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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MICHAEL M. MANN,

Plaintiff and Respondent,

v.

RANDOLPH J. BRANDELLI

Defendant and Appellant.

B241407

(Los Angeles County  
Super. Ct. No. NC042813)

APPEAL from an order of the Superior Court of Los Angeles, Roy L. Paul,  
Judge. Affirmed.

Law Office of Randolph J. Brandelli and Randolph J. Brandelli for  
Defendant and Appellant.

John A. Bunnett, for Plaintiff and Respondent.

After judgment was entered in favor of respondent Michael M. Mann on his claims for legal malpractice against appellant Randolph J. Brandelli, the trial court denied Brandelli's motion for judgment notwithstanding the verdict, and granted in part and denied in part his motion for a new trial. In Brandelli's prior appeal, this court affirmed the rulings on his post-judgment motions, including the grant of a new trial limited to Mann's damages (*Mann v. Brandelli* (June 17, 2011, B224817) [nonpub. opn.]). Following a bench trial, the trial court awarded Mann \$155,178.16 in damages. Brandelli challenges the adequacy of Mann's showing regarding his damages at the bench trial. We reject his contentions and affirm.

## **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Events Preceding Complaint*<sup>1</sup>

Mann has four children, including a son, Mark.<sup>2</sup> In September 2002, Mann's mother, Jesse Kate Jacobs, established a living trust. Upon Jacobs's death, the trust instrument designated Mark as trustee, and provided for the distribution of the trust's assets. In Paragraph 6.9(a), the trust stated that when Jacobs died, the trustee was to distribute \$10,000 to each of Mann's four children, including Mark. The trust further stated in Paragraph 6.9(c): "My Trustee shall next distribute the balance of my Trust Estate to [Mann]. . . . [¶] My Trustee shall hold, manage, invest and distribute the balance of the Trust Estate in trust for [Mann] . . . for his lifetime. During the term of this trust, my Trustee shall distribute income only

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<sup>1</sup> On our own motion, we take judicial notice of the entire record and the unpublished opinion in the first appeal. (*Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 50-51; Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).) Our judicial notice of these matters moots the parties' unopposed requests for judicial notice of particular documents within the record of that appeal. (*Forbes v. County of San Bernardino, supra*, 101 Cal.App.4th at p. 51, fn. 1.)

<sup>2</sup> As appellant and Mark share a surname, we refer to Mark by his first name.

. . . . My Trustee may make such distributions . . . to [Mann] as my Trustee determines is reasonable and appropriate under circumstances known by my Trustee to be relevant to the making of any such distributions. [¶] Upon the death of [Mann], . . . this trust shall terminate, and its assets and any undistributed income shall be distributed to [Mann's four children] . . . .”

In February 2003, Jacobs executed the first amendment to the 2002 trust, which modified Paragraph 6.9(c) “in its entirety” to read as follows: “My Trustee shall next distribute the balance of my Trust Estate to [Mann's four children, including Mark] in equal, by value shares, share and share alike. [¶] [I] specifically make[] no provision for [Mann] in this Trust, not because of lack of love or affection, but because he is already adequately provided for.”

In September 2005, Jacobs executed the second amendment to the 2002 trust, which replaced Paragraph 6.9 “in its entirety.” As amended, Paragraph 6.9(a) provided for no gift to Mark, and otherwise increased the gifts to Mann's other children to \$15,000. Paragraph 6.9(b) stated: “My Trustee shall next distribute the balance of the Trust Estate to [Mark]. If [Mark] fails to survive until the final date of distribution, then his share shall be distributed to his spouse . . . .” Paragraph 6.9(e) stated: “[I] specifically make[] no provision for [Mann] in this Trust, not because of lack of love or affection, but because he is already adequately provided for.”

Jacobs died in late 2006. In February 2007, Mann hired Brandelli, an attorney, to contest the amendments to the 2002 trust. Brandelli filed a petition to determine the validity of the amendments and recorded a lis pendens on Jacobs's home, which the amended trust gave to Mark. In June 2007, the probate court dismissed the petition due to deficiencies in it. After the petition was dismissed, the lis pendens was expunged, and Mark sold the home.

Brandelli filed a second petition and also sought to set aside the dismissal. In November 2007, the court declined to set aside the dismissal and sustained Mark's demurrer to the second petition without leave to amend, concluding that it was time-barred. In February 2008, the probate court denied Brandelli's motion for reconsideration of the order declining to set aside the dismissal.

