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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ERIC KWEON, Plaintiff, Cross-defendant and Appellant, v. SANG YUN LEE et al., Defendants, Cross-complainants and Appellants.	B278027 (Los Angeles County Super. Ct. No. BC519767)

APPEAL from orders of the Superior Court of Los Angeles County. Barbara Marie Scheper, Judge. Affirmed in part; reversed in part; and remanded to trial court with directions.

Browne George Ross, Peter W. Ross, Benjamin D. Scheibe and Corbin K. Barthold for Plaintiff, Cross-defendant and Appellant.

Horvitz & Levy, David S. Ettinger, Steven S. Fleischman; Parker Mills, David B. Parker; and Limnexus, Bryan King Sheldon and David Yang for Defendants, Cross-complainants and Appellants.

This action stems from a rift between the majority owner and minority owner of a sewing company called Trinity Sports, Inc. (Trinity). The minority owner, Eric Kweon (Kweon), believed he was being treated unfairly by the majority owner, Sang Yun Lee (Lee), and left the company. Kweon proceeded to form a competing company that took the business of Trinity's primary customer. Along the way, Kweon's company hired away many of Trinity's employees.

Kweon sued Lee to recover wrongfully withheld Trinity profits. In turn, Lee and Trinity (collectively the Trinity Parties), cross-complained against Kweon for breach of fiduciary duty, intentional interference with Trinity's customer, and intentional interference with Trinity's employees. The jury found in favor of the Trinity Parties. Based upon Kweon's posttrial motions, the trial court granted JNOV[1] on the interference claims (and thereby, by default, denied a new trial as to the interference claims), denied JNOV as to the Trinity Parties' breach of fiduciary duty claim, and granted a new trial as to all claims as to which JNOV was not granted.

Both parties appeal.

We affirm the order granting JNOV as to the Trinity Parties' claim that Kweon interfered with Trinity's employees, the order denying JNOV as to the Trinity Parties' fiduciary duty claim, and the order granting a new trial as to all claims as to which JNOV was not granted.

We reverse the order granting JNOV as to the Trinity Parties' claim that Kweon interfered with Trinity's customer. In

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[1] Judgment notwithstanding the verdict (JNOV).

addition, we reverse the trial court's default denial of a new trial as to that same claim.

On remand, the trial court is directed to conduct a new trial on all three of Kweon's claims against Lee and on the Trinity Parties' claims against Kweon for breach of fiduciary duty and interference with its customer.

FACTS

Trinity and Its Two Owners; Citizens of Humanity

Trinity specialized in sewing premium denim and its primary customer was Citizens of Humanity. Lee was the majority shareholder and chief executive officer, and Kweon was a minority shareholder and vice-president. Kweon claimed to own 20 percent of Trinity; Lee claimed Kweon only owned 10 percent. The evidence as to whether it was 10 or 20 percent was conflicting.

Lee used Trinity funds for a timeshare, a car and car insurance; he claimed the expenses were for Trinity's benefit. During a year of financial crisis, Lee's total compensation went up and Kweon's total compensation went down.

With respect to Citizens of Humanity, Kweon was the primary liaison and he attended its weekly production meetings. Gary Freedman (Freedman) was Citizens of Humanity's primary point of contact.

Kweon's Meeting with Freedman; Kweon's Resignation; Other Events in Early 2012

Kweon met with Freedman in January 2012. In the same month, Kweon suggested to Lee that Trinity charge Citizens of Humanity higher prices. Around that time, if not a little later, a Trinity employee was in Kweon's office and saw a photo of a

warehouse ceiling with little American flags across it. According to the employee, it was not a photo of a Trinity warehouse.

On April 11, 2012, Kweon resigned. At the time, Trinity had about 350 employees.

On the day he resigned from Trinity, Kweon deleted all data from his company computer and smart phone. That same day, the chief operating officer of Citizens of Humanity, Federico Pagnetti (Pagnetti), sent Kweon the following email: "[Kweon], so the decision is made? Hope we can meet again soon." After Kweon cleaned out and left his office at Trinity, an external hard drive was missing.

The Formation of Oheck; Hiring and Solicitation of Trinity Employees

Freedman testified that soon after Kweon resigned, they had lunch and Freedman proposed that Kweon either work for Citizens of Humanity or open a sewing factory. At some point they agreed to form a company called Oheck.[2] Once Oheck was formed, Citizens of Humanity owned 49.9 percent and Kweon owned 45 percent. A Citizens of Humanity officer owned the rest.

The Oheck operating agreement provided that it would charge Citizens of Humanity no more than what Trinity had charged prior to Kweon's resignation. The parties contemplated that Citizens of Humanity would give as much business as it wanted to Oheck, and Oheck would be obligated to do that business.

