform them of the branch closure, the list of customers used by the bank did not have any notations next to Saribekyan's name. Other customers had notations next to their names after they were called. No BANA witness testified to calling Saribekyan. Saribekyan testified that she was never called. Had she received a call or written notice, she would have immediately gone down to the bank to retrieve her valuable possessions. Nor was Saribekyan told that the branch was closing when she visited the bank in April 2013, two months before the branch closed. There were no signs posted regarding the closure until May 15, a month after Saribekyan visited the branch.

Despite BANA's contention that it provided ample notice to its customers, more than one-third of the Universal City branch's 750 safe deposit boxes had to be drilled open by BANA employees. And of those 750 boxes, over 10 percent had contents that needed to be inventoried without the customer being present.

Pursuant to BANA's written procedures regarding drilling and inventorying safe deposit boxes, the bank is required to drill only one box at a time. And, the contents of the now-open box are to be inventoried immediately afterwards, with the same two bank associates present throughout the process. These procedures are designed to minimize the risk of loss or theft of the contents of the box.

These procedures were not followed at the Universal City branch. Instead, because of the large number of boxes that needed to be drilled open in a short time, BANA decided to open

Saribekyan's box on day one and have the locksmith and one employee remove the contents and place them in a bag, label the bag with Saribekyan's information, and store it in the bank vault.

Although the bag, properly used, would have allowed BANA to track whether someone opened the bag, removed something, or transferred part of the contents to another bag, the BANA employees at the Universal City branch did not track the serial number and, in fact, removed and discarded the strip with the serial number.

The unsecured bag remained in the vault from June 12 until June 15. During that time, seven people were in and out of the vault. Finally, on June 15, two different BANA employees inventoried the bag's contents. Because the serial number on the bag had not been tracked, these employees did not know if the contents they retrieved from the vault were the same as what the other team had removed from Saribekyan's drilled safe deposit box.

It took those two BANA employees over four hours to inventory the Saribekyan bag's contents. After completing the inventory, they filled in a form attesting that the information was true and correct and that the items listed were removed from Saribekyan's box in their presence—even though that was not a true statement. Neither of these employees noted on the inventory form that the contents had been inventoried by different employees days after the box had been drilled open and placed in a bag that could not be tracked. After placing the now-inventoried contents into two bags, they put them in boxes for shipping to BANA's centralized storage facility.

On June 27, 2013, Saribekyan went to the Universal City branch to retrieve jewelry and learned that her safe deposit box

had been drilled open and its contents sent to BANA's centralized storage facility. Saribekyan was shocked and called Halajyan, who came to the bank and asked to see the inventory sheet for the contents of the safe deposit box. Halajyan noticed and complained that some of the items were incorrectly described and others were not listed at all. Halajyan complained that a $10,000 bill, a $5,000 bill, and U.S. gold coins were not listed at all. He also complained that what was described on the inventory sheet as four bags of "beads," were actually four bags of diamonds. In addition, Saribekyan noticed that gold nuggets were erroneously described as "yellow beads."

Saribekyan and Halajyan demanded their property back and refused to leave the bank without it. Although they were upset, they believed that the inventory sheet was just incorrect and that they would eventually get their property back. They remained at the bank until after it closed. They were assured that their property would be returned the next day; then they were later told they would have their property back the following Monday.

More than two weeks later, on July 15, BANA called Saribekyan to go to the Studio City branch to retrieve her property. When Saribekyan and Halajyan arrived, the branch manager brought out a box marked "box 1 of 2." They left without opening or taking the one box and demanded that both boxes be returned.

Three days later, Saribekyan and Halajyan returned to the Studio City branch to retrieve their property. This time, BANA presented them with two boxes. When they opened the boxes, they went through each piece of property and photographed it. BANA employees remained with Saribekyan and Halajyan as

they went through each piece of property. Halajyan told the BANA employees that four bags of supposed beads listed on the inventory sheet were actually 44 diamonds and that they were missing, as were some additional diamonds. He also told them that U.S. gold coins, some loose gold, a $10,000 and a $5,000 bill, and his grandmother's necklace were missing. One of the containers that originally had gold in it was now filled with pennies. He said items worth millions of dollars were missing.

