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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

FAISAL AL SAUD, Plaintiff, Cross-defendant and Appellant, v. STEVEN J. SAXTON et al., Defendants, Cross-complainants and Appellants.	B253076 (Los Angeles County Super. Ct. No. BC476972)

APPEAL from orders of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed in part; reversed in part and remanded; dismissed in part.

Law Offices of Herbert Hafif, Greg K. Hafif and Michael G. Dawson for Plaintiff, Cross-defendant and Appellant.

Eagan Avenatti, Michael J. Avenatti and Ahmed Ibrahim for Defendants, Cross-complainants and Appellants.

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This appeal is from entry of a new trial order and the denial of a judgment notwithstanding the verdict; both are appealable under Code of Civil Procedure section 904.1, subdivision (a)(4). We must dismiss the purported appeal from the judgment. We lack jurisdiction to consider the judgment because no final judgment has been entered.

The parties dispute whether the trial court properly ordered a new trial based on plaintiff's counsel's (undisputed) misconduct during closing argument as well as the paucity of evidence. Plaintiff essentially concedes the new trial was warranted on his breach of contract cause of action but argues that no new trial should have been ordered on his conversion cause of action. Defendants argue that the court should have entered a judgment notwithstanding the verdict (JNOV) on both causes of action.

We conclude the trial court should have entered a JNOV on plaintiff's breach of contract cause of action because no evidence showed plaintiff suffered damages. We further conclude the trial court acted within its discretion in granting a new trial on the conversion cause of action after concluding that the misconduct "permeated" the verdict.

We affirm the order granting a new trial of the conversion cause of action, reverse the order denying JNOV on the breach of contract cause of action and remand the case to the trial court for further proceedings. We dismiss the portion of the appeal purportedly from the judgment.

FACTS AND PROCEDURE

Defendant Steven Saxton was the founder and chairman of codefendant Hollywood Studios International (HSI). HSI's goal was to produce, distribute and finance television shows and movies. HSI entered an agreement with plaintiff, referred to as a memorandum of understanding or MOU, which is the basis for plaintiff's breach of contract cause of action and defendants' breach of contract cause of action. The latter was dismissed by the trial court.

His Royal Highness, Prince Faisal Al Saud of Saudi Arabia (Prince Faisal or plaintiff) sued Saxton and HSI. Prince Nawaf is plaintiff's cousin, who plaintiff caused to invest $9 million in HSI.[1] That was the largest investment HSI received.

Plaintiff alleged causes of action for breach of contract and conversion. During trial, plaintiff's counsel made clear the alleged breach of contract concerned only unpaid commissions. The conversion cause of action stemmed from Saxton's refusal to release to plaintiff a Maserati Gran Turino, paid primarily by HSI and in part by plaintiff. In their cross-complaint, defendants alleged causes of action for quiet title (of the Maserati) and breach of contract based on plaintiff's failure to use his best efforts to obtain capitalization for HSI. The MOU provided: "H.H. Prince Faisal will make best efforts to continue the growth and capitalization of HSI . . . ." Numerous other causes of action, which were dismissed or found insufficient by the trial court, are not relevant on appeal.

1. Payment of Commissions (Plaintiff's Breach of Contract)

The MOU provided that plaintiff was entitled to "fees" for capitalizing HSI. Plaintiff testified that under this "fee" provision he was entitled to a 7 percent commission, and Saxton testified that plaintiff was entitled to a 5 percent commission on moneys invested in HSI as a result of plaintiff's efforts. It was undisputed that plaintiff caused his cousin Prince Nawaf to invest $9 million in HSI. It was undisputed that Prince Nawaf initially had promised to invest $10 million.