### *B. Events Related to First Appeal*

On November 17, 2008, Mann initiated the underlying action against Brandelli, asserting claims for professional negligence, breach of contract, intentional misrepresentation, breach of fiduciary duty, and constructive fraud. During the jury trial, as evidence of damages, Mann relied on an appraisal of Jacobs's home, which estimated that its market value in April 2008 was \$275,000. In addition, Mann submitted evidence that contrary to his legal services contract, Brandelli required him to pay \$723.50 in filing fees. The jury found that Mark had exercised undue pressure on Jacobs to secure the amendments, that Brandelli engaged in legal malpractice in handling Mann's case, and that Mann's damages totaled \$240,723.50.

On March 12, 2010, the trial court entered judgment in Mann's favor in accordance with the jury's special verdicts. After Brandelli moved for judgment notwithstanding the verdict and for a new trial on all issues, the trial court denied the motion for judgment notwithstanding the verdict, but granted a new trial limited to damages. In ruling on the motions, the court concluded that a limited new trial was required because the 2002 trust afforded Mann only an income interest in the house, but the evidence at trial concerned the house's fair market value.

Regarding these matters, the trial court stated: "On the issue of damages, the evidence at trial was clear that [Mann] was originally entitled under the terms of

the [unamended t]rust to an income interest in the [house] during his lifetime, at the [t]rustee's discretion. The [a]mendments that Jacobs executed effectively disinherited [Mann]. The jury verdict of \$240,723.50 [in] damages, based on the appraised full market value of the house, rather than the value of [Mann's] income interest, is not supported by substantial evidence.” (Italics and underlining deleted.) Furthermore, the court stated: “[R]emittitur is not possible in this case because of the lack of evidence regarding damages to permit the [c]ourt to make an independent judgment as to a reasonable award -- thus making it necessary to open up this portion of the case to new evidence.”

On May 21, 2010, Brandelli noticed his first appeal. In determining that the trial court did not abuse its discretion in ordering a limited new trial, we explained that “the record disclose[d] a reasonable basis for concluding that Mann could establish the amount of his damages flowing from the loss of his interest under the trust.” (*Mann v. Brandelli, supra*, [nonpub. opn.] at pp. 22-23.) As we noted, Mann's showing at trial regarding his damages was predicated on his view that under the 2002 trust, the house was to be distributed to him upon Jacobs's death. (*Id.* at p. 23.) Furthermore, during the trial, Brandelli did not question Mann's interpretation of the 2002 trust until the presentation of evidence was virtually complete; indeed, he initially agreed to the damages instruction that embodied Mann's interpretation, and challenged it only after both parties had presented their evidence. (*Ibid.*) Because the trial court did not reject Mann's interpretation until it ruled on the post-judgment motions, Mann had no opportunity to supplement the evidence regarding his damages before the case was submitted to the jury. (*Ibid.*) We concluded: “As the kind of evidence needed to establish Mann's damages (for example, evidence of the house's rental value during Mann's projected lifespan) was akin to the evidence he presented regarding the house's market value, the trial

court reasonably concluded that Mann could likely present evidence establishing his damages.” (*Ibid.*)

### *C. Events Related to Second Appeal*

On March 12, 2012, the trial court conducted a bench trial pursuant to its ruling on the new trial motion. Only Mann filed a trial brief and submitted evidence. Brandelli represented himself during the trial.

Victor Palacios, whom Mann offered as an expert on the house’s rental value, had extensive experience with income properties, for purposes of probate actions and the management of trusts. According to Palacios, half of the properties that he handled were in Long Beach, where Jacobs’s house was located. In assessing the house’s rental value, Palacios visited the house, looked at photos of its interior taken when it was sold in 2007, examined other records, and determined the rental value of similar residences in its vicinity. He also considered the costs of operating the house as a rental property, and the need for a loan secured by the house to pay the gifts required at Jacobs’s death under the 2002 trust. Palacios opined that Mann’s life expectancy, based on his age, was 13.1 years. He further opined that the total net value of the house’s rental income from 2007 through Mann’s life expectancy was \$148,968.16

Mann testified that he was in good health and had no medical problems. He stated that his monthly income was \$900, and consisted primarily of Social Security benefits.