Saribekyan and Halajyan left the bank that day without their property because BANA employees refused to let them take their property unless they signed a form releasing BANA of liability. This position was consistent with BANA's written corporate policy. The value of the property that BANA refused to release was $1.5 to $2 million.

After leaving without their property, Saribekyan and Halajyan retained an attorney and informed BANA they were handing the matter over to their lawyer. BANA employees continued to contact them to get them to sign a release. Each time, Saribekyan and Halajyan refused, reiterating that their attorney was handling the matter and that millions of dollars of their property was missing.

In June 2014, Saribekyan sued BANA, alleging claims, inter alia, for breach of contract, conversion, and negligence.[3] On January 20, 2015, BANA finally released the two boxes of

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[3] Saribekyan also alleged other causes of action, but she dismissed those claims before trial and they are not at issue in this appeal. Nor does Saribekyan appeal the trial court's ruling on her Business and Professions Code section 17200 cause of action.

Saribekyan's property without obtaining an executed release. BANA never returned the additional missing property.

As part of a motion for nonsuit, the trial court limited Saribekyan's conversion claim to items that BANA ultimately returned, excluding any of the items in her safe deposit box that were never returned to her. The trial court, citing, inter alia, *George, supra,* 33 Cal.2d at pp. 837-838, held that no conversion could be claimed because negligence in caring for the goods is not an act of dominion over them such as is necessary to make a bailee liable as a converter. In addition, the court granted BANA's motion for nonsuit on Saribekyan's negligence claim, ruling as a matter of law that the bank's duty to Saribekyan arose strictly from contract, i.e., the rental agreement for the safe deposit box.

The jury returned a special verdict for Saribekyan on her conversion and breach of contract claims. The jury found that the defendant failed to use ordinary care in safeguarding plaintiff's property, but that "[p]laintiff agree[d] to be bound by all of the provisions in the Rules and Regulations." The jury also found that plaintiff was harmed as a result of defendant's conduct and that defendant's conduct was a substantial factor in causing plaintiff's harm. The jury also found that defendant intentionally and substantially interfered with plaintiff's property by taking possession of the items on July 18, 2013, and not returning those items until January 20, 2015. This period of possession was without plaintiff's consent and, as a result, plaintiff suffered emotional distress. The jury also found, by clear and convincing evidence, that one or more officers, directors, or managing agents of defendant refused to return the contents of the safe deposit box that were not missing with malice, oppression or fraud. The jury

awarded plaintiff $2,549,260 for her lost or damaged property, and $15,000 for her emotional distress damages. In a bifurcated proceeding, the jury awarded plaintiff $2 million in punitive damages.

There were several posttrial motions filed by both parties.

BANA filed a motion for entry of judgment on special verdicts. Although denying that motion because the Business and Professions section 17200 claim had not been finally adjudicated, the court indicated that it intended to enforce BANA's limitation of liability contained in its Rules and Regulations as to the contract claims.

BANA moved for a new trial and filed a separate motion for judgment notwithstanding the verdict based on the jury's award of $2 million in punitive damages. Among other grounds, BANA argued that the punitive damages award was impermissibly excessive. The court granted the motion for new trial and reduced the punitive damages award to $150,000. Further, the court found that having reduced the award to the constitutional maximum, a new trial would be futile.

Saribekyan filed a motion for a new trial based on the irregularities in the proceeding. Specifically, Saribekyan challenged the trial judge's limitation on her conversion claim and its grant of nonsuit on her negligence cause of action. The trial judge denied that motion.

Saribekyan also filed a motion to be determined the prevailing party and to be awarded attorney fees. The trial judge found that there was no prevailing party pursuant to Code of Civil Procedure section 1717 and denied plaintiff's request for attorney fees. The court also found that costs could not be awarded because Saribekyan had not complied with California

Rules of Court, rule 870 by filing and serving a memorandum of costs.

Saribekyan filed a timely appeal from the judgment and from the trial court's grant of BANA's new trial motion. And, after the court denied her attorney fees and cost motion, Saribekyan timely appealed from that order. These two appeals have been consolidated.

