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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

MI RYONG SONG, Plaintiff and Appellant, v. SUK K. LEE, Defendant and Respondent.	B235336 (Los Angeles County Super. Ct. No. BC418479)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Reversed and remanded.

Horvitz & Levy, David M. Axelrad and Jason R. Litt, Parker Shumaker Mills and David B. Parker for Plaintiff and Appellant.

Yoka & Smith and Christopher E. Faenza, Murchison & Cumming and Edmund G. Farrell III for Defendant and Respondent.

Mi Ryong (Mimi) Song[1] appeals from an adverse judgment in her action against Suk K. Lee for breach of a confidential settlement agreement. She contends the trial court erred in excluding a second version of the settlement agreement found by her attorneys after the discovery cutoff date and shortly before trial. Her claim is that interlineations on this version would establish that respondent Suk K. Lee breached the confidentiality agreement by providing a copy of his version of the agreement to George Oh for use in a will contest.

We agree that the trial court erred because there was no violation of a discovery order and the trial court did not find that the late production of the second version was willful or that appellant had engaged in repeated and egregious discovery abuses. We also conclude exclusion of the document was not appropriate as an exercise of the court's inherent authority to ensure a fair trial or to avoid delay. Because the error is material, we reverse and remand for a new trial.

FACTUAL AND PROCEDURAL SUMMARY

This case arises in the context of complicated and contentious relationships between two groups of immigrants from South Korea, resulting in numerous lawsuits, including the present action. To understand the context for the present action, it is necessary to summarize some of the other litigation involving these groups.

A. Background

Mimi Song came to the United States at age 20 with her family in 1977. She took a job in a Korean supermarket owned by James Oh. James had sponsored the immigration of Mimi and her sister, Marie Song, and other members of their family. At

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[1] Appellant refers to herself as "Mimi" in her briefs and we adopt that designation. Where the same surname is shared by more than one person discussed in this opinion, for ease of reading we often use the first name. No disrespect is intended.

that time, James was married to Nancy[2], the aunt of Mimi and Marie. James and Nancy had two children, George and Linda.[3] James and Nancy separated in 1979 and were divorced in 1981. He asked Mimi and Marie to start a new supermarket business with him. In 1981 they opened their first supermarket. At time of trial, Mimi Song was president and CEO of Super Center Concepts, a chain of 38 warehouse supermarket stores which grew from the original store opened with James and Marie.

In 1984, Mimi married James in Las Vegas. When they returned to southern California, they realized that the marriage was not right because James had been her uncle. They immediately filed to end the marriage. In late 1984, Mimi married another man in Korea. They divorced in 1986 or 1987. After the divorce, Mimi began living with James.[4] They lived together until James died in March 2008. According to Mimi's testimony, George and Linda had been estranged from their father since the early 1990's. James had prepared a will in September 2000 that left his entire estate to Mimi. The will stated that George and Linda were intentionally omitted.

B. Jennifer Lee v. James Oh

James and Mimi had a long-term and good relationship with respondent Suk K. Lee and his family.[5] In January 2001 that relationship changed when James was served with a lawsuit brought against him by Suk K. Lee's daughter, Jennifer Lee, alleging that James had sexually assaulted her. (LASC Case No. BC243600, "Jennifer Lee action".) Mimi met with Suk K. Lee in an attempt to resolve the matter. He demanded $7 to $10 million.

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[2] Nancy's Korean name is Young Ock Hyun; she is referred to in the briefing as "Nancy."

[3] Appellant testified that George changed his name to Anthony Michael Lee and that Linda changed her name to Claire Zhen.

[4] James married Christine Lee in 1999, but they later divorced.

[5] In her breach of contract action, Mimi Song alleged that George and respondent were cousins.

Eventually, Jennifer Lee dismissed the action and three mediation sessions were held before a superior court judge. A settlement was reached encompassing both her claims against James, and other claims made by her father against James regarding stock in Super Center Concepts, fraudulent conveyances, and tax matters. Mimi did not attend any of the mediation sessions. Exhibit 1 in the present case is a copy of the settlement agreement in the Jennifer Lee action, produced by George as we explain below. The confidentiality provision of that agreement was particularly important to Mimi because the lawsuit raised shameful matters. The settlement agreement was signed by Jennifer Lee, Suk K. Lee, her mother, Young Ja Lee, James Oh, Marie Song, and Mimi Song, individually and on behalf of the supermarket business, Super Center Concepts.

