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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAVEL CABUTA et al., Plaintiffs and Appellants, v. HILLER & HILLER CPA's et al., Defendants and Respondents.	B279422 (Los Angeles County Super. Ct. No. KC066965)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert A. Dukes, Judge. Affirmed.

Law Offices of Thomas M. McIntosh, Thomas M. McIntosh for Plaintiffs and Appellants.

Garrett & Tully, P.C., Stephen J. Tully and Tomas A. Ortiz for Defendant and Respondent Hiller & Hiller CPA's.

Smythe Law Group, Inc., and Michelle J. Smythe; Bissell and Associates P.C., and Olivia O. Bissell for Defendant and Respondent West Coast Construction Alliance, Inc.

Plaintiffs and appellants C&P Construction Company, Inc. (C&P) and Paul Cabuta (together, Plaintiffs) sued Hiller & Hiller, CPAs (Hiller) after allegedly discovering misappropriations of C&P's corporate funds. The trial court granted Hiller's motion for summary judgment on the ground that Plaintiffs failed to produce evidence that Hiller caused them injury. We affirm the judgment and impose monetary sanctions against Cabuta and his attorney.

FACTUAL AND PROCEDURAL BACKGROUND

Complaint

According to the operative first amended complaint, C&P is a construction company that focuses primarily on natural disaster, accident, fire, and other repair work. Cabuta is the president and majority shareholder of C&P.

Jeff Janes was a minority shareholder of C&P and employed as C&P's chief financial officer and treasurer from 1998 until 2011. Jeff Janes also owns West Coast Construction Alliance, Inc. (West Coast Alliance) and West Coast Construction (together, West Coast), which are construction companies providing similar services to C&P. Jeff Janes's wife, Sandra Janes, worked as C&P's bookkeeper.

Sometime around 1998, the Janeses[1] allegedly began misappropriating C&P corporate funds for their own personal use. Although not entirely clear from the complaint, C&P appears to allege that some of the misappropriated funds were used to capitalize West Coast. In addition, West Coast allegedly misappropriated C&P's trade secrets, usurped business opportunities from C&P, and converted C&P's assets.

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1 We refer to Jeff and Sandra Janes as the Janeses.

Hiller is a professional tax and accounting firm. C&P engaged Hiller to prepare its corporate income taxes and provide accounting related services from 1999 through 2009. Plaintiffs alleged that Hiller was aware of improprieties by the Janeses, yet continued to approve C&P's corporate books and file tax returns containing improper personal expenses. In addition, C&P allegedly filed tax returns with various other errors, including misstating Cabuta's ownership interest in C&P and erroneously representing that Jeff Janes was C&P's president. Hiller also allegedly failed to involve Cabuta in C&P's accountings, despite Hiller's awareness that Cabuta was president of C&P.

C&P asserted causes of action against Hiller for professional negligence, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud. Cabuta asserted a single cause of action for breach of fiduciary duty against Hiller.[2] Plaintiffs asserted causes of action against West Coast for conversion, declaratory relief, an accounting, unjust enrichment, equitable relief, unfair competition, intentional and negligent interference with prospective economic advantage, and misappropriation of trade secrets.[3]

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[2] Although not evident from the record, according to Hiller, the trial court sustained a demurrer as to Cabuta's sole claim against it. Plaintiffs do not deny this in their reply brief.

[3] Plaintiffs also asserted that West Coast and Hiller engaged in a conspiracy to fraudulently convert C&P's income and assets. Plaintiffs do not refer to this claim on appeal, and appear to have abandoned it.

Hiller's Motion for Summary Judgment

In May 2016, Hiller filed a motion for summary judgment as to C&P's claims on the grounds that C&P could not show reliance or causation as to any of its claims, C&P's claims were time barred, Hiller did not owe C&P a fiduciary duty, and C&P could not establish scienter with respect to its fraud claim. In support of its argument that C&P could not show reliance or causation, Hiller produced evidence that it was hired only to prepare C&P's income taxes and with the understanding that it could rely on information provided by C&P's management to be accurate and correct. It also produced evidence showing it was not engaged to provide oversight and direction to C&P's management, nor was it engaged to audit or verify information provided to it by C&P's management. Hiller further produced evidence showing it did not control C&P's money or assets, did not have check writing authority, and did not have authority to oversee the day-to-day financial affairs of the company. Hiller argued that, given its limited engagement and authority, it was unreasonable for C&P to rely on it to monitor the company's financial condition and disclose improper expenditures, and Hiller cannot be held "causally responsible" for failing to do so.