During the closing arguments, Brandelli contended that Mann failed to prove his damages with reasonable certainty. Brandelli maintained that Palacios’s testimony was speculative; that Mann could not have received rental income from the house, as it had been sold in 2007; and that Mann did not show that the trustee

would have distributed all the rental income to Mann, in lieu of exercising his discretion to withhold income from Mann.

On March 21, 2012, the trial court entered a judgment awarding Mann damages totaling \$155,178.16. In issuing the judgment, the court determined that Palacios was qualified as an expert on rental values and that his testimony was credible. The court also rejected Brandelli's contentions based on the 2007 sale of the house and the trustee's discretionary powers, noting that he had offered no evidence to support wthem. This appeal followed.

## **DISCUSSION**

Brandelli contends (1) that Palacios's expert testimony was defective and (2) that Mann's showing was inadequate to establish his damages. For the reasons explained below, we reject his contentions.

### *A. Limitations on Brandelli's Contentions*

At the outset, we observe that Brandelli's challenges on appeal are subject to two restrictions. To begin, Brandelli did not seek a new trial following the bench trial. Generally, the failure to move for a new trial precludes a party from complaining on appeal that the damages awarded are excessive, regardless of whether the matter was tried by a jury or a court. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.) Absent a new trial motion, a party may assert only legal errors, "such as erroneous rulings on admissibility of evidence . . . or failure to apply the proper legal measure of damages." (*Ibid.*) For this reason, Brandelli has failed to preserve his contentions, to the extent they involve the resolution of factual issues. (*Ibid.*)

Brandelli's challenges are also constrained by the narrow scope of the new trial ordered by the court below. Generally, a new trial may be properly confined

to a specific issue related to damages, without encompassing all such matters, provided the issue “could be separately tried without prejudice to the litigants . . . .” (*Barmas, Inc. v. Superior Court* (2001) 92 Cal.App.4th 372, 376.) We determine the scope of the new trial by reference to the order granting it, with an eye to the fundamental rationale for limiting new trials. (*Duff v. Duff* (1894) 101 Cal. 1, 4-5.) Ordinarily, “[t]he primary reasons to order a new trial limited to an issue . . . are to relieve the trial court and the parties of the unnecessary burden of relitigating issues that have been decided, and to respect and preserve the results of a trial on issues as to which the appellant has not shown error. [Citations.]” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 696.)

Here, the record establishes that the trial court ordered a new trial limited to the financial value of the income from the house. During the jury trial, Mann offered evidence that due to Brandelli’s negligence, the *lis pendens* was expunged, and Mark was able to sell the house in 2007. Regarding these matters, Mann testified that after the dismissal of Brandelli’s initial petition, Mann saw a ““sold”” sign in front of the house and realized that he had “lost everything.” In view of the amount of damages awarded by the jury, the jury’s special verdicts necessarily reflected a determination that Brandelli’s negligence caused the loss of the house to the 2002 trust.

The new trial order discloses no indication that the partial retrial was to encompass this determination, or any issue other than the financial value of Mann’s life interest in the house’s revenue. In ordering the partial retrial, the trial court found (1) that Mann was entitled solely to “an income interest in the [house] during his lifetime,” and (2) that remittitur was not possible due to the lack of evidence required for “an independent judgment as to a reasonable award . . . .” The court thus concluded that it was necessary “to open up *this portion of the case*



to new evidence.” (Italics added.) Accordingly, the order authorized only a trial limited to the financial value of Mann’s life interest.

Our decision in the first appeal incorporated this interpretation of the new trial order. In affirming the order, we concluded that “the kind of evidence needed to establish Mann’s damages (for example, evidence of the house’s rental value during Mann’s projected lifespan) [is] akin to the evidence he presented regarding the house’s market value” during the first trial. Nothing before us now suggests that this understanding of the trial court’s order was incorrect.

### B. *Expert Testimony*

We turn to Brandelli’s challenges to the damages award. He maintains that Palacios’s testimony regarding the house’s rental value was speculative and lacked foundation because Palacios never examined the house’s interior. We disagree.