On May 14, 2012, Citizens of Humanity leased a warehouse for Oheck and Kweon converted it into a factory for sewing. In

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[2] The Trinity Parties maintain that Oheck was planned while Kweon was still an officer at Trinity.

doing so, he installed an air compressor and boilers. The lines for those were run through the ceiling of the leased property. For each sewing machine, there was a drop down line for electricity and air.

Oheck began hiring in July 2012. It hired many former Trinity employees.

A Trinity employee, Yaret Parra (Parra), was called by Alonso Lima (Lima) in July 2012. Lima was a former Trinity employee and current Oheck employee. He said that Kweon was offering Parra a job. According to Lima, it would be better pay and health benefits, and it would be a better environment. Also, Lima said that Trinity was going to close. Lima contacted Parra again several months later about employment. Juan Martinez (Martinez), another former Trinity employee, contacted Parra in October or November 2012. He said he was working at Oheck, that Kweon was offering Parra a job, that Oheck would provide better pay and benefits, and that Trinity would close.

Elvira Rincon (Rincon) is Parra's mother and also worked at Trinity. Rincon was contacted by a person she knew as "Rene." He said she should tell her two daughters, Parra and "Maribel," to work for Kweon because it would be a better salary and a "better deal." In addition, Rene represented that Trinity was going to close.

The Fall of Trinity and Rise of Oheck

Initially, Citizens of Humanity continued to give work to Trinity. But a few months after Kweon resigned, Trinity began losing key employees. Six months after Kweon resigned, Trinity's workforce was cut in half, down from 350 employees to about 170 or 180.

In August 2012, Citizens of Humanity began asking Trinity to fulfill small orders. Lee asked for assurances that Trinity would receive the same business it had received from Citizens of Humanity in the past. He did not get those assurances. At one point, Citizens of Humanity informed Lee that it would be giving work to Oheck. In Lee's opinion, Citizens of Humanity drove Trinity to end their business relationship. In September 2012, Trinity lost about 70 to 80 more employees. Oheck ultimately became Citizens of Humanity's exclusive sewing contractor.

Trinity received no work from Citizens of Humanity after September 2012. As of Spring 2013, Lee did not take a salary. He borrowed money from a line of credit to pay employees. At one point, he tried to sell Trinity but was unsuccessful. Later, he started selling its assets through an auction company. The sale of the assets resulted in a return of $750,000. With that money, he paid off the line of credit and negotiated a buy-out of his lease. Trinity shut down in December 2014.

Oheck's Periods of Nonregistration

At some point, Oheck filed an application to register as a garment manufacturer. That application was signed by Kweon on August 1, 2012. Oheck, however, did not receive a certificate from the Department of Industrial Relations until early October 2012. Thus, between mid-August 2012 and early October 2012, Oheck was operating without registration. It again operated without registration between October 2, 2013, and October 28, 2013.

The Pleadings

In the first amended complaint, Kweon sued Lee for breach of fiduciary duty, unjust enrichment, and constructive fraud.[3] According to the pleading, Lee used Trinity funds for personal expenses, paid himself exorbitant salaries and bonuses, and used misleading accounting to defraud Kweon out of his share of Trinity's profits.

In their answer, the Trinity Parties raised the statute of limitations as an affirmative defense.

The Trinity Parties cross-complained against Kweon and Oheck. Against Kweon, the first amended cross-complaint alleged: breach of fiduciary duty, interference with prospective economic advantage pertaining to Trinity's relationship with Citizens of Humanity, intentional interference with the contractual relations between Trinity and its employees, and unfair competition (violation of Bus. & Prof. Code, § 17200 et seq.). Oheck was sued for intentional interference with contractual relations between Trinity and its employees as well as unfair competition.

Trial; Jury Instructions

Aside from offering evidence already summarized above, the jury heard the following: A damages expert opined that Kweon was deprived of $2 million to $6.8 million in profit distributions and simple interest depending on how large his ownership interest was at various times while he was working at Trinity.

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[3] The first amended complaint named Trinity as a defendant, and it alleged accounting and dissolution claims. Prior to trial, Kweon dismissed Trinity and dismissed his accounting and dissolution claims.

With respect to the claim that Kweon breached his fiduciary duty to Trinity, Lee opined that it would take "at the very least" about six months to start a premium denim sewing factory from scratch. The implication was that because Oheck was operating in less time than six months, Kweon and Freedman must have formed or been planning to form Oheck before Kweon resigned.