At trial, the parties agreed that plaintiff was paid a portion of the commissions HSI owed him. The parties disputed whether he was paid the entire $630,000 plaintiff maintained he was owed. Plaintiff testified extensively, but was unable to identify the alleged unpaid amount. Plaintiff testified that although both he and Saxton had responsibility for monitoring his commissions, he did not keep track of his commission

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[1] Prince Nawaf did not testify at trial and the parties refer to him only as Prince Nawaf or Nawaf, without using his full name. A letter referred to Prince Nawaf as Prince Nawaf Faisal Faud Abdulaziz. Lacking information on his full name, we adopt the parties' convention of referring to him as Prince Nawaf. We intend no disrespect.

payments. The following colloquy led the trial court to state that plaintiff did not know how much he was owed.

"Q [Defendants' Counsel:] Okay. What do you claim you're due in commissions as you sit here today? What's the amount?

"A I don't have—I don't have amount. I just know that is 7 percent from the original money.

"Q According to you, you were entitled to 7 percent of $9,000,000, correct?

"A Yeah.

"Q $630,000?

"A 630?

"Q I'm sorry?

"A I don't know. I don't know if that's 600—7 percent of $9,000,000.

"Q How much is that?

"A I don't know. I'm not like your teacher. So if you just—you know, I tell you 7 percent from 9,000,000.

"Q All right. Let's assume it is $630,000. How much of that have you been paid in commissions, do you know?

"A I produced all the documents.

"Q I'm just asking you, sir. According to you, what is your testimony as to how much you have received in commissions?

"A I give my lawyer all—all everything.

"Q You don't know, do you?

"A No. I gave him all—all the documents.

"Q You can't tell us how much you received in commissions as you sit here today, can you?

"A I gave all of documents.

"Q You can't tell us?

"A I have the document. Why I tell?

"Q How much are you owed in commissions? When the jury goes back in the deliberation room, how much are you claiming you're owed in commissions as you sit here today? What is the number that they should award you according to you, do you know?

"A You keep asking me the same question. I said to you, I produced all the document and I raised 9,000,000, and from 9,000,000 is 7 percent. It's very easy. And that's—that's anyone can know. That's—that's how—

"Q Did you receive any commissions?

"A I received commission and I produce it by document from my bank.

"Q Can you tell us how much you're owed as you sit here today, sir? Yes or no. [¶] . . . [¶]

"The Witness: I produced all the document, I said. [¶] . . . [¶]

"Q You don't know. As you sit here today, you don't know how much you're owed in commissions, do you?

"A I like to be clear always. Like I can't just say. I – that's why I produce all the document, to see everything."

The court asked plaintiff if he had "an idea" of what he was owed, and plaintiff responded, "Your Honor, I give all the document."

Plaintiff testified that in 2009 he opened a bank account at Bank of America. He testified that all of his commission payments were deposited into that account and none were deposited in his other bank accounts including his accounts in Saudi Arabia.

Central to plaintiff's argument that he had not received full payment was his claim that HSI's advances on plaintiff's living expenses were not included in his commission payments, an issue defendants disputed. HSI paid many of plaintiff's expenses including rent, vehicle leases, bodyguards, and other assistants. One of plaintiff's personal assistant's testified that he was paid to pick up plaintiff's dry cleaning and groceries and to cook him lunch. The assistant also at times chauffeured plaintiff.

While plaintiff purported to dispute the inclusion of living expenses as advances on his commission, plaintiff essentially admitted HSI was not required to pay his living

expenses. The only reason he believed HSI should pay his expenses was that he learned (shortly before trial) that the company paid Saxton's expenses. Plaintiff acknowledged the MOU did not require HSI to pay his living expenses. Plaintiff testified that when he decided to move to Los Angeles he told Saxton he would pay his portion of their expenses (as they shared a house and cars). When plaintiff learned that HSI paid Saxton's share, he no longer thought he "should pay." If Saxton were paying personally, plaintiff did not mind paying his expenses, but if the company paid Saxton's expenses plaintiff believed it should have also paid his expenses. No contractual reason was provided for plaintiff's belief that he owed money for his expenses only if Saxton similarly owed money.