Evidence Code section 801, subdivision (b), permits an expert to state an opinion that is “[b]ased on matter (including his special knowledge . . .) perceived by or personally known to the witness . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . .” As explained in *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 738, whether a witness may testify as an expert on the value of real estate is within the sound discretion of the trial court. There, the trial court permitted a realtor to testify regarding the value of a commercial complex that included a restaurant, manufacturing facilities for a specific type of car, an auto body and painting shop, and a used car sales area. (*Id.* at p. 737.) The appellate court rejected the contention that the realtor’s testimony was speculative, even though she had visited the complex only to buy vehicles, and never scrutinized it for purposes of valuation. In finding no abuse of the trial court’s discretion, the appellate court noted that the realtor had 10 years’ experience as an agent, two

years' experience as a broker, some experience selling commercial property, and familiarity with the complex. (*Id.* at pp. 737-739.)

Here, Palacios had considerable experience with income properties in the area of Jacobs's house. Furthermore, in assessing the house's rental value, Palacios visited the house, examined photos of its interior taken when it was sold in 2007, reviewed records related to it, and determined the rental value of similar residences in its vicinity. In view of these facts, Palacios's opinion was adequately based on matters personally known to him and was "of a type that reasonably may be relied upon by an expert" (Evid. Code, § 801, subd. (b)). Accordingly, the trial court did not err in admitting his testimony.

### *C. No Deficiencies in Mann's Showing*

Brandelli asserts several related challenges to the adequacy of Mann's showing. Their overarching theme is that Mann was obliged to present evidence regarding a specific issue, but failed to do so. Again, we disagree.

#### *a. February 2007 Petition*

Brandelli contends that Mann failed to prove his actual interest in the house because he did not submit the first petition that Brandelli filed on his behalf in February 2007. According to Brandelli, the petition sought to have the 2002 trust declared void. He argues: "If [the] original action . . . had been successful in this regard, [Jacobs's will related to the 2002 trust] would have been ineffective, and [Jacobs] would have died intestate. Mann . . . presented no evidence at the new trial of the value of what he would have received if he were to take an intestate share of the estate."

This contention fails, as it relies on a false premise, namely, that Mann was obliged to relitigate the nature of his interest in the house. In ruling on Brandelli's

post-judgment motions, the trial court determined that “the evidence at trial was clear” that the 2002 trust afforded Mann an income interest in the house. Because the grant of a new trial was predicated on this determination, Mann was not required to demonstrate his interest in the house during the new trial. (See *DeVall v. DeVall* (1951) 102 Cal.App.2d 53, 57 [during new trial, party was not obliged to address issues resolved at prior hearing that fell outside scope of new trial order].)

Brandelli’s contention is also defective for a second reason. Although the February 2007 petition attacked the “purported trust” established by the amendments to the 2002 trust, it did *not* challenge the validity of the 2002 trust. The petition specifically alleged: “[Mann] has standing to bring this petition because [Mann] will benefit by a judicial determination that the purported trust is invalid, thereby causing [Jacobs’s] assets *to be distributed through* [Jacobs’s] *Trust dated September 25, 2002.*” (Italics added.) Accordingly, the February 2007 petition could not have disturbed the trial court’s determination regarding Mann’s interest in the house, even if it had been admitted during the bench trial.

#### b. *Mark’s Sale of the House*

In a related contention, Brandelli maintains that Mann failed to make an adequate showing regarding his interest in the house, which Brandelli identifies as the income generated by the proceeds from Mark’s sale of the house in 2007. Noting that the 2002 trust empowered the trustee to sell the house, Brandelli argues that “[s]ince the house had been sold out of the [2002 trust], . . . [Mann’s] income interest under the [2002 trust] was actually the present value of the income from the proceeds of the sale.”

This contention fails due to the narrow scope of the new trial. During the jury trial, neither Mann nor Brandelli advocated the theory that Mark sold the house as the trustee under the terms of the 2002 trust. Mann’s theory of the action

was that Mark sold the house after Brandelli failed to take the actions necessary to invalidate the amended trust, which gave the house to Mark. In response, Brandelli maintained only that the amended trust was not the product of undue influence, and that he acted reasonably in attempting to have the amended trust set aside. As noted above (see pt. A., *ante*), the jury's special verdicts reflected a determination that Brandelli's negligence resulted in the *loss* of the house to the 2002 trust. In view of the limited scope of the new trial, Mann was not obligated to relitigate that determination.