DISCUSSION

Standards of Review

As to that aspect of this appeal dealing with the trial judge's grant of nonsuit on a portion of Saribekyan's conversion cause of action and her negligence claim, we review those rulings de novo. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541-1542.) In reviewing a grant of nonsuit, we are guided by the same rule requiring the evaluation of evidence in the light most favorable to the plaintiff. In other words, we will not sustain the judgment unless, interpreting the evidence most favorably to the plaintiff and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff, a judgment for the defendant is required as a matter of law. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

Regarding Saribekyan's claim that the trial judge erroneously submitted a legal issue to the jury, that error is reversible only upon a showing of prejudice. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1389.)

Finally, as to whether BANA's limitation of liability provision in its Safe Deposit Box Rental Agreement is subject to revocation as unconscionable, that is a question of law subject to de novo review. (*Magno v. The College Network* (2016) 1

Cal.App.5th 277, 283-284 (*Magno*); *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 713 [appellate review of a trial court's interpretation of a contract generally presents a question of law for de novo review].)

A. *The Trial Court Erroneously Limited Saribekyan's Conversion Claim*

The trial court ruled that Saribekyan could not assert a claim for conversion for the valuables that were never returned. The court relied on *George, supra,* 33 Cal.2d 834, as the basis for its ruling. In so doing, the trial court erred.

Saribekyan's cause of action for conversion did not require her to prove that BANA could return the property. Conversion is the wrongful exercise of dominion over the property of another. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) To prove conversion, a plaintiff must establish three elements: (1) plaintiff's ownership or right to possession of the property; (2) defendant's wrongful act toward or disposition of the property interfering with plaintiff's possession; and (3) damages. (*Fong v. East West Bank* (2018) 19 Cal.App.5th 224, 231; *Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 119 (*Fremont Indemnity*).) Thus, the gist of the action for conversion is the wrongful interference with the owner's right or dominion and possession of his property. (*Chatterton v. Boone* (1947) 81 Cal.App.2d 943, 946 (*Chatterton*).) Within the context of a bailment, a conversion arises when the bailee has done some act implying the exercise or assumption of title, or of dominion over the goods, or some act inconsistent with the bailor's right of ownership, or in repudiation of such right. (*Ibid*.) For example, a bailee may be liable for conversion where it uses the property for its own purposes, or where the property is lost because of the

bailee's unauthorized use of it. (See, e.g., *Byer v. Canadian Bank of Commerce* (1937) 8 Cal.2d 297, 299-300 [forwarding of bonds without restricting delivery to the addressee]; *Hollywood Motion Picture Equipment Co. v. Furer* (1940) 16 Cal.2d 184, 189.)

The motive with which the bailee exercises dominion or refuses the owner possession of property to which he is entitled is immaterial. (*Chatterton*, *supra*, 81 Cal.App.2d at p. 946.) The foundation of the act of conversion rests neither in the knowledge nor the intent of the defendant. "It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results." (*Poggi v. Scott* (1914) 167 Cal. 372, 375 (*Poggi*).)

None of the elements for conversion requires the plaintiff to establish that the defendant had the ability to redeliver the property upon plaintiff's demand. In fact, the defendant's failure to redeliver the property upon such a demand "constitutes *prima facie* evidence of a conversion thereof." (*Wolfe v. Willard H. George, Inc.* (1930) 110 Cal.App. 532, 535.) Thus, a defendant can be liable for conversion even if it no longer has plaintiff's property and cannot, therefore, return it.[4] (See, e.g., *Poggi,*

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[4] We granted leave to consider the recent decision *Kanovsky v. At Your Door Self Storage* (Nov. 25, 2019, B297338) [nonpub. opn.]. We find the case and its holding to be distinguishable from the facts presented in this appeal. In *Kanovsky*, the question was whether a contract for the lease of an at-home storage container was breached by water damage to the contents when the rental agreement expressly disclaimed liability for water damage. The opinion also considers whether two other statutes, the Self-Service Storage Act and the Household Goods Carrier Act, create private causes of action. While distinguishable, *Kanovsky* does observe "[i]f by main force you take property hostage, you better

supra, 167 Cal. at p. 376; *Smith v. Miller* (1935) 5 Cal.App.2d 564, 566-568; *Reynolds v. Lerman* (1956) 138 Cal.App.2d 586, 589-592.) In *Poggi*, the defendant sold barrels of wine that belonged to the plaintiff. The court held that as the defendant had no legal right to sell the barrels, in selling them to another he exercised an unjustifiable and unwarranted dominion over the property of another and from his acts a loss resulted. (*Poggi, supra*, 167 Cal. at p. 376.) Regardless of whether the defendant knew that the barrels contained wine, he was liable for their conversion. (*Ibid.*)