Plaintiff introduced evidence stating that he had been paid $1.2 million in commissions. Specifically, a letter dated June 11, 2011, from Sheik Marwan (an advisor to Prince Nawaf) to Saxton provided: "This letter is written on behalf of His Royal Highness Prince Nawaf Faisal Faud Abdulaziz, a major investor in HSI via the corporate entity Fares III." The letter stated: "We have some serious concerns based on several visits by our representatives represented to HSI. Our observations are based on the visit to HSI in December 2010, as well as via several follow-up meetings and information provided by HSI senior management. . . . It is our strong belief that the investment of $9,000,000 made by His Royal Highness Prince Nawaf into HSI has been mismanaged based on the following observations: 1. A significant amount of funds, estimated to be just over $1.2 million, were paid to Prince Faisal Al Saud as commissions." The letter described other financial mismanagement allegedly committed by HSI including failing to control expenditures, failing to implement proper financial controls, and failure to implement stock valuation methodologies.

Saxton testified that plaintiff was overpaid commissions. He relied on a spreadsheet identifying payments HSI purportedly made to plaintiff. These payments included payments for vehicles, plaintiff's personal assistants, EuroCar, Inc. ($100,000), rent, and other expenses. The spreadsheet prepared by HSI's bookkeeper showed plaintiff was paid $747,697. Later, Saxton conceded the spreadsheet contained errors

totaling $110,000. This included a $100,000 payment made by someone other than HSI into plaintiff's account, which as defendants admitted could not be credited to them. HSI's bookkeeper did not testify and no other witness testified as to the amount of commissions that remained unpaid. Plaintiff did not remember receiving all of the payments listed on the spreadsheet.

2. Maserati (Conversion)

Plaintiff's conversion claim concerned a Maserati Gran Turino that was purchased for $128,000. It was undisputed that plaintiff paid $28,0000 towards the Maserati's purchase price and the car was registered to him. HSI paid the remaining $100,000 of the purchase price. The spreadsheet identifying payments to plaintiff included HSI's $100,000 Maserati payment (to EuroCar). (Plaintiff apparently also believed it was an advance on his commission as he alleged this in his complaint.) Plaintiff's assistant testified that Saxton referred to the Maserati as belonging to plaintiff even though HSI paid for insurance.

When plaintiff returned to Saudi Arabia in 2010, he wanted to have the vehicle shipped to him. Initially Saxton said he would do so. But subsequently Saxton refused to return it and told plaintiff that he would not return it because Prince Nawaf told him not to give plaintiff the car. Plaintiff sent Saxton a letter demanding the car, and Saxton responded telling plaintiff to speak to Prince Nawaf. By the time of trial, plaintiff still did not have possession of the Maserati.

In an e-mail, Saxton wrote: "This is to notify you that Prince Faisal has demanded that his car (the Maserati) be returned to him immediately. This is the car which the Company paid for on his behalf. The car is titled to him as an individual . . . ." Saxton continued: ". . . I was told that as Advisors and Representatives of Prince Nawaf, it was believed that Prince Faisal has overstepped any potential arrangement for payment of Finders Fees and that you were reviewing the situation do [*sic*] determine how you were going to proceed to recoup, which included potentially filing a legal complaint for the overage of monies that Prince Faisal received from the Company."

Plaintiff's dentist, Teddie Hudson Abou-Rass, attempted to retrieve the vehicle for plaintiff. She spent $38,000 in her unsuccessful retrieval efforts, including three first-class plane tickets from Riyadh to Los Angeles.

Roger Simonsen, an employee of a company owned by plaintiff's counsel, testified that the fair market value of the Maserati was $110,000. He had not viewed the vehicle and did not know its condition. He opined that rental agencies were able to rent luxury vehicles such as the Maserati for $2,500 to $3,500 a week (but found no actual Maserati rentals).

Plaintiff testified that during the period of time he did not have his Maserati he drove a Bentley Flying Spur that cost over $220,000. Plaintiff testified that he was not distressed by having to drive the Bentley. He explained: ". . . I wasn't distressed like the stress over Maserati or Bentley . . ." but he was distressed because he had trusted Saxton and Saxton betrayed him. Plaintiff testified he suffered emotional distress for losing his friend.