C. Will Contest

Mimi Song initiated a probate of the will leaving her James's estate. George and Linda contested the will. They detailed their father's history of sexual entanglements with Mimi and Marie Song, and his third wife, Christine Lee.[6] They said that James and Marie had been prosecuted for tax crimes, and had pled guilty to attempting to bribe an Internal Revenue Service agent. James was placed on a supervised release and several years of parole. George and Linda claimed that Mimi had coerced James into executing the will leaving his entire estate to her by "(1) threatening to report him to the appropriate government agencies for alleged tax fraud, allegedly violating his parole, and allegedly committing perjury to a Federal District Court Judge, (2) threatening to expose his alleged relationships with underage girls to the media and the police, and (3) convincing him that [the will] was necessary to ensure that Christine [Lee, his third wife] would not

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[6] In the will contest, George and Linda asserted that James turned to Janet Kim and her daughter, Christine Lee, for acupuncture treatments when doctors were unable to cure his ailments. They alleged that James was defrauded by the two women into giving them substantial real estate holdings, as well as cash, jewelry, and expensive cars. They contend that James married Christine at Janet's urging. The will contest alleges that James eventually sought to annul the marriage to Christine, and sued her and Janet Kim for fraud. Christine filed for dissolution. The fraud action against her was settled, but James allegedly received a large judgment against Janet Kim.

get his assets upon his death, and that she (Mimi) would take care of George and Linda and ensure that all of Decedent's assets would pass to George and Linda instead of Christine."

George and Linda alleged that James lacked testamentary capacity. They also alleged Mimi Song had exercised undue influence over James, having occupied a position of trust and confidence with him, and having had a longstanding sexual and confidential relationship with James which made him emotionally dependent on her. They contended that James was particularly vulnerable because he was in ill health, realized that he had been swindled out of millions of dollars by Janet Kim and Christine Lee, and was going through a difficult divorce from Christine, as well as the fraud lawsuit against his wife Christine and mother-in-law, Janet Kim.

During discovery in the will contest, George produced Exhibit 1, a copy of the confidential 2001 settlement of the Jennifer Lee action against James.

D. Present Breach of Contract Action

In 2009, Mimi Song sued respondent Suk K. Lee for breach of contract, alleging that he had breached the confidentiality provision of the settlement agreement in Jennifer Lee's action against James by providing a copy of the settlement agreement (Exhibit 1) to George for use in the will contest. Respondent's position is that George obtained Exhibit 1 from his father's files.

Paragraph 4 of Exhibit 1 is the confidentiality provision on which appellant's action is based. It states: "The parties to this Agreement shall keep both the fact that this Agreement was made and the terms of this Agreement strictly confidential, and shall not reveal that the parties have entered into this or any other agreement, except for such disclosures as may be required by law or compelled by legal process. In the event of a breach of this provision the aggrieved party or parties may avail themselves of every remedy available under law." Exhibit 1 also provides for an award of attorney fees to the prevailing party in the event of any litigation "in connection with or concerning the subject matter of this Agreement or to enforce any term hereof . . . ."

E. Discovery of Exhibit 4, another version of the settlement agreement

Nine days before the discovery cutoff date in the breach of contract action, respondent filed amended answers to appellant's first set of interrogatories. Appellant asserts that, for the first time, the amended responses on behalf of respondent contended that the confidential settlement agreement was an illusory promise and not enforceable, that appellant did not understand either the confidentiality or attorney fee provisions when she signed the agreement, and that respondent did not review the agreement prior to signing it. Respondent also asserted that he did not receive, and that appellant did not give, any consideration in relation to the settlement agreement.

Appellant took the position that this response raised entirely new defenses at a point when there was insufficient time left to conduct discovery about them. Trial counsel for appellant, Steven Goldsobel, notified counsel for respondent that he undertook further investigation. At his request, Bryan Sheldon, whose firm acted as counsel for the Oh parties in defense of the Jennifer Lee action, examined his files from that case. He discovered Exhibit 4, another version of the settlement agreement in that case, and gave it to counsel for appellant. Sheldon had represented appellant at the outset of the present breach of contract action, and had filed the complaint on her behalf before substituting out. Exhibit 4 was promptly disclosed to counsel for respondent.

Exhibit 4 became crucial to appellant's claim that respondent had breached the confidentiality provision of the settlement agreement. As we explain, handwritten interlineations appearing on Exhibit 1 and Exhibit 4 were slightly different in form, although the substance was the same. Appellant argued that this was because the interlineations on the copy possessed by George (Exhibit 1) were the same as on the copy given to respondent at the settlement but were different from the copy retained by Sheldon on behalf of the Oh parties (Exhibit 4). This would contradict respondent's position that George obtained his copy of the settlement agreement, Exhibit 1, from his father's files because the copy given to the Oh side was Exhibit 4, which was slightly different. That circumstance, unless explained, supported the allegation that respondent gave George the agreement, thus breaching the confidentiality provision.

Respondent brought a motion in limine to exclude Exhibit 4 because of its late disclosure. Appellant vigorously opposed the motion. At an Evidence Code section 402 preliminary fact hearing, Sheldon testified about the settlement of the Jennifer Lee action, the preparation and signing of the settlement agreement, and his discovery of Exhibit 4 in his files upon being asked by present counsel for appellant to investigate. He testified that he represented James in the suit brought by Jennifer Lee. Before the mediation began, Jennifer was asserting that James had sexually molested her over a span of years. Respondent, her father, also was claiming there had been fraudulent transfers of Super Center Concept stock and tax improprieties. He intended to bring a whistleblower tax action against James and others. Three mediation sessions were held in the courtroom of Judge Otero in August and September of 2001. Sheldon testified that he believed that all but one person attended each of the sessions. These included Suk Lee, Jennifer Lee, their attorney Greg Smith and a Korean-speaking associate from Smith's firm. On the other side the attendees were James, Sheldon, his partner, John Lim, and George Lim. Mimi Song did not attend any of the mediation sessions and was not present when the settlement agreement was prepared.