In opposition to Hiller's motion, C&P submitted a declaration from Cabuta in which he declared that Hiller was initially hired to provide tax preparation services, but he learned in 2012 that Hiller had made changes to entries and re-categorized line items in C&P's financial documents. C&P also submitted a declaration from a certified public accountant, David Hanzich, who opined that Hiller made changes to C&P's financial documents "for the purpose of expense re-allocation," which "had a significant and material impact on the net taxable income

of the firm." Hanzich further opined that Hiller's involvement "far exceeded Mr. Cabuta's understanding that [Hiller] was only preparing [C&P's] corporate tax returns. Rather, [Hiller] [was] in fact, integrally involved in the preparation of the internal accounting and financial statements of the enterprise."

C&P argued that, once Hiller went beyond the original scope of its employment, C&P was "justified in relying that [Hiller] would not commit acts of negligence or fraud." C&P additionally asserted that Hiller "redirect[ed] assets [and] re categoriz[ed] assets for the benefit of one shareholder over another without disclosure to the other shareholders," which was "evidence of causation."

At oral argument, C&P's counsel argued that Hiller's actions caused injury because, as a result of its re-categorization of personal expenses as corporate expenses, C&P may face additional tax liabilities, fines, and penalties. In support, counsel pointed to a 2012 memorandum drafted by Hanzich,[4] in which he opined that "the personal expenses incurred by Jeff Janes and Sandra Janes were also posted as operating expenses in the profit and loss statements of [C&P] . . . . The internal financial statements . . . were used as the basis for the corporate tax filing. The personal expenses reported as operating expenses . . . were not eliminated from the profit and loss statement by the outside tax accountant [Hiller]. Therefore, we believe that the net income of the business was significantly understated from 1998 through 2011, which may expose the corporation to additional tax liabilities, penalties and exposure to fines and penalties related

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[4] Hiller submitted the 2012 memorandum in support of its motion for summary judgment, but it is not clear for what purpose.

to tax fraud."

The court granted Hiller's motion for summary judgment, finding there was no evidence that Hiller caused any injury to C&P or assisted in the misappropriation of corporate funds.[5] The court noted that, even if Hiller reallocated expenses in such a way as to materially impact C&P's net taxable income, C&P failed to explain how this caused it harm or benefited the Janeses. In addition, C&P failed to provide any evidence to support its assertion that Hiller redirected or re-categorized assets for the benefit of one shareholder over another. The court also determined Hiller owed no fiduciary duty to C&P, and C&P failed to raise a triable issue of any fraud or concealment.[6]

The court entered judgment in Hiller's favor on September 26, 2016. On October 5, 2016, Hiller served on Plaintiffs notice of entry of judgment.

West Coast's Motion for Summary Judgment

In May 2016, West Coast filed a separate motion for summary judgment. The court granted the motion on August 2, 2016.

On August 22, 2016, West Coast served on Plaintiffs a document titled, "Notice of Entry of Order Granting Defendant West Coast Construction Alliance, Inc.'s Motion for Summary Judgment" (Notice of Entry of Order). The notice does not refer

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[5] Plaintiffs failed to include in the record on appeal a signed copy of the court's order granting summary judgment. Instead, the record contains only an unsigned "proposed" order, drafted by Hiller. Both parties, however, refer to and rely on the proposed order as though it is the court's final order.

[6] The court found triable issues as to whether Plaintiffs' claims were time barred.

to a judgment. Attached to the Notice of Entry of Order was a copy of the court's seven-page order granting West Coast's motion for summary judgment. The order states the following: "THE COURT ORDERS: 1. That judgment be entered in favor of [West Coast] and against Plaintiffs . . . ."

Notice of Appeal

Plaintiffs filed a notice of appeal on December 5, 2016. The notice states that Plaintiffs appeal from the trial court's September 26, 2016 judgment after an order granting a summary judgment motion. The notice does not refer to any orders or judgments related to West Coast's motion for summary judgment.