Plaintiff further testified that he did not know how much money his dentist incurred in seeking return of the Maserati. When asked how much he should be reimbursed for expenses related to the retrieval of his Maserati, plaintiff answered, "I have to see all the records before I bring numbers."

3. Plaintiff's Bank Statements

Plaintiff testified that he did not produce bank statements from his accounts in Saudi Arabia. He did not believe HSI deposited any money in those accounts.

As indicated by plaintiff's testimony quoted above, he relied heavily on his statements from Bank of America, citing it as the only evidence indicative of HSI's failure to pay its obligation to him. Plaintiff emphasized that although he did not know the amount owing, such amount could be determined from the review of his Bank of America bank statements. Plaintiff reviewed a few of his statements, and those were admitted at trial.

When plaintiff's counsel sought to admit the remainder of plaintiff's Bank of America records, defense counsel objected. Two separate hearings ensued. The court

ultimately found the documents inadmissible. The court explained that no custodian of records from Bank of America was called. Plaintiff did not review the records or testify that they accurately portrayed his transactions. Additionally, no one testified they were true copies of a business record. The trial court's conclusion that the bank records were inadmissible is not challenged on appeal.

4. Instructions

Jurors were instructed that "Faisal Al Saud claims that he and Hollywood Studios International entered into a contract for the payment of commissions, referred to as the MOU. Faisal Al Saud claims that Hollywood Studios International breached this contract by not paying him all of the commissions due under the contract. Faisal Al Saud also claims that Hollywood Studios International's breach caused harm to Faisal Al Saud for which Hollywood Studios International should pay. Hollywood Studios International denies the allegations and claims that they have paid all commissions due under the contract. To recover damages from Hollywood Studios International for breach of contract, Faisal Al Saud must prove [all] of the following: One, that Faisal Al Saud and Hollywood Studios International entered a contract; two, that Faisal Al Saud did all or substantially all of the significant things that the contract required him to do; three, that all of the conditions required by the contract for Hollywood Studios International's performance had occurred; four, that Hollywood Studios International failed to do something that the contract required it to do; and five, that Faisal Al Saud was harmed by that failure."

Jurors also were instructed: "To recover damages for the breach of a contract to pay money, Faisal Al Saud must prove the amount due under the contract."

With respect to damages for conversion, jurors were instructed: "You must not speculate or guess in awarding damages. The following are specific items of damages claimed by Prince Faisal: One, the fair market value of the Maserati at the time Mr. Saxton and HSI wrongly exercised control over it; and two, reasonable compensation for the time and money spent by Prince Faisal in attempting to recover the Maserati. Fair market value is the highest price a buyer would have paid for—paid to a willing seller

assuming, one, that there was no pressure on either one to buy or sell; and two, that the buyer and seller know all the uses and purposes for which the Maserati is reasonably capable of being used. Loss of use of the Maserati. To recover damages for loss of use, Faisal Al Saud must prove the reasonable cost to rent a similar vehicle for the amount of time the vehicle has been wrongfully withheld from him."

5. Closing Argument

Plaintiff's counsel argued that plaintiff was entitled to 7 percent commission and only lump sum payments should be considered commission payments, i.e. no advance of plaintiff's living expenses fell within the definition of a commission. Counsel argued plaintiff was entitled to the value of the Maserati and the expenses incurred in retrieving it while acknowledging that his expert was biased.

Defendants' counsel emphasized that plaintiff's bank statements were not in evidence.

During rebuttal, counsel for plaintiff argued: "Counsel also said, where are the bank statements, where are the bank statements. Well, I showed the bank statements to the prince . . . on the stand, the big binder. And I tried to move them into evidence—" Defense counsel objected.