The Trinity Parties' damages expert, David Weiner (Weiner), reviewed Trinity's financial records and tax returns. He noted that its profit margin was 17 percent of revenues and its expenses were 83 percent of revenues. He also noted that Trinity had steady revenue for nine years. From that, he derived a weighted average.

Weiner opined regarding Trinity's lost profits based on an assumption that Kweon's interfered with its business. The lost profits ranged from $1.54 million to $13.66 million depending on different scenarios for how long Trinity could have kept operating.

The jury received various instructions.

On Lee's statute of limitations defense, the jury was instructed: "Lee contends that Kweon's lawsuit was not filed within the time set by law. To succeed on this defense, Lee must prove that Kweon's claimed harm occurred before August 29, 2010 unless Kweon proves that before August 29, 2010, he did not discover, and did not know of facts that would have caused a reasonable person to suspect, Lee's wrongful act or omission." In addition, the jury was instructed, "If you find that Eric Kweon had notice of facts sufficient to arouse the suspicions of a reasonable person about Lee's alleged wrongful act or omission, Kweon had a duty to investigate and is charged with the

knowledge that he would have obtained from sources open to his investigation."

Regarding Kweon's actions the day that he resigned, the jurors were instructed: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

With respect to the claim that Kweon interfered with Trinity's relationship with its employees, the jurors were instructed: "Neither Oheck nor [Kweon] can be held liable for statements made to Trinity's employees by Rene[,] Martinez and/or [Lima] unless you find that they were acting in the course and scope of their employment for Oheck or were authorized to make the statements by [Kweon] or Oheck." Adding on to that, the trial court explained to the jury that it "should view testimony about an oral statement made by a party outside the courtroom with caution."

As to Oheck's failure to register as a garment manufacturer during certain times, the jury was told: "Every company engaged in the business of garment manufacturing must register with the Labor Commissioner. Any company engaged in the business of garment manufacturing who is not registered is guilty of a misdemeanor."

The Special Verdict; Statement of Decision

In the special verdict, the jury found that Kweon's claims for breach of fiduciary duty, unjust enrichment and constructive fraud were time-barred.

The jury found in favor of Oheck on the Trinity Parties' claims for interference with Trinity's contractual relationships with its employees.

Regarding the Trinity Parties' claims against Kweon, the jury found in their favor with respect to breach of fiduciary duty, interference with its relationship with Citizens of Humanity, and interference with Trinity's relationships with its employees. The jury awarded $1.5 million in damages. Despite finding that Kweon acted with malice, oppression or fraud, the jury awarded no punitive damages.

In its statement of decision, the trial court indicated that it found in favor of Oheck and Kweon on the Trinity Parties' unfair competition cause of action.

Kweon's Motions for JNOV and a New Trial

Kweon filed a motion for JNOV as well as a motion for new trial. The JNOV motion was premised on insufficiency of the evidence to support the verdict. As for the motion for new trial, it was asserted based on insufficiency of the evidence; the verdict and/or other decision was against the law; there was an error in law occurring at the trial and excepted to by Kweon; irregularity in the proceedings by which Kweon was prevented from having a fair trial; improper orders or an abuse of discretion by the trial court; inadequate damages; and accident or surprise.[4] The motion for new trial listed 16 questions on which Kweon wanted a new trial, including the statute of limitations.

The trial court granted Kweon's motion for JNOV as to the Trinity Parties' claims that Kweon interfered with Trinity's relationships with its employees and its relationship with Citizens of Humanity. In contrast, the trial court denied Kweon's

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[4] These are grounds recognized for a new trial in Code of Civil Procedure section 657, subdivisions (1), (3), (5), (6), and (7).

motion for JNOV as to the Trinity Parties' claim that Kweon breached his fiduciary duty.

The JNOV order explained that the Trinity Parties failed to identify "a single employee who left Trinity to work for Oheck based on the conduct of Kweon." It also stated: "As to both interference claims, [the Trinity Parties] [were] required to prove that Kweon's conduct was a substantial factor in causing Trinity's harm. [¶] At the close of the evidence Kweon moved for nonsuit as to both interference claims. The [trial court] denied the motion. The [trial] court concludes that this was error. . . . There was simply no causal connection between the alleged lack of a garment manufacturer's license and any harm to Trinity. Likewise, the deletion of the computer files admittedly caused no harm to Trinity. The alleged defamatory statement[s Kweon made to Trinity employees—that Trinity would go out of business—were] non-actionable opinion regarding a possible future event.[5] The only other alleged wrongful conduct was identified as Kweon's breach of fiduciary duty making the interference claim duplicative of the breach of fiduciary duty claim. Accordingly, the court grants the motion as to the interference claim." Last, the order stated: "The motion is denied as to the breach of fiduciary duty claim. The court finds that . . . evidence was sufficient to support the jury's finding in favor of [the Trinity Parties] on this claim."