Sheldon was shown Exhibit 4, the second version of the settlement agreement. He explained that on the last day of the mediation, September 14, 2001, a resolution was reached. He prepared the settlement agreement on his laptop, and gave a floppy disc to the court clerk who printed out two copies so that each side could take one after the agreement was signed. When the clerk went home, after normal court hours, an additional change was suggested and agreed to. He believed the suggestion was by the defense side (James). To accommodate that change, Sheldon handwrote the addition on page 4, paragraph 8. This is the additional language on each of the copies printed out earlier by the court clerk. After Sheldon made the notations, everyone present at the mediation signed off on each copy of the agreement. Sheldon took one copy to his office and Smith took a second copy to his office. There were two versions.

Marie Song, Mimi Song, and Jennifer Lee's mother, who were intended to be bound by the agreement, were not present and therefore could not sign the agreement in

the courtroom. Sheldon said that on the following Monday, he and Smith exchanged the signature pages of the settlement agreements by facsimile with the signatures on them.

Sheldon testified that the handwritten interlineations on page 4 of the settlement agreements are somewhat different on the two versions. On Exhibit 4, the end of the handwritten first line ends with the word "agreement." On Exhibit 1, the version produced by George, the end of the first line ends with the word "James" and then the word "Oh" appears on the following line. Sheldon explained: "So although I think the agreements . . . say exactly the same thing, the words are a little bit different. And also, the signature pages are different on these two different versions, particularly the one that has one or two, that have fax headers on it. Because you can see that there was some faxing back and forth, and they're slightly different." Exhibit 4 has the fax information showing that Sheldon's office had received a signature page with the signature of Young Ja Lee. On Exhibit 1 the signature line for Young Ja Lee was blank because she was not present at the mediation and did not sign that day. Exhibit 1 shows that Smith received the signatures of Marie Song, Mimi Song, and Mimi Song on behalf of Super Center Concepts. Sheldon made two copies of the settlement agreement. The question asked at trial did not specify whether this was a reference to Exhibit 1 or 4, but we assume it was Exhibit 4 which was retained by Sheldon. There was an original, one copy in his file, and another copy that went to his client. He did not specify whether this copy was given to James, rather than someone aligned with him. Sheldon explained that the amount of the settlement agreement was based in part on the claims respondent had made regarding Super Center stock and fraudulent transfers, and that all settlement proceeds went to Jennifer Lee rather than respondent because she had a claim for personal injury, and there were no tax implications from the payment.

Counsel for appellant in the present action, Goldsobel, contacted Sheldon's partner, John Lim on June 20, 2011. A copy of Exhibit 1 was e-mailed to their law office with an inquiry about whether this was the agreement in their file in the Jennifer Lee case. Since Lim was out of town, Sheldon had the files retrieved from storage and looked for the settlement agreement. This was the first he had heard of interest in the two

versions of the settlement. He compared the versions and found that Exhibit 1 was not the version in his file. Instead the version in his file was Exhibit 4. Although he had been involved in this case when it was filed, his firm substituted out before any discovery had been propounded by respondent.

At the conclusion of Sheldon's testimony at the Section 402 hearing, the trial court said it had no problem with Sheldon testifying about the settlement conference, the participants, and the settlement that was reached. But the court said it did have a problem with Exhibit 4 because "this is something that has been in possession of plaintiffs since the beginning of trial, even though they've had a change of counsel. And just before trial, you do a little more investigation. That doesn't change the fact that plaintiff was in at least constructive possession of these things from day one. It is a discovery violation." The court also indicated that the location of the originals of the settlement agreements was unknown and that there was no information about how many copies were made and to whom they were given. The court said: "I think that on top of the discovery violation, which, you know, had this all been produced earlier, maybe we would have figured it out, but now it's a big [Evidence Code section] 352 issue. And I don't think that it's appropriate to start talking about these two different versions when plaintiff had it all along." The court stated that when current trial counsel for appellant came into the case, they inherited "the lawsuit and everything that goes with it," including "what is in the custody of plaintiff's [appellant's] counsel." The court said appellant's trial counsel should have looked into this issue before trial. The court said that the amendment to Suk Lee's discovery response "speculating" about how George obtained Exhibit 1 did not change anything because counsel for appellant had an obligation to conduct research in trial preparation. The court repeated that this constituted a discovery violation. Appellant was not allowed to produce Exhibit 4 at trial.

During trial, the court reiterated that Sheldon would not be allowed to testify about Exhibit 4