Outside the presence of jurors, defense counsel moved for a mistrial; the court denied the motion but explained: "That was a low blow. I kept those records out because they were legally unreliable." "The reason we have rules for authentication, and especially when you want to prove an absence of a record, is to show that they are reliable . . . ." "That's like a prosecutor standing up saying, you know, gee whiz, if it wasn't for that judge suppressing the gun, I could have shown you the gun."

6. Verdict, Judgment, and Postjudgment Proceedings

In a special verdict jurors found that plaintiff and HSI entered into a contract; plaintiff performed; HSI breached the contract; and plaintiff suffered damages in the amount of $390,000. Jurors further concluded plaintiff owned a Maserati, and Saxton and HSI intentionally prevented him from having access to it for a significant period of time. Jurors concluded that the fair market value of the Maserati was $110,000 and

reasonable compensation for trying to recover it was $20,000. The court subsequently entered its ruling on the quiet title cause of action finding plaintiff was the legal owner of the Maserati.

Judgment consistent with the jury verdict was entered September 3, 2013. On September 17, 2013, the court stayed enforcement of the judgment.

Defendants moved for a JNOV and a new trial. At the hearing the court again expressed concern over plaintiff's closing argument. The court emphasized that the bank records would have been the only concrete evidence presented by plaintiff. During closing arguments defense counsel "held up this binder" and referred to the bank records, which the court had found inadmissible. The court further indicated there was no evidence to support the amount of damages. The court stated the "entire jury verdict bothers me." Counsel's statement "was something that I think could have changed the verdict in some regard. It was a powerful statement. It also just destroyed the credibility of the defense lawyer." "And lawyers have to have some credibility in front of a jury because he just got through saying why aren't they in evidence?"

The court stated: "[T]he plaintiff can say I can't tell you exactly how I was harmed, but ordinarily there is other evidence at trial. An expert, an accountant or somebody that comes in and clarifies and gives us a number we can believe in. That's what was lacking in this case."

The court, however, was confident in its decision that the Maserati belonged to plaintiff. The court therefore did not grant a new trial on the quiet title cause of action.

The court denied plaintiff's motion for JNOV, and granted a new trial on plaintiff's breach of contract cause of action and conversion cause of action. In its written order, the court stated:

"During the trial, considerable attention was draw[n] to the existence of a binder that purportedly contained Plaintiff's bank records. Before final argument, this Court ruled that these records were inadmissible, with the exception of those pages that were admitted, as Plaintiff ha[d] failed to properly authenticate the balance of these documents.

The bank records were especially important in this case as there was considerable uncertainty regarding the payments made to plaintiff.

"During final argument, defense counsel properly argued that no bank records had been introduced to prove receipt, or lack of receipt, of commission payments. In rebuttal argument, Plaintiff's counsel showed the jury the binder of records earlier ruled as inadmissible, and told the jury that the binder contained the records and that he tried to introduce them at trial.

"Counsel's misconduct was highly prejudicial in that it implied that the missing records existed and could prove his claim. Additionally, the argument showed defense counsel to be a liar.

"Defendant made a timely objection. The Court sustained the objection. After reading the transcript of the proceedings, and upon further reflection, this Court concludes that its admonition to the jury was ineffective, and a mistrial should have been granted.

"There is no doubt in the Court's mind that this misconduct permeated the verdict."

The court also concluded jurors simply speculated as to the damages. It found their verdict was not rooted in the evidence. This appeal followed.

DISCUSSION

1. The Trial Court Should Have Granted Defendant's Motion for JNOV on the Breach of Contract Cause of Action

We have jurisdiction to consider defendants' argument that the court erred in denying their motion for a JNOV. (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 306 (*Pacific Corporate Group Holdings*).)

Our standard of review is well settled. "A trial court must grant a motion for JNOV whenever a motion for a directed verdict for the aggrieved party should have been granted. (§ 629.) ' " '[T]he power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit.' [Citation.] 'A motion for a directed verdict "is in the nature of a demurrer to the evidence, and is governed by practically the same

rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom." ' " ' " (*Pacific Corporate Group Holdings, supra,* 232 Cal.App.4th at p. 309.) Viewing the evidence in the light most favorable to the verdict, if any evidence supports the verdict a motion for a JNOV must be denied. (*Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 782.)