The motion for new trial was granted "as to all Kweon's claims against Lee in the complaint and the [breach of fiduciary duty] claim against Kweon in the cross-complaint." The order

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5 Presumably, the trial court was referring to the statements made by Lima, Martinez, and Rene.

stated: The trial court erred when it allowed the testimony of Parra and Rincon regarding the statements of Lima, Martinez, and Rene. "The foregoing statements are hearsay offered to prove that Kweon was interfering with Trinity's employees. No evidence was offered to establish that the third parties, Lima, Martinez or Rene, were agents of Kweon or authorized to speak on his behalf. No exception to the hearsay rule applies. And, in point of fact, neither Parra nor Rincon were persuaded to leave Trinity based on these statements. As mentioned above, no Oheck employee was called to testify as to why he or she left Trinity.

"The court also erred in allowing the jury to consider the lack of a garment manufacturer's license in connection with the interference claim against Kweon. The evidence did not support a finding that Kweon was responsible for insuring that the license was obtained or that he knew the license had not been issued when production at Oheck began.

"Lastly, the court erroneously denied Kweon's motion to exclude the expert opinion testimony of David Weiner. Weiner based his opinion regarding the damage to Trinity on Trinity's historical average revenue, adjusted for expenses saved as a result of the loss of employees and then applied a discount factor. Weiner acknowledged on cross examination that damage attributable to the loss of an employee based on wrongful conduct was the cost to replace that employee. But Weiner did not use this method and instead assumed that every employee who left Trinity did so based on the wrongful conduct of Kweon. This assumption was unsupported by admissible evidence. Weiner also assumed that Kweon was responsible for the loss of business from Citizens of Humanity. This assumption was also

unsupported by admissible evidence. Even according to Lee's testimony, it was Freedman who refused to guarantee the number of units per month making it impossible for Trinity to survive. No evidence was offered to implicate Kweon in this decision. Finally, Weiner also assumed that [Citizens of Humanity] would have continued to do business with Trinity into the future even though the evidence established that there was no contractual commitment between Trinity and [Citizens of Humanity] and Citizens was free to take its business elsewhere at any time.

"Because of the [trial] court's erroneous evidentiary rulings as described above, the [trial court] finds that a new trial is warranted on Kweon's claims against Lee as alleged in the [first amended complaint] as well as the breach of fiduciary duty claim brought by [the Trinity Parties] against Kweon [in the first amended cross-complaint]. Although a number of witnesses were called by both sides, the case was at its heart a credibility contest between Kweon and Lee. It appears to the court that the admission of the above-described evidence necessarily impacted the jury's credibility determination. . . . It is of course impossible for the court to know how impactful the erroneously admitted evidence was to the jury's decisions. . . . Accordingly, the court concludes that its erroneous evidentiary rulings and failure to grant non-suit as to the interference claims against Kweon materially affected Kweon's substantial rights and prevented him from receiving a fair trial."[6]

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[6] We construe this order to also mean that a new trial as to the interference claims was denied as moot given that, as to those claims, the trial court granted JNOV.

At the hearing, after ruling on the motions, the trial court explained its thoughts regarding breach of fiduciary duty as follows: "I do think by going forward, we're going to have an issue with respect to what the damages are for [breach of fiduciary duty], but . . . I think there are inferences to be drawn there that could allow a jury properly instructed and not having been tainted by receiving hearsay evidence where they can conclude that [Kweon] destroyed those computer files because it would have reflected that he was engaged in far more than just discussions, that he was, I don't know, looking at buildings, preparing or already discussing leasing arrangements and locations for the building. Now, again, I think that's up to the jury to decide if that's more than mere preparation, but I think that there is evidence that would allow that."

These appeals followed.

DISCUSSION

I. Appealability of the JNOV Order.

A court order granting a partial new trial is appealable. (Code Civ. Proc., § 904.1, subd. (a)(4); *Cobb v. University of So. California* (1995) 32 Cal.App.4th 798, 802 (*Cobb*).) On the other hand, a JNOV as to some but not all claims is not appealable. (*Id*. at p. 804.) "Any issue concerning [an] order granting partial judgment notwithstanding the verdict can be reviewed by the filing of a petition for extraordinary relief [citation] or once a final judgment is entered." (*Ibid*.)

Even though there is no final judgment, the Trinity Parties ask us to review the merits of the order granting JNOV. They contend that the order is reviewable pursuant to Code of Civil Procedure section 906. (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 330 ["Since plaintiffs have properly appealed

from the new trial order, the judgment, including the portion affected by the judgment notwithstanding the verdict, is subject to review in this appeal"].)