*c. Trustee's Discretion*

Pointing to the trustee's discretionary authority under the 2002 trust, Brandelli contends that Mann failed to show that he would have received the full amount of the income from the house. Paragraph 6.9(c) of the 2002 trust states in pertinent part: "During the term of this trust, my Trustee shall distribute income only . . . for [Mann's] health, maintenance, support, education, comfort and welfare. My Trustee may make such distributions of income to [Mann] as my Trustee determines is reasonable and appropriate under circumstances known by my Trustee to be relevant to the making of any such distributions." Brandelli argues that Mann presented no evidence that Mark, as trustee under the 2002 trust, would have abused his discretion by distributing less than the full amount of the house's income to Mann. We disagree.<sup>3</sup>

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<sup>3</sup> To the extent Brandelli challenges the sufficiency of the evidence admitted during the bench trial to support the damages award, our analysis applies established principles of review for substantial evidence. Our power as an appellate court "begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics deleted.)

Generally, “[t]o determine the extent of the trustee’s discretion, we look to the intention of the trustor, as manifested in the trust instrument.” (*Ventura County Dept. of Child Support Services v. Brown* (2004) 117 Cal.App.4th 144, 154.) In view of Paragraph 6.9(c), Jacobs established what is known as a “discretionary support trust, in which the trust’s purpose is to provide for a beneficiary’s needs but the trustee has discretion in determining those needs.” (*Young v. McCoy* (2007) 147 Cal.App.4th 1078, 1087 (*Young*).) Under such a trust, the trustee may not withhold payments in bad faith or with an improper motive. (*Ventura County Dept. of Child Support Services v. Brown, supra*, 117 Cal.App.4th at p. 154.) In this regard, trustees owe income beneficiaries a fiduciary duty. (*Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1208.) This duty includes the duty to deal impartially with beneficiaries and to preserve trust property. (*Ibid.*; Prob. Code, §§ 16002, 16006.)

The trustor’s intention also governs the inquiry into whether the trustee abused his discretion. In the context of a discretionary support trust, “[a] trustee’s discretion is not unlimited . . . . If a trustee abuses [his] discretion, a court may order that trustee to do things differently. . . . [W]hether a trustee exercises [his] discretion appropriately or abusively is measured by how this exercise conforms to the trustor’s intent. ‘[T]he basic inquiry, whenever the exercise of a trustee’s discretion, absolute or otherwise, is challenged, is always whether the trustee acted in the state of mind contemplated by the trustor.’” (*Young, supra*, 147 Cal.App.4th at p. 1087, quoting *Estate of Greenleaf* (1951) 101 Cal.App.2d 658, 662.)

In rejecting Brandelli’s contention regarding Mann’s entitlement to the full income from the house, the trial court concluded that Jacobs “desired and intended” the house’s income “to pass to Mann for the duration of his life.” The court explained: “The [2002 trust] states that it was the intent of Jacobs to leave the income of the [t]rust to Mann for life. As [t]rustee, Mark was under ‘a duty to

administer the trust solely in the interest of the beneficiaries.’ [(Prob. Code, § 16002.)] Contrary to Jacobs’[s] intent in the [2002] trust . . . , no income from the [t]rust was distributed to Mann.”

The evidence admitted during the new trial was sufficient to support the trial court’s determinations, in view of the limited scope of that trial. Aside from offering Palacios’s testimony, Mann submitted the 2002 trust and testified regarding his income. The 2002 trust, viewed as a whole, shows Jacobs’s intent to afford Mann an entitlement to the income from the house, absent special circumstances that made it reasonable for the trustee to withhold some or all of the income. The instrument expressly provides in Paragraph 11.3: “Notwithstanding anything to the contrary in this agreement, my Trustee shall *not* exercise any power in a manner inconsistent with the beneficiaries’ *right* to the beneficial enjoyment of the trust property in accordance with the general principles of the law of trusts.” (Italics added.) In addition, Mann’s testimony regarding his modest monthly income supports the reasonable inference that a full distribution of income was necessary for his “health, maintenance, support, education, comfort and welfare.” As the trial court noted, Brandelli presented no evidence showing the existence of any circumstances that might justify a decision by the trustee to withhold income.

Furthermore, for the reasons discussed above (see pt. A., *ante*), the evidence admitted at the bench trial must be assessed in light of the issues resolved by the jury trial. The jury’s special verdicts reflected determinations that Mark’s exercise of undue influence over Jacobs invalidated the amended trust, and that his misconduct led to the loss of the house to the 2002 trust. In view of these determinations, Mann was not required to submit new evidence during the new trial to show that following Jacobs’s death, Mark breached his duties as trustee under the 2002 trust. The trial court thus properly considered Mark’s bad faith

conduct as trustee in concluding that Mann was entitled to the full income from the house.<sup>4</sup>

d. *Present Value of Damages*

Brandelli contends Mann failed to show the present value of his damages. He argues that although Palacios estimated the house's total rental income from 2007 through Mann's life expectancy, Mann offered no evidence permitting that sum to be adjusted to reflect its present value. As explained below, Brandelli has not demonstrated reversible error.