A. No Substantial Evidence Supported the Verdict on the Breach of Contract Cause of Action

" 'A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.' " (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 104.) Jurors were instructed that plaintiff had the burden of proving each element. Plaintiff did not object to this instruction and on appeal does not argue it was incorrect.

Plaintiff failed to present evidence of each element; specifically he presented no evidence that he suffered damages. Based on his testimony, plaintiff was entitled to $630,000 in commission payments. But plaintiff testified that he did not know if he was paid the commissions owed to him. He testified that he did not keep track of his commissions. Plaintiff testified he tried to obtain his bank statements to show what had been paid. He explained: ". . . I demand this bank account, I tried so much to get it. Even they say they have to contact the head office of Bank of America to give it to me. Take me long time. I go to the bank, like 10—like 10 time to the bank. I and I speak with Mary. . . . I asked her to give me all . . . the bank account [statements] I have, and I give it to you. So anything that HSI has given me is going to be show[n] in this statement." The problem for plaintiff was that with only few exceptions the bank statements were not admitted into evidence.

The only other evidence plaintiff presented indicated that he had been paid $1.2 million, but that hardly supported his argument that he was not paid $630,000. No expert testimony was presented on the amount paid to plaintiff. No accountant or forensic accountant testified. Saxton testified that plaintiff was overpaid. Even if Saxton's

overpayment theory is found lacking, no other affirmative evidence of the amount owing was presented. There simply was no evidence indicating that HSI failed to pay plaintiff the commissions it owed him or stated otherwise that plaintiff suffered damages from defendant's breach of contract. "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (Civ. Code, § 3301.) Here, it was uncertain whether plaintiff was damaged, i.e. whether he was owed any commission payments.

B. Plaintiff's Theories Do Not Support a Contrary Conclusion

i. Plaintiff's First Theory—Only Lump Sums May Be Counted

Plaintiff's primary theory is that only lump sum payments may be considered commission payments and HSI's $100,000 payment towards his Maserati and other expenses including rent must be excluded. Plaintiffs' theory is not supported by the MOU, which does not purport to cover plaintiff's expenses. Nor was it supported by plaintiff's own testimony. Plaintiff testified he agreed to pay his own living expenses. He explained: "When I decide to move to America to work with Steven and HSI, we decide to—I said to him, if he pay like 10, I will pay 5 and he pay 5. That's—that's our agreement, that I pay the—the half of everything . . . in America. House or car or anything. [¶] If he pay for the house, I will pay for the house like him." Anything Saxton paid, plaintiff "should be responsible for paying that amount as well from [his] commissions." Plaintiff testified that the agreement did not provide for expense reimbursement. Nor did it provide his house or car would be reimbursed. Although plaintiff believed his expense reimbursement should have been commensurate with Saxton's, his belief is not rooted in any contract and therefore does not support his breach of contract cause of action.[2]

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[2] Plaintiff testified: ". . . I just realized this recently that the company paid for him, and he didn't tell me this. He didn't tell me this before. And I just realized it recently. And if the company pay for the house, I don't think I should pay, you know . . . ." If the company paid, plaintiff did not believe he should be charged a commission for his share. He explained again, ". . . If Mr. Saxton also paid for hi[s] expenses, personal, from the

ii. Plaintiff's Second Theory—He Did Not Receive All Alleged Payments

Plaintiff correctly points out that he testified all payments were made to his Bank of America account. He further testified that his bank statements would reveal the amount owing. But as explained, ultimately the bank statements were not admitted in evidence, undermining plaintiff's argument that "[d]efendants ignored Al Saud's testimony all commission payments were deposits into his Bank of America accounts." Inadmissible bank statements do not support damages.[3] No evidence supported plaintiff's argument that he received only $150,000 in commission payments. Stated otherwise, no evidence shows that plaintiff was not paid the commissions owed to him.

iii. Plaintiff's Third Theory—Defendants Had the Burden of Proof to Show Payment of Commissions

For the first time on appeal, plaintiff argues that defendants bore the burden of proving the payment of his commissions. Arguably the contention is forfeited by plaintiff's failure to timely raise it. Assuming it is preserved, plaintiff fails to demonstrate that this case was a rare one justifying the shifting of the burden of proof.