The court mistakenly relied on *George, supra,* 33 Cal.2d 834, to limit Saribekyan's claim to that property that BANA eventually returned to her. The *George* case did not involve a conversion. In that case, the defendant never possessed the dominion over the property of the plaintiff, nor did it act in a way with regard to plaintiff's property that was inconsistent with the terms of the bailment. As *George* explains, "[n]egligence in the caring for the goods is not an act of dominion over them such as is necessary to make the [defendant] liable as a converter." (*George*, *supra*, 33 Cal.2d at p. 838.) Thus, in *George*, the Supreme Court held that the fact that a fire, not caused by the bailee, that destroyed goods stored in defendant's warehouse could not sustain a finding of conversion.[5] (*Ibid.*)

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safeguard it." (*Id.* at *8). That general principle, while admittedly dicta, is applicable here.

[5] Further, even if *George* were applicable, BANA failed to establish the factual predicate for its assertion. When goods have disappeared during the course of a bailment for hire, as in *George*, the bailee is required to offer evidence to show that the failure to return the plaintiff's property resulted from some

In this case, the loss did not occur while BANA was simply storing the valuables for Saribekyan as part of a bailment for hire. There was not a fire at the bank while Saribekyan's valuables were securely locked in a safe deposit box for which Saribekyan's key was required for access. There was no evidence presented at trial that the loss of the Saribekyan's property occurred before the box was drilled open by BANA, while the bank simply acted as a depository for plaintiff's goods. Rather, in this case, BANA drilled open that box without first giving notice to the owners. This action was wholly inconsistent with the terms of the parties' rental agreement and violated the terms under which Saribekyan had agreed to the bailment for hire.

In addition, after drilling open the box, BANA's dealings with the contents of Saribekyan's box were wholly inconsistent with the bank's own policies for the treatment of bailed property. BANA removed the contents of the box without following its own procedures. Several different employees over several days had access to the property before the contents of the box were inventoried. These employees also violated the bank's requirement by tampering with the security envelope, so that access to the contents of the box could not be traced. As a further manifestation of BANA's violation of the terms of the original bailment, which resulted in BANA's exclusive possession of Saribekyan's property, defendant prepared an inaccurate

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specific casualty, such as fire. (*Vilner v. Crocker Nat'l Bank* (1979) 89 Cal.App.3d 732, 737 (*Vilner*) ["A simple showing of the exercise of ordinary care is not a sufficient explanation."].) In this case, BANA provided no explanation regarding its inability to account for over $2.5 million in money, gold, gems and other valuables missing from Saribekyan's safe deposit box.

inventory, and then shipped the contents to another BANA location. As an ultimate manifestation of its exclusive dominion over plaintiff's property, BANA refused to return any of Saribekyan's property until she signed a release.[6] These facts demonstrate that BANA exercised substantial interference with Saribekyan's right to possession—from the time that the box was drilled open until some of the property was eventually returned after a lawyer was secured and suit threatened. And, although the jury was never asked to consider or to decide what happened to the missing property, a reasonable inference from the facts presented here is either that an employee of the bank stole the valuables or that they are still in BANA's possession but have been irretrievably lost. Such a finding would have clearly supported finding the bank liable for the theft or loss. (*Cussen v. Southern California Sav. Bank* (1901) 133 Cal. 534 (*Cussen*); *Fremont Indemnity, supra,* 148 Cal.App.4th at p. 119.)

The injured party may elect among several remedies for conversion of personal property. Under Civil Code section 3336, there are presumptive damages for conversion. Ordinarily, the measure of damages for conversion is the value of the property at the time of conversion, with interest from that time. (*Ibid.*) Essentially, in a conversion suit, the plaintiff recovers the full value of the property, in effect forcing the defendant to buy what

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[6] The act of preventing an owner from exercising all rights of ownership in personal property constitutes a conversion. (*Itano v. Colonial Yacht Anchorage* (1968) 267 Cal.App.2d 84.) Thus, a conversion may occur by an unjustified refusal to return an item upon plaintiff's demand for its return. (*Edwards v. Jenkins* (1932) 214 Cal. 713, 720; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918.)

it has taken. (*Fremont Indemnity, supra,* 148 Cal.App.4th at p. 119.) When a plaintiff recovers all or some of the property that has been unlawfully taken from him, the amount returned is considered as mitigation of damages. (*Beetson v. Hollywood Athletic Club* (1930) 109 Cal.App. 715, 722; *Black v. Hilliker* (1900) 130 Cal. 190; *Ross v. Sweeters* (1932) 119 Cal.App. 716.) And, if the owner's property is returned entirely, then "the measure of damage, in the absence of special damage, is the expense of procuring its return with interest." (*Beetson,* at p. 722.)