STANDARD OF REVIEW

"Summary judgment is proper where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) To prevail on a summary judgment motion, the moving defendant has the initial burden to show a cause of action has no merit because an element of the claim cannot be established or there is a complete defense to the cause of action. (*Id*. subd. (o); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) To satisfy this burden, the defendant must present evidence which either conclusively negates an element of the plaintiff's cause of action, or which shows the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855.) Once the defendant has made this showing, the burden shifts to the plaintiff to set forth specific facts which show a triable issue of material fact exists. [Citation.]" (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1581.)

"We review the trial court's decision de novo, considering all the evidence presented by the parties (except evidence properly excluded by the trial court) and the uncontradicted inferences reasonably supported by the evidence. [Citation.] The evidence is viewed in the light most favorable to the plaintiff, liberally construing the plaintiff's submissions while strictly scrutinizing the defendant's showing, and resolving any evidentiary doubts or ambiguities in the plaintiff's favor. [Citation.]" (*Namikas v. Miller, supra,* 225 Cal.App.4th at p. 1581.)

Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 (*Perry*); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 854.) It is no longer called a "disfavored" remedy. "Summary judgment is now seen as "a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry*, at p. 542.)

DISCUSSION

I. We Decline to Consider Arguments Related to West Coast Because Plaintiffs Have Not Appealed Any Order or Judgment Related to West Coast

Plaintiffs' opening brief on appeal includes substantial argument challenging the trial court's order granting West Coast's motion for summary judgment. We decline to consider these arguments because Plaintiffs have not appealed any order or judgment related to West Coast's motion.

Per the Rules of Court, "[t]o appeal from a superior court judgment or an appealable order of a superior court . . . an appellant must serve and file a notice of appeal" that "identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a).) In general, we lack jurisdiction to review orders or judgments that are not identified in a notice of appeal. (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 44–45; *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 967.) Although we must liberally construe notices of appeal, (Cal. Rules of Court, rule 8.100(a)(2)), the rule of liberal construction does not permit appellate review of a judgment or appealable order where a notice of appeal unambiguously evidences an intent to appeal from a different judgment or appealable order. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624–625; *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173.) In other words, when the judgment or appealable order appealed from is clear and unmistakable from the notice of appeal, we are without jurisdiction to liberally construe the notice of appeal to encompass judgments or appealable orders that are not specifically identified.

Here, Plaintiffs' notice of appeal clearly and unmistakably seeks review of the trial court's September 26, 2016 judgment after its order granting Hiller's motion for summary judgment. It does not identify, explicitly or implicitly, any other appealable orders or judgments, including any orders or judgments related to West Coast's motion for summary judgment.[7] As a result, our

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[7] In their reply brief, Plaintiffs admit they filed the notice of appeal "based on the judgment and the entry of judgment filed by" Hiller.

review is limited to the trial court's September 26, 2016 judgment. Plaintiffs' arguments regarding West Coast's motion for summary judgment are irrelevant to that review, and we disregard them in our consideration of this appeal.[8]

II. The Trial Court Properly Granted Hiller's Motion for Summary Judgment

Plaintiffs[9] contend the trial court erred in granting Hiller's motion for summary judgment based on the lack of triable issues related to causation, reliance, and damages.[10] We disagree.

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[8] West Coast asks that we dismiss the appeal with prejudice because the notice of appeal was not timely filed within 60 days of the August 22, 2016 Notice of Entry of Order. (Cal. Rules of Court, rule 8.104(a)(1).) Plaintiffs, in turn, suggest their time to appeal did not begin running on August 22, 2016 because the Notice of Entry of Order refers to a non-appealable order, rather than a judgment. (See *Saben, Earlix & Associates v. Fillet* (2005) 134 Cal.App.4th 1024, 1030 ["a summary judgment is appealable, but an order granting summary judgment is not"]; Code Civ. Proc., § 437c, subd. (m)(1).) We need not decide this issue because, by virtue of Plaintiffs' failure to file a notice of appeal related to West Coast's motion for summary judgment, there is no pending appeal involving West Coast for us to dismiss. Further, there is no dispute that Plaintiffs' notice of appeal was timely as to the Hiller judgment.