Because the calculation of the present value of Mann's damages hinges on a factual issue regarding the discount rate, Brandelli's failure to move for a new trial works a forfeiture of his contention (see pt. A., *ante*). The adjustment of damages to their present value is intended to preclude excessive recoveries by plaintiffs. (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 643.) Generally, “[b]efore an appellate court can interfere with a judgment on the ground that it is excessive, “the excess must either appear as a matter of law, or be such as to suggest, at first blush, passion, prejudice or corruption on the part of the trier of the fact.” [Citation.]” (*Kelly v. CB & I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452, quoting *Butler v. Peluso* (1957) 154 Cal.App.2d 624, 629.) No such circumstances are presented here.

The appropriate discount rate is usually determined by the rate of return on invested funds and a countervailing factor, namely, the rate of inflation. (*Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 642; *Schiernbeck v. Haight* (1992)

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<sup>4</sup> Brandelli's reliance on *Young* is misplaced. There, the appellate court concluded that the trustee of a discretionary income trust did not abuse his discretion in withholding certain payments, as there was no evidence that he acted in bad faith. (*Young, supra*, 147 Cal.App.4th at pp. 1087-1088.) That is not the case here.

7 Cal.App.4th 869, 876 (*Schiernbeck*.) The resolution of these factors into a discount rate presents a factual question. (*Schiernbeck, supra*, 7 Cal.Ap.4th at p. 876.) Accordingly, because the record does not establish as a matter of law that the damages awarded to Mann are excessive, Brandelli forfeited his contention by failing to seek a new trial.

However, we would reject Brandelli's contention were we to consider it. Our research has disclosed no published decision holding or suggesting that a future damages award is fatally defective absent evidence of present value, or that the burden of producing that evidence falls exclusively on the plaintiff. On the contrary, in *Schiernbeck*, the appellate court struck an award of interest because the trial court mistakenly believed that the underlying damages award had been discounted to present value, but did not reverse the damages award itself. (*Schiernbeck, supra*, 7 Cal.App.4th at pp. 874-879, 882.) Similarly, in *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 612-615, the appellate court affirmed a future damages award, even though no evidence of present value had been presented.

Furthermore, most other courts that have addressed the burden of proof have not allocated it exclusively to the plaintiff. In *Alma v. Manufacturers Hanover Trust Co.* (9th Cir. 1982) 684 F.2d 622, 627, the Ninth Circuit held that the defendant has the burden of producing evidence regarding the discount rate, that the plaintiff has the burden of producing evidence regarding inflation, and that the award need not be adjusted if neither side produces evidence regarding these matters. Other courts have also concluded that the defendant is obliged to produce evidence regarding the discount rate. (*CSX Transp., Inc. v. Casale* (Va. 1994) 247 Va. 180, 186 [441 S.E.2d 212, 216]; *Wingad v. John Deere & Co.* (Wis. 1994) 187 Wis.2d 441, 452 [523 N.W.2d 274, 279]; but see *Gorniak v. National R.R. Passenger Corp.* (3d Cir. 1989) 889 F.2d 481 [burden of producing evidence regarding present value falls on plaintiff].)



Imposing the burden of proof regarding the discount rate on the defendant is reasonable, as adjusting damages to present value is ordinarily favorable to the defendant. In this respect, adjustment to present value closely resembles the defense of mitigation of damages. Within California, the burden of proof regarding mitigation of damages falls upon tortfeasors and parties who have breached a contract. (*Carnation Co. v. Olivet Egg Ranch* (1986) 189 Cal.App.3d 809, 816-817 & fn. 9.) Concerning that allocation, the court in *Carnation Co.* explained: “[I]t is sensible to require the defendant to prove those items which go to reduce the plaintiff’s recovery, as plaintiffs would have little incentive to do so.” (*Id.* at p. 818.) Accordingly, even if Brandelli had not forfeited his contention, we would find no reversible error from the absence of evidence regarding present value.

**DISPOSITION**

The judgment is affirmed. Mann is awarded his costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.