In this case, the trial judge never sought a determination from the jury of the value of Saribekyan's valuables that were converted by BANA. There is no question that the trial court's impermissible limitation on Saribekyan's conversion claim prejudiced her and denied her a fair trial. The jury awarded Saribekyan only $15,000 on her conversion claim—well below the $2.5 million value determined by the jury to be the amount of lost or stolen property. Accordingly, the trial court's limitation of the conversion claim constitutes prejudicial error and mandates reversal of the judgment and a new trial.

B. ***The Trial Court Erroneously Granted Nonsuit on Saribekyan's Negligence Claim***

The trial court granted BANA's motion for nonsuit on Saribekyan's negligence claim, ruling as a matter of law that BANA's duty to Saribekyan arose strictly from the rental agreement for the safe deposit box. In so ruling, the trial court erred.

Relying on *Rodriguez v. Bank of the West* (2008) 162 Cal.App.4th 454, 460, the trial court assumed that the bank's duty to Saribekyan arose solely from contract. That case, which

held that a bank's basic duty to act with reasonable care in its transactions with its customers arose out of contract, does not limit a customer's claims to contract. In fact, several cases have held that, despite a contractual relationship between a bank and its customer, a customer may bring a negligence cause of action against the bank. (See, e.g., *Allen v. Bank of America Nat. Trust & Sav. Assn.* (1943) 58 Cal.App.2d 124, 127; *Holcomb v. Wells Fargo Bank, N.A.* (2007) 155 Cal.App.4th 490, 497.) For example, where, as here, Saribekyan alleged a breach accompanied by a common law tort, such as conversion, a tortious breach of contract may be found. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 551.)

When a customer rents a safe deposit box from a bank, the relationship between the customer and the bank is that of bailor and bailee. (*Webber v. Bank of Tracy* (1924) 66 Cal.App. 29, 33 (*Webber*); *Cussen*, *supra*, 133 Cal. at p. 535.) Under traditional bailment doctrine, the standard of care depends on the circumstances surrounding the bailment. (13 Witkin, Summary of Cal. Law (11th ed. 2017) Personal Property, § 167.) The bank/bailee is a bailment for hire. (Civ. Code, § 1851.) Under that statutory provision, the bailee is required to use "at least ordinary care for the preservation of the thing deposited" by the customer. (Civ. Code, § 1852.) This statutory duty of care gives rise to tort liability. (*Starbucks Corp. v. Amcor Packaging Distribution* (E.D.Cal. Jan. 16, 2015, Civ. No. 2:13-1754 WBS-CKD) 2015 U.S. Dist. Lexis 5746 at p. *4.) Thus, when a customer brings an action to recover damages for the loss of or damage to bailed property, the bailee's liability need not be predicated on breach of the bailment agreement. (See, e.g., *Webber, supra*, 66 Cal.App. 29; *George*, *supra*, 33 Cal.2d at p. 841

[where bailed goods are destroyed by fire, plaintiff could frame the complaint on negligence or breach of contract].) Pleading alternative theories of relief on the same set of facts, of course, is quite proper and is often done where, as here, there are legally cognizable bases for recovery in both contract and tort.[7] (*Gerbert v. Yank* (1985) 172 Cal.App.3d 544.)

The grant of nonsuit by the trial court deprived Saribekyan of a fair trial. Had the trial court allowed the issue of negligence to go to the jury, the jury could have found BANA negligent and awarded her at least the over $2.5 million for her missing property. Further, the jury would have been required to consider and to decide the degree of negligence evinced by BANA's conduct and whether that conduct was willful. As the trial court recognized, these findings would have necessitated a reconsideration of the enforceability of the limitation of liability provision in BANA's Rules and Regulations.[8] Having taken that

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[7] An exemption from tort liability may in some cases be provided by contract, but that contractual limitation may be invalid. (See *Vilner, supra*, 89 Cal.App.3d at p. 735.)