"[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) "To prevail, the party bearing the burden of proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence)." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1667.) "Greater access to relevant evidence does not mandate that a defendant bear the burden of proof on the issue." (*Id*. at p. 1671.) However, when financial records are in the exclusive control of

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company, then I pay because I work for the company like him." Plaintiff confirmed that he did not personally pay any of the rent.

[3] In his statement of facts, plaintiff states he reviewed his bank records and determined only certain commissions were paid. The record does not support the assertion that plaintiff reviewed all of his statements. Evidence that he reviewed a few of his statements does not support the inference that other payments had not been made.

the defendant, the burden of proof may shift to the defendant. (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 36.) But there must be a compelling justification to shift the burden of proof. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25.)

On appeal, plaintiff argues that the essential financial records were in defendants' exclusive control, but no record evidence supported this statement (which was not raised in the trial court). If anything, the record suggested that plaintiff also had the information relevant to his commission payments. Plaintiff testified he had the responsibility to monitor his commission payments. He further testified that his Bank of America statements would accurately reveal his commission payments. At a minimum this suggested that the information was not in defendants' exclusive control and for purposes of this appeal plaintiff fails to demonstrate error in the allocation of the burden of proof.

In any event, assuming defendants bore the burden of proof, plaintiff fails to argue or demonstrate he suffered prejudice from the incorrect allocation of that burden. Defendants presented a spreadsheet, which after corrected showed over $630,000 in payments to plaintiff. As the trial court noted in its new trial order, plaintiff's expenses, direct payments to plaintiff, the $100,000 payment for the Maserati were paid to plaintiff or on his behalf.[4] While plaintiff argues that his expenses should not have been included as previously explained his belief that he was entitled to payment just as Saxton is not supportable by any reading of the parties' agreement. Thus, even assuming the court erred in instructing jurors that plaintiff bore the burden of proof, plaintiff failed to demonstrate prejudice.

2. The Trial Court Acted Within Its Discretion in Granting a New Trial on the Conversion Claim

We review the trial court's grant of a new trial for abuse of discretion. (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 159.)

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4 As noted previously, plaintiff alleged in his complaint that "he instructed Saxton to pay for the vehicle using the fees Plaintiff was entitled to under the MOU."

A. Denial of a JNOV Was Proper Because Substantial Evidence Supported Conversion Cause of Action

"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.)

Substantial evidence supported the finding that plaintiff owned the Maserati and HSI and Saxton improperly withheld it from him. First, the registration was in plaintiff's name. Second, Saxton testified that HSI's $100,000 payment for the Maserati was an advance on plaintiff's commission. Further, defendants' identified the Maserati payment as part of plaintiff's commission on their spreadsheet documenting his commissions. In his letter Saxton stated that HSI paid for the Maserati on *plaintiff's* behalf. Therefore, the inference was strong that even though HSI paid the majority of the vehicle cost, it paid the money on plaintiff's behalf. It was undisputed that defendants refused to return the vehicle to plaintiff when plaintiff demanded it.

Further, there was evidence that the fair market value of the vehicle was $110,000 and that plaintiff's agent spent $38,000 trying to retrieve it for plaintiff. This evidence supported juror's calculation of damages. Thus, each element of a cause of action for conversion was supported by record evidence. The trial court properly denied defendants' motion for a JNOV on that cause of action.