We agree that the JNOV order is reviewable. Code of Civil Procedure section 906 provides that we "may review . . . any . . . order . . . which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party[.]" Here, the JNOV pertains to the Trinity Parties' interference claims, and it was based on the trial court's determination that those claims were not supported by sufficient evidence. When granting the new trial motion, the trial court determined that Kweon was prejudiced, in part, by its failure to grant a nonsuit as to the Trinity Parties' interference claims. In other words, the trial court determined that part of the reason it should have granted a new trial on the first amended complaint and the fiduciary duty claim in the first amended cross-complaint was because the interference claims lacked sufficient evidence and should not have been given to the jury to consider. Therefore, both the new trial and JNOV orders implicate the trial court's determination that the interference claims were unsupported by sufficient evidence. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845 ["Rulings on motions for nonsuit and for [JNOV] are reviewed for the existence of substantial evidence"].) The JNOV order implicates the merits of the appealed new trial order and/or it necessarily affects that order. In addition, the JNOV order substantially affects the rights of the Trinity Parties.

II. Applicable Law: New Trials and JNOVs.

A trial court is vested with discretion to grant a new trial. However, it has no discretion to grant a new trial based on perceived errors at trial that were not errors. (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 59; *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 147.) Also, a new trial cannot be granted unless the trial court makes an "independent determination, under article VI, section 13 of the California Constitution, both that error occurred, and that the error prevented the complaining party from receiving a fair trial. [Citation.]" (*People v. Ault* (2004) 33 Cal.4th 1250, 1262.) Legal issues are subject to a reviewing court's independent consideration. (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 639–640.)

"Well-settled standards govern judgments notwithstanding the verdict: 'When presented with a motion for JNOV, the trial court cannot weigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.] A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied. . . . [Citation.] [Citation.] The same standard of review applies to the appellate court in reviewing the trial court's granting of the motion. [Citations.] Accordingly, the evidence . . . must be viewed in the light most favorable to the jury's verdict,

resolving all conflicts and drawing all inferences in favor of that verdict.' [Citation.]" (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 258–259.)

As pertains to this appeal, there are important rules for when a trial court either does or does not grant a new trial as an alternative to a JNOV.

"If the court grants [JNOV] . . . and likewise grants [a] motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the [JNOV] is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed." (Code Civ. Proc., § 629, subd. (d).)

Ordinarily, reversal of JNOV would result in the verdict and/or judgment being reinstated. (*Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1366–1368.) However, it must be noted that "a moving party who unsuccessfully sought a complete new trial on all issues may appeal because the court refused to grant the complete relief sought." (*Cobb, supra,* 32 Cal.App.4th at p. 802.) Consequently, when JNOV is reversed on appeal but a prophylactic cross-appeal establishes that a denial of an alternative motion for a new trial was error, a reviewing court can order a new trial.

III. Whether there was Reversible Error with Respect to Claims Alleged by Kweon.

The Trinity Parties contend that the trial court abused its discretion when it granted a new trial on Kweon's fiduciary duty, unjust enrichment, and constructive fraud claims because it relied on errors at trial that did not occur. As we explain, two of the errors the trial court relied upon were not errors, but the other three were. We conclude that any error in the trial court's ruling on the motion for new trial was harmless under *People v.*

Watson (1956) 46 Cal.2d 818, 837 (*Watson*) [error not reversible unless it is "'reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error'"].)

A. Propriety of Rulings at Trial.

The trial court concluded it deprived Kweon of a fair trial because it erred when it allowed the testimony of Parra and Rincon, when it permitted the jury to consider the lack of a garment manufacturer's license in connection with an interference claim against Kweon, when it denied Kweon's motion to exclude Weiner's damages opinion, and when it failed to grant a nonsuit regarding the Trinity Parties' two interference claims. We conclude the items listed were errors except for the denial of Kweon's motion to exclude Weiner's damages opinion and the denial of Kweon's motion for nonsuit with respect to the claim that he interfered with Trinity's relationship with Citizens of Humanity.

1. *Parra and Rincon.*

It was improper for the trial court to allow the testimony of Parra and Rincon.