[8] While BANA assumes that the trial court would have enforced the limitation of liability on Saribekyan's negligence damages in the same fashion as it did with the damages for breach of contract, that assumption is questionable. Civil Code section 1714 provides that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care . . . ." Contractual provisions releasing a party from liability for negligence are disfavored and are strictly construed against the party relying on them. (*Delta Air Lines, Inc. v. Douglas Aircraft Co.* (1965) 238 Cal.App.2d 95, 100.) For an agreement to preclude liability for affirmative negligence, there must be unequivocal language in the agreement. (*Vinnell Co. v. Pacific*

issue out of the trial, the trial court committed prejudicial error, which requires reversal of the judgment and a new trial.

C. *The Trial Court Erroneously Submitted the Legal Issue of Enforceability of a Contract to the Jury*

Over plaintiff's objection, the trial judge asked the jury to decide whether Saribekyan "agree[d] to be bound" by BANA's Rules and Regulations. The trial judge did not ask the jury to determine the factual issue of whether Saribekyan received the written Rules and Regulations at the time she signed the rental rgreement. From that answer, the trial judge would have had additional factual findings upon which to base a legal determination of whether the bank's agreement was

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Electric Ry. Co. (1959) 52 Cal.2d 411, 414-415.) In the agreement at issue here, the limitation language is contained in the Liquidated Damages provision and fails to clearly and unequivocally limit the bank's liability for its active negligence. Further, where, as here, the negligence arose from the bank's drilling open the box and failing to protect and preserve its contents, the rationale set forth in the Liquidated Damages provision (that the bank is not able to verify the contents of the box) does not apply. Once BANA drilled open Saribekyan's box, had it followed its own procedures, it would have been fully capable of verifying the contents of the box. Further, the jury may have found that BANA's conduct in this case amounted to willful or gross negligence. In such an instance, the law looks carefully and with skepticism at provisions attempting to contract away legal liability for the commission of such torts. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 751, 754 (*City of Santa Barbara*).) Although BANA argues that the jury never made such a determination here, the negligence cause of action was out of the case before the matter was remanded to the jury.

unconscionable. Rather, the jury was asked to adjudicate the enforceability of those terms based exclusively on whether Saribekyan agreed to be bound by them. And, the judge thereafter relied on that finding to enforce the limitation of liability provision.

Where, as here, the trial judge has erroneously submitted a legal issue to the jury, the appellate court must determine whether that error resulted in prejudice. (*Beasley, supra*, 235 Cal.App.3d at p. 1387.) In this instance, the error did, in fact, prejudice Saribekyan. The trial judge, relying upon this jury finding to enforce the limitation of liability, reduced the jury's award of $2,549,260 to just $2,460. Thus, prejudice from this error is obvious.

D. *The Limitation of Liability in the BANA Safe Deposit Box Rental Agreement Is Unenforceable as a Matter of Law*

The trial court enforced the limitation of liability provision in the BANA Safe Deposit Box Rental Agreement's Rules and Regulations. It found that this provision was neither unconscionable nor against public policy. This ruling is subject to de novo review and, for the reasons discussed below, we reverse.

Unconscionability has both a procedural and a substantive element. (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) The procedural element focuses on oppression or surprise. (*Ibid.*) Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed upon terms are hidden in the form drafted by the party seeking to enforce them. (*Ibid.*)

The substantive element considers the effects of the contractual terms and whether they are overly harsh or one-sided. (*Ibid.*)

In this case, the contract at issue—the rental agreement with the Rules and Regulations incorporated by reference—was one of adhesion. This agreement was a standardized contract imposed upon Saribekyan without an opportunity to negotiate its terms. And, the limitation of liability provision is buried in small print in a five-page document, incorporated by reference in the one-page rental agreement signed by Saribekyan that contained several other provisions. As for surprise, the facts here show that, although incorporated by reference, the Rules and Regulations containing this limitation of liability were never shown to Saribekyan or even available for her review at the time that she entered into the box rental agreement. There is no serious question here that the element of procedural unconscionability has been met.