[9] Confusingly, Cabuta appears to join C&P's arguments, despite the fact that summary judgment was not entered against him.

[10] We do not consider Plaintiffs' arguments related to fiduciary duty and scienter, as Plaintiffs asserted such arguments for the first time in their reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

Initially, Plaintiffs' briefing is wholly inadequate. Despite the fact that Plaintiffs assert the trial court erred in overlooking relevant evidence, they fail to provide a single meaningful citation to evidence in the record in support of their arguments on appeal. The entire argument section of Plaintiffs' opening brief contains one purported citation to the record, which is a citation to "CT." This appears to be an attempted citation to a clerk's transcript. However, there is no clerk's transcript in this case as Plaintiffs chose to provide a separate appendix in lieu of clerk's transcript.

Plaintiffs' legal analysis is similarly lacking. For example, Plaintiffs' entire analysis of the damages issue consists of a single, wholly conclusory sentence: "There were actual damages caused by the actions of [Hiller] to both C & P and Cabuta as stated in the reports of expert David Hanzich and presented at the hearing on June 2, 2016." Making matters worse, Plaintiffs do not identify the Hanzich reports to which they refer, and we have no record of a hearing on June 2, 2016.[11]

Further, much of the authority Plaintiffs recite has seemingly no relevance to the issues before us. For example, Plaintiffs devote nearly an entire page of their argument related to Hiller to a recitation of authority on unjust enrichment and restitution. However, they do not seek restitution from Hiller or assert that it was unjustly enriched. Plaintiffs also cite authority for the proposition that reliance by an agent may be imputed to a principal, but fail to explain how the law of agency has any

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[11] Although it is possible Plaintiffs intended to refer to the oral argument on June 16, 2016, no evidence was presented at that hearing.

relevance to this case.

Because Plaintiffs' arguments are not fully developed and not supported by sufficient citations to the record, they are subject to forfeiture. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.) Even on de novo review, we are " 'not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record.' " [Citation.]" (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Indeed, " '[d]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues . . . .' [Citation.]" (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.) Although we could deny Plaintiffs' appeal on this basis, we nonetheless briefly consider their arguments and find them meritless.

Each of C&P's claims against Hiller required a showing that Hiller caused injury to Plaintiffs. (See *Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [professional negligence]; *Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1114 [breach of fiduciary duty]; *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 [breach of contract]; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 [fraud].) In connection with its motion for summary judgment, Hiller presented evidence showing that, because of its limited engagement and authority, it could not have caused injury to Plaintiffs in the manner alleged. This was sufficient to satisfy Hiller's initial burden.

In opposition, C&P presented evidence—in the form of declarations from Cabuta and Hanzich—showing Hiller acted beyond the scope of its initial engagement by making changes to C&P's financial documents. Neither declaration, however, showed that Hiller caused Plaintiffs harm by virtue of its actions. In the relevant portion of Cabuta's declaration, for example, he merely asserts he became aware that Hiller made changes to C&P's financial documents. Cabuta does not explain what those changes were, how they were improper, or how they negatively affected Plaintiffs.

Hanzich's declaration is similarly deficient. Hanzich asserts that Hiller made changes to C&P's financial documents "for the purpose of expense re-allocation," which had a "significant and material impact on the net taxable income of the firm." Like Cabuta, Hanzich does not specifically identify what changes Hiller made or explain how the changes negatively impacted Plaintiffs. Nor does he opine that Hiller's actions were in any way improper.

We acknowledge that the record before the trial court contained a 2012 memorandum by Hanzich in which he opined that "the net income of [C&P] was significantly understated from 1998 through 2011, which may expose the corporation to additional tax liabilities, penalties and exposure to fines and penalties related to tax fraud." Initially, it is doubtful Hanzich continued to maintain the opinions expressed in the 2012 memorandum. Plaintiffs did not submit or cite the 2012 memorandum in their opposition to Hiller's motion for summary judgment.[12] Instead, they submitted a separate declaration from

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[12] Plaintiffs did reference the 2012 memorandum at oral argument, but did not explain their failure to cite the

Hanzich dated June 1, 2016, in which he fails to mention that Hiller's actions could cause potential exposure to additional tax liabilities and penalties. This strongly suggests Hanzich no longer held such an opinion as of June 2016.