The testimony showed by implication that Kweon authorized Lima, Martinez and Rene to offer Parra a job, to extol the virtues of Oheck, and to warn of Trinity's doom to entice Parra (and maybe Rincon) to work at Oheck. It was inadmissible per the hearsay rule unless it was offered for a nonhearsay purpose or there was an applicable hearsay exception. (Evid. Code, § 1200, subd. (a) ["'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated"]; Evid. Code, § 1200, subd. (b) ["Except as provided by

law, hearsay evidence is inadmissible"].) Statements can be "implied hearsay" if they are offered for "'the truth of the matter that is stated in such statement by implication.' [Citations.]" (*People v. Garcia* (2008) 168 Cal.App.4th 261, 289; *People v. Perez* (1978) 83 Cal.App.3d 718, 727.)

The Trinity Parties argue that the testimony was offered for the nonhearsay purpose of proving Parra and Rincon were solicited by being "told that it was better to work at Oheck than at Trinity and that Trinity would be closing." (*People v. Roa* (2017) 11 Cal.App.5th 428, 442 ["A statement 'offered for some purpose other than to prove the fact stated' . . . is not hearsay"]; *People v. Smith* (2009) 179 Cal.App.4th 986, 1003 [""If a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence""].) This argument fails. What Lima, Martinez, and Rene said was irrelevant unless it was authorized by Kweon. This means the testimony was necessarily offered to prove the implied hearsay that Kweon authorized Lima, Martinez, and Rene to make the statements.

The pivotal query becomes whether there is a hearsay exception. The Trinity Parties advert to the exception set forth in Evidence Code section 1222, subdivision (a).[7] It provides that a statement is not made inadmissible by the hearsay rule if it "was made by a person authorized by the party to make a statement or

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[7] The Trinity Parties also argue that the statements were admissible under the hearsay exception for statements by a party opponent pursuant to Evidence Code section 1220. But the statements of Lima, Martinez and Rene do not establish admissions by Kweon.

statements for him concerning the subject matter of the statement." (Evid. Code, § 1222, subd. (a).)

The Trinity Parties suggest that Lima, Martinez, and Rene were employees of Oheck and were therefore agents of either Oheck or Kweon. This argument is waived because it is not supported by reasoned argument. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.) We observe that while "one may be both [an employee] and an agent [citation], the terms are not wholly synonymous. [Citation.]" (*Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 205.) An employee renders personal service to an employer. An agent, on the other hand, is a person who represents another in dealings with third persons. "The distinguishing features of an agency . . . are its representative character and its derivative authority. [Citation.]" (*Id.* at p. 206.) The Trinity Parties fail to explain why employees are automatically Oheck's agents and/or the agents of its owner. They cite Civil Code section 2299, but it does not change the analysis. Its plain language—"agency is actual when the agent is really employed by the principal" (Civ. Code, § 2299)—does not operate to convert simple employees of Oheck into agents of Oheck and/or Kweon.

The Trinity Parties suggest the trial court properly admitted the testimony based on the ability of Kweon to return to the stand to deny he ever authorized those statements. They rely on established law that "a principal must disaffirm an unauthorized act of his agent within a reasonable time after acquiring knowledge thereof, else his silence may be deemed ratification or acquiescence." (*Gates v. Bank of America Nat'l Trust & Sav. Asso.* (1953) 120 Cal.App.2d 571, 577.) Because actual agency was never established, this rule never came into

play.[8] It is similarly unhelpful to the Trinity Parties that the trial court stated it would "would consider a motion to strike" if Kweon denied authorizing the statements. The Trinity Parties had the burden of proof regarding the agency issue, not Kweon. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . he [or she] is asserting"].)[9]

2. *Oheck's Lack of Registration*.

The Trinity Parties argue that Oheck's periods of operation without registration violated Labor Code section 2676[10] and was admissible to prove that it interfered with Trinity's employees.

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[8] An agent can be actual or ostensible. An agent is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe that another person is the principal's agent. (*Kelley v. R.F. Jones Co.* (1969) 272 Cal.App.2d 113, 120.) The Trinity Parties have not suggested this case involves an ostensible agency issue.

[9] Though the issue was not raised by the Trinity Parties, it is important to note that Lima's and Martinez's statements that Kweon was offering Parra a job did not prove they were agents of Kweon and/or Oheck. Agency cannot be created by the conduct of an agent alone. (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 587-588.) To establish agency, the Trinity Parties were required to offer admissible evidence that Kweon authorized Lima and Martinez to make the statements. The only evidence was implied hearsay for which the Trinity Parties did not establish a hearsay exception.

[10] Labor Code section 2676 provides: "Any person engaged in the business of garment manufacturing who is not registered is guilty of a misdemeanor[.]"

For that reason, they contend there was no basis for the new trial order as to Kweon. This argument is unavailing. Even if the evidence was admissible against Oheck, that does not mean it was admissible against Kweon, or that Kweon should have been tied to any statutory violation. It was Oheck who was operating without registration for brief periods. The evidence could have been sanitized such that Kweon was not tied to it. Thus, the trial court was justified in determining it erred when it allowed the evidence against Kweon.