As for substantive unconscionability in this case, the trial court ruled that the limitation was necessary where, as here, the bank rents out safe deposit boxes without knowledge of their contents or the value of the contents.[9] Citing Civil Code section 1840, the court found that liability of a depository for negligence cannot exceed the amount which it is informed of by the depositor, or has reason to suppose the thing deposited to be worth.

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[9] The case cited by BANA to this Court and to the trial court in support of this argument, *Nalbandyan v. Citibank, N.A.* (C.D.Cal. Jan. 27, 2017, No. LA CV15-09302 JAK-KKx) 2017 WL 549012, was reversed in relevant part in *Nalbandyan v. Citibank, N.A.* (9th Cir. June 12, 2019, No. 17-55856) 2019 U.S. App. Lexis 17579.

This statutory provision, however, has been held inapplicable to protect a safe-deposit company from liability for the actual value of a deposit lost by its negligence where the very manner of conducting its business contemplates that it shall not know nor be informed of the value or character of the contents of the box.[10] (*Cussen*, *supra*, 133 Cal. at p. 538.)

More importantly, in this case BANA breached these Rules and Regulations by drilling open Saribekyan's box without having first provided her the contractually required notice. At that juncture, despite how its business model is intended to operate, BANA had complete notice and possession of the contents of the box. On any occasion when BANA drills open a box, the claim that it cannot verify or protect the actual contents of the box is vitiated. Having breached one of its provisions, BANA now argues that the contract's limitations for the consequences of that breach—i.e., the theft or loss of Saribekyan's valuables—ought to be enforced for reasons wholly inapplicable in this case.

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[10] Many of the cases cited by BANA in support of the enforcement of such limitations of liability rest on the essential rationale that a property owner generally will maintain insurance coverage on its own property. (See, e.g., *H.S. Perlin Co. v. Morse Signal Devices* (1989) 209 Cal.App.3d 1289, 1295-1297 [enforcing liquidated damages in a burglar alarm contract].) That rationale has no application to the facts in this case. A reasonable consumer would neither have insured its personal property before placing it in a secure bank vault nor imagine that such protections are necessary. Nor was Saribekyan told, as she was not given the Rules and Regulations, that she would have to purchase her own insurance. (Compare *Cregg v. Ministor Ventures* (1983) 148 Cal.App.3d 1107, 1111.)

More fundamentally, if BANA cannot assure the security of contents of the safe deposit box maintained by it, then it may wish to consider renaming the service it provides. If this is a confidential, but not safe or secure, box, then it needs to expressly disclose that fact and to disclaim in a much more obvious fashion that it is renting a deposit box that may ultimately prove to be insecure. Alternatively, it may wish to require a boxholder to insure particularly valuable contents of the box before depositing them and to provide proof of insurance before completing the rental transaction. Such a requirement would draw the customer's attention to the fact that the contents of these boxes may be drilled open without notice, reviewed by different bank employees, placed in a bag that is not tamper-proof, thereafter sent to another location and then held for ransom in exchange for a signed release.

The reduction in the jury's award of more than $2.5 million in damages for the property lost or stolen after BANA opened a safe deposit box without sufficient notice and emptied its contents to less than $2,500 imposes terms that are " ' " 'so one-sided as to "shock the conscience." ' " ' "[11] (*Magno, supra,*

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[11] Other terms in the BANA Rules and Regulations are similarly unfairly one-sided. In one provision, BANA contractually exculpates itself from any liability arising from the bailment for hire that it has created under the Civil Code. It also requires the renter to assume all liability except that due to the bank's willful injury. The bank's contract requires that the renter "clearly prove[ ]" a willful act by the bank before liability "for any loss sustained" shall attach. Such limitations of liability are viewed unfavorably in California. (Civ. Code, § 1668; *City of Santa Barbara, supra,* 41 Cal.4th at pp. 751, 754.)

1 Cal.App.5th at p. 288.) The substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner. (*Ibid*.) Here, it would be wholly unexpected to Saribekyan—or any other safe deposit box renter—that BANA could fail to notify her, drill open her box without authorization, remove its contents—in violation of the bank's own procedures—without exercising reasonable care, lose or steal $2.5 million of its contents, and then limit its liability to $2,460 for such conduct.