In any event, we do not find Hanzich's 2012 memorandum sufficient to survive summary judgment. The memorandum does not directly attribute to Hiller any fault for understating C&P's income in the tax filings. Although it states that Hiller did not remove personal expenses from financial statements that were the basis for the tax filings, Hanzich did not opine that Hiller had any duty to do so. Nor have Plaintiffs otherwise established such a duty. Moreover, Hanzich's opinion that Plaintiffs *may* face future tax liabilities is far too speculative to constitute evidence of damages sufficient to survive summary judgment. (See *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 952 [on summary judgment, court properly excluded as speculative evidence of potential tax liability where it was uncertain whether or how much plaintiffs would pay].)

III. Sanctions

West Coast Alliance filed a separate motion requesting that we impose monetary sanctions on Cabuta and his attorney[13] because Plaintiffs' appeal is frivolous, was improperly noticed, and was untimely filed as to West Coast.[14] (See Code Civ. Proc.,

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memorandum in their briefing and separate statement.

[13] West Coast Alliance asks that we not order sanctions against C&P because it is no longer an active business.

[14] On February 7, 2018, we provided notice that we were considering issuing sanctions. (Cal. Rules of Court, rule 8.276(c).)

§ 907; Cal. Rules Court, rule 8.276(a).) West Coast Alliance requests sanctions in the amount of $7,500, which represents its attorney fees incurred in connection with this appeal.[15] We find sanctions in the amount of $5,000 are warranted pursuant to Rules of Court, rule 8.276(a)(4), which allows us to impose sanctions on a party or attorney for "any . . . unreasonable violation" of the Rules of Court.

Here, Plaintiffs unreasonably violated Rules of Court rule 8.100, which mandates that "[t]o appeal from a superior court judgment or an appealable order of a superior court . . . an appellant must serve and file a notice of appeal" that "identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a).) Although Plaintiffs purport to appeal the trial court's ruling on West Coast Alliance's motion for summary judgment, they neglected to file a notice of appeal identifying any judgment or order related to West Coast Alliance. Instead, Plaintiffs attempted a backdoor challenge to the West Coast Alliance ruling by surreptitiously inserting argument related to that ruling into their opening brief of the Hiller appeal. This was a clear and wholly unreasonable violation of rule 8.100. As a result of Plaintiffs' conduct, West Coast Alliance was forced to involve itself in the Hiller appeal, and incurred otherwise unnecessary attorney fees in the process. We find it just that Plaintiffs, rather than West Coast Alliance, bear the costs for their unreasonable violation of the Rules of Court.

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[15] West Coast Alliance submitted evidence showing its attorney fees in connection with this appeal were $7,500. Plaintiffs do not argue that this amount was excessive, and we find it reasonable given the work performed.

We acknowledge, however, that West Coast Alliance shares some blame for the current situation. Although it maintains the Notice of Entry of Order provided proper notice of an entry of judgment, the notice does not explicitly state that judgment was entered. In fact, the only mention of a judgment is on the second to last page of the seven page order granting West Coast's motion for summary judgment, which was included as an attachment to the Notice of Entry of Order. It is understandable that Plaintiffs were confused as to the nature of the notice and procedural posture of the case.[16] Nonetheless, Plaintiffs easily could have cleared any confusion by simply asking the trial court whether judgment had been entered. The solution was not to violate the Rules of Court and involve West Coast Alliance in an otherwise unrelated appeal, thus causing it to incur fees unnecessarily.

Under these circumstances, we find sanctions in the amount of $5,000, rather than the requested $7,500, are warranted.

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[16] We do not mean to suggest the court's "Order Granting [West Coast's] Motion for Summary Judgment" constituted a judgment, or that West Coast provided sufficient notice of that judgment. We express no opinions on those issues.

DISPOSITION

The judgment is affirmed. Hiller and West Coast Alliance are awarded their costs on appeal. West Coast Alliance's motion for sanctions is granted. Cabuta and his attorney, Thomas McIntosh, are ordered to pay West Coast Alliance sanctions in the amount of $5,000. Cabuta and McIntosh are jointly and severally liable for the sanctions, and they shall pay them to West Coast Alliance within 30 days.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.