3. *Weiner's Testimony on Damages*.

"An established company may base its claim to future profits on evidence of its past profits[.]" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 778 (*Sargon*).) Weiner used Trinity's past profits to calculate lost profits in the future. Accordingly, Weiner's testimony was properly admitted at trial.

4. *Failure to Grant a Nonsuit*.

The failure to grant a nonsuit pertains to the interference claims. The Trinity Parties aver that these claims are governed by *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134 (*Korea Supply*). It explained that the elements of intentional interference with prospective economic advantage include the following: "'"(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' [Citation.]" (*Id*. at p. 1153.) The court also explained that as the third

element of the tort, a plaintiff must "plead and prove that the defendant's acts are wrongful apart from the interference itself. [Citation.]" (*Id*. at p. 1154.)

As to interference with Citizens of Humanity, there is no dispute that the Trinity Parties established the first two *Korea Supply* elements for an interference claim by showing an economic relationship between Trinity and Citizens of Humanity plus Kweon's knowledge of that relationship. Elements three through five were supported by evidence of a breach of fiduciary duty, which, as urged by the Trinity Parties, qualified as an independent legal wrong.

The elements of a breach of fiduciary duty claim are the following: "(1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. [Citation.]" (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) Kweon owed a fiduciary duty while he was vice-president of Trinity not to enter into a competing business or otherwise seize its business opportunities. (*Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 345 (*Bancroft-Whitney*); *Xum Speegle, Inc. v. Fields* (1963) 216 Cal.App.2d 546, 554.)

The evidence showed that while Kweon was still working for Trinity, he met with Freedman. Around the same time, Kweon suggested to Lee that he raise the prices he was charging Citizens of Humanity. This would have benefited Oheck given that it ultimately agreed to charge Citizens of Humanity no more than Trinity had charged. Kweon removed a hard drive from his Trinity office, and he deleted information from his Trinity computer and phone. Also, he had a picture of a warehouse ceiling in his office, and he later had various lines installed in the ceiling of a warehouse for Oheck. Finally, Oheck was up and

running in less than six months after Kweon's resignation from Trinity. According to Lee, it would take at least six months to start a new company from scratch. Thus, the jury could have inferred that Kweon must have been working toward opening a competing business and stealing Trinity's primary customer before he resigned.

There was sufficient evidence that Kweon's breach of fiduciary duty damaged Trinity because there is an inference that either Oheck would never have been formed absent that breach or Oheck would not have been formed as fast as it was, and there is an inference that Trinity would have enjoyed the business of Citizens of Humanity for a longer period of time. Our analysis coincides with the trial court's conclusion that there was sufficient evidence that a breach of fiduciary duty by Kweon resulted in harm to Trinity.

Thus, regarding the claim that Kweon interfered with Citizens of Humanity, the trial court properly refused to grant a nonsuit. (*Khajavi v. Feather River Anesthesia Medial Group* (2000) 84 Cal.App.4th 32 42–43 ["'A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor'"].) In other words, the failure to grant a nonsuit cannot be labeled legal error.

The opposite is true regarding the claim that Kweon interfered with Trinity's employees.

Kweon did not owe Trinity a fiduciary duty after he resigned. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Ca1.App.4th 409, 421 ["To divest himself or herself of the [fiduciary] duty, the officer m[ay] resign the office"].) Absent improper contact with employees by Kweon

or his agents while he owed Trinity a fiduciary duty, there was no evidence of a wrongful act by some legal measure other than the interference. The evidence failed to establish improper contact. The only purported interference evidence pertained to Lima, Martinez and Rene. That evidence failed because the evidence did not establish that they were Kweon's agents; their allegedly interfering conduct occurred after Kweon left Trinity; and there was no evidence that Lima, Martinez and Rene caused anyone to leave Trinity for Oheck. Consequently, the trial court should have granted a nonsuit.

B. Scope of the New Trial Order.

The Trinity Parties contend that the new trial order did not encompass the statute of limitations defense to Kweon's claims. This contention lacks merit. Though the new trial order did not mention the statute of limitations, the new trial motion was directed, in part, to that defense. Also, there would be no point to ordering a new trial on Kweon's claim if there was not also a new trial on the statute of limitations. We conclude that the trial court intended to grant a new trial as to all issues pertaining to Kweon's claims, including defenses.