B. The Court Provided Sufficient Reasons for the Grant of a New Trial

Plaintiff argues the trial court did not provide any reasons for granting a new trial on the conversion claim in its written order. We disagree. As the trial court's written order reflects, the court concluded that plaintiff's counsel's misconduct during closing argument "permeated the verdict." This includes the conversion cause of action as it was part of the jury verdict. Misconduct is a sufficient ground for a new trial. Code of Civil Procedure section 657 expressly authorizes a trial court to grant a new trial when there is

an irregularity in the proceeding.[5] Moreover, even if the court failed to supply adequate reasons for the new trial in its written order, the order would be defective but not void.[6] (*Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 229.)

Assuming defendants' correctly characterize the trial court's order as a limited new trial rendering the denial of a complete new trial reviewable (compare *Cobb v. University of So. California* (1996) 45 Cal.App.4th 1140, 1144 [limited new trial reviewable for abuse of discretion]; *Pacific Corporate Group Holdings, supra*, 232 Cal.App.4th at p. 303 [order denying new trial not appealable]), the order was undoubtedly correct. No irregularity in the proceeding affected the trial court's verdict on the quiet title cause of action (which was not part of the jury verdict). And as described above the evidence strongly supported the conclusion that plaintiff owned the Maserati. Even defendants appear to recognize the separateness of the quiet title and conversion claims when they argue that the quiet title claim should have been tried first, (an issue which is moot in light of the new trial order which guarantees the conversion cause of action will be tried after the quiet title cause of action).[7]

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[5] Code of Civil Procedure section 657 provides in pertinent part: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial."

[6] Plaintiff does not argue this court should independently review the record to determine whether a new trial was warranted. But even if he had made such argument, we would conclude that the misconduct during closing argument supported granting a new trial on both causes of action tried to the jury. (See *Whitlock v. Foster Wheeler, LLC, supra*, 160 Cal.App.4th at pp. 158-159 [when trial court fails to provide stated reasons Court of Appeal independently reviews order to determine whether order should be upheld].)

[7] Defendants argue "the trial court erred by refusing defendants' request to render a decision on their quiet title cross-claim prior to the jury's verdict on legal claims." (Capitalization and boldface omitted.) Defendants also argue that plaintiff is not entitled to a double recovery—both the Maserati and its fair market value, a point plaintiffs'

3. The Parties' Remaining Arguments Are Not Reviewable

We need not consider defendants' protective cross-appeal from the judgment. When "a reviewing court affirms an order granting a partial new trial, issues that are unrelated to the new trial order must await review in an appeal from the final judgment." (*Pacific Corporate Group Holdings, supra*, 232 Cal.App.4th at p. 305.) In any event defendants request review of additional issues only if this court "decides that there should be no new trial," which we have not concluded.

Plaintiff argues that this court has jurisdiction to consider the court's ruling striking punitive damages for conversion and disallowing damages based on the fair rental value of the Maserati because those orders are part of the judgment. However, the judgment is vacated because we have affirmed in part the new trial order. (*Pacific Corporate Group Holdings, supra*, 232 Cal.App.4th at pp. 302, 305; see *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 307 ["[a]n appeal from a judgment that is not final violates the one final judgment rule and must therefore be dismissed"].) Because there is not currently a final judgment, plaintiff's remaining arguments are not cognizable on appeal.

DISPOSITION

The trial court's order denying defendant's motion for a judgment notwithstanding the verdict on the breach of contract cause of action is reversed. The court is directed to enter a new order granting defendants' motion for judgment notwithstanding the verdict on the breach of contract cause of action. The trial court's order granting a new trial on the conversion cause of action is affirmed. The case is remanded to the trial court to conduct a new trial on the conversion cause of action and any other necessary proceedings. Plaintiff's purported appeal from the judgment and defendants' purported

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concede. Defendants argue that the trial court improperly entered a directed verdict on the quiet title cause of action, but the trial court made clear it was entering a verdict, not a directed verdict.

protective appeal from the judgment are dismissed. Defendants are entitled to costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.