Despite its bolded "Liquidated Damages" title, the limitation of liability in the BANA contract went beyond a liquidated damages provision in the event of breach of contract. Rather, it limited damages from a loss for "whatever" reason, to 10 times the monthly rental rate.[12] As a limitation of liability for negligence, this provision is contrary to the general policy in California to hold persons responsible for injuries caused through want of ordinary care. (Civ. Code, § 1714.)

Further, as a liquidated damages provision for a claim of contractual breach, BANA's limitation of liability fails to comport with Civil Code section 1671. When a liquidated damages provision is contained in a consumer contract, the provision is void except when it is impracticable or extremely difficult to fix the actual damage. (Civ. Code, § 1671, subd. (d); *Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern Cal., Inc.* (2006) 135 Cal.App.4th 1023, 1029 (*Utility Consumers'*).) As discussed above, we do not accept BANA's claim that fixing the amount of actual damages in cases where

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[12] To the extent that this provision could be read to exculpate BANA for any intentional or willful injury, the parties agree that it is unenforceable. (Civ. Code, § 1668.)

box contents have been stolen or lost is impracticable or extremely difficult.

For a liquidated damages provision to be enforceable, the amount selected "must 'represent a reasonable endeavor by the parties to estimate fair compensation for the loss sustained.' " (*Utility Consumers', supra* 135 Cal.App.4th at p. 1029.) In this instance, it cannot be argued that compensation limited to 10 times the box rental bears any reasonable estimate of the value of the contents of a safe deposit box. In fact, the sum is so paltry that it does not remotely reflect an amount that would justify the expense of a consumer renting a safe deposit box. If someone, like Saribekyan, is renting the largest-sized safe deposit box available and bringing a duffel bag of valuables to the bank, it cannot be said that the parties agreed to reasonably limit the bank's liability for the loss of its contents to less than $2,500. Were a box's contents worth so little, no rational consumer would pay the annual rental expense to keep these items secure. Where, as here, the liquidated damages amount does not represent a reasonable endeavor by the parties to estimate a fair average compensation for the loss, it is unenforceable. (*McCarthy v. Tally* (1956) 46 Cal.2d 577, 584.)

E. *Punitive Damages and Attorney Fees and Costs*

Saribekyan appeals three other rulings made by the trial judge. She argues that the court erred in remitting the jury's $2 million punitive damages award and in rejecting Saribekyan's claim that she was the prevailing party entitled to attorney fees and costs.

We need not reach two of these issues. The trial court based its reduction in the punitive damages amount on its earlier decision to limit Saribekyan's conversion claim to exclude

amounts that were stolen or lost after BANA took possession of the contents of the box. As we find that ruling erroneous, the jury's $15,000 award on this cause of action cannot form the basis for a reduction in an award of punitive damages based on constitutional proportionality. Similarly, the trial court's ruling on attorney fees flowed from its decision that Saribekyan was not the prevailing party. That ruling rested largely on the court's enforcement of BANA's limitation of liability clause. As we find that provision unenforceable, the trial court's attorney fee decision relying on that limitation is also erroneous.

The trial court erred in denying Saribekyan her costs based on her failure to comply with California Rules of Court. Based on the trial judge's own instructions, the parties prepared a judgment that left blank for the court to decide later who was the prevailing party and how much costs and attorney fees the prevailing party was to recover. This was done because BANA argued that the posttrial motions could impact who would be declared the prevailing party. Saribekyan could not have filed a memorandum of costs within 15 days after notice of the entry of judgment because at that time, she had not been declared the prevailing party. Saribekyan did, however, timely file her motion less than 30 days after the trial court ruled on judgment notwithstanding the verdict and new trial motions. Thus, her motion was timely under the California Rules of Court and consistent with the trial court's instruction that she file that motion after the posttrial motions had been heard and decided and the court would be in a position to determine whether Saribekyan was the prevailing party. Further, while a memorandum of costs is an optional form approved by the Judicial Council, the law does not require that costs be requested

only in this way. (See *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1016.) Because, however, the issue of whether Saribekyan was the prevailing party has been remanded for determination after a new trial, the issue of whether costs are recoverable by that prevailing party is similarly remanded.

DISPOSITION

The judgment is reversed and remanded for proceedings consistent with this opinion. Plaintiff shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JONES, J.*

We concur:

EDMON, P.J.,

EGERTON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.