C. Lack of Prejudice.

The trial court concluded that this case boiled down to a credibility contest between Kweon and Lee, and it is apparent that it believed the jury was unduly influenced into disbelieving Kweon (and into believing Lee) due to having to consider certain evidence and the interference claims. For these reasons, the trial court granted a new trial. The question is whether it would have granted a new trial if it determined that the only errors were admission of the testimony of Parra and Rincon, admission of Oheck's lack of registration, and the failure to grant a nonsuit as

to the Trinity Parties' claim that Kweon interfered with Trinity's employees.

We conclude the trial court would have ruled the same absent any mistakes. The breach of fiduciary duty and interference with Citizens of Humanity claims against Kweon were merely alternative theories based on essentially the same facts. Weiner's testimony pertained to damages, not actions by Kweon. Thus, it is reasonably probable that those two items—an alternative theory and damages evidence—would not have changed the trial court's analysis.

Under *Watson*, any error in granting the new trial motion was harmless.

IV. Whether There Was Reversible Error With Respect to Claims Alleged by the Trinity Parties.

Regarding claims against Kweon asserted by the Trinity Parties, there are three: breach of fiduciary duty, interference with Citizens of Humanity, and interference with Trinity's employees. The Trinity Parties contend that the new trial order regarding breach of fiduciary duty and the JNOV regarding the interference claims should be reversed. Kweon, in his cross-appeal, contends that the trial court should have granted JNOV (instead of a new trial) as to breach of fiduciary duty. In the prophylactic part of his cross-appeal, he contends that the trial court should have granted a new trial in the alternative to granting JNOV as to the interference claims. We discuss each cause of action in turn.

A. The Trinity Parties' Claim for Breach of Fiduciary Duty.

As discussed in part III.A.4. of the discussion, *ante*, there was sufficient evidence that Kweon breached his fiduciary duty to Trinity, e.g., Kweon's suggestion to Freeman about Citizens of

Humanity's pricing, the speed with which Oheck got up and running, the destruction of digital evidence, etc. We therefore affirm the trial court's denial of Kweon's motion for JNOV. For the same reasons discussed in part III.C of the discussion, *ante*, the new trial order as to breach of fiduciary duty must be affirmed. In summary, even if the trial court considered only the three real errors, it is reasonably probable that it would still have granted Kweon's motion for new trial because the Trinity Parties' breach of fiduciary duty claim against Kweon came down to a credibility contest between Kweon and Lee just as much as Kweon's claims against Lee.

B. Interference with Citizens of Humanity.

The trial court granted JNOV as to the claim that Kweon interfered with Citizens of Humanity because, to the degree it was supported by Kweon's breach of fiduciary duty, it was duplicative. This was error. A plaintiff may pursue separate legal theories for recovery even if the damages are identical. (See *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158–1159.) Moreover, as we discussed in part III.A.4. of the discussion, *ante*, the claim was supported by substantial evidence. Thus, JNOV on this claim is reversed.

In connection with Kweon's prophylactic cross-appeal, we conclude that the trial court should have granted a new trial as to this interference claim. This is because it was an alternative to breach of fiduciary duty for recovering damages based on essentially the same facts. It was all or nothing. If there was a new trial as to one of these theories, there had to be a new trial as to the other theory.

C. Interference with Trinity's Employees.

As we discussed in part III.A.4. of the discussion, *ante*, there is no merit to the Trinity Parties' claim that Kweon unlawfully interfered with its employees. As a result, JNOV is affirmed. This renders Kweon's prophylactic cross-appeal on this claim moot.

DISPOSITION

1. We affirm the trial court's order granting a new trial in favor of Kweon as to the first amended complaint.

2. We affirm the trial court's order granting JNOV to Kweon on the claim in the first amended cross-complaint that Kweon interfered with Trinity's employees.

3. We affirm the trial court's order denying JNOV to Kweon on the breach of fiduciary duty claim in the first amended cross-complaint; we affirm the order granting a new trial on the breach of fiduciary duty claim in the first amended cross-complaint.

4. We reverse the trial court's order granting JNOV to Kweon on the claim in the first amended cross-complaint that Kweon interfered with Trinity's relationship with Citizens of Humanity; we reverse the trial court's de facto denial of Kweon's motion for a new trial as to the claim in the first amended cross-complaint that Kweon interfered with Trinity's relationship with Citizens of Humanity.

Upon remand, the trial court is directed to conduct a new trial on Kweon's first amended complaint against Lee (all three causes of action); conduct a new trial on the claims in the Trinity Parties' first amended cross-complaint for breach of fiduciary duty and interference with Trinity's relationship with Citizens of Humanity; and enter judgment for Kweon on the claim in the Trinity Parties' first amended cross-complaint for interference with Trinity's employees.

The parties shall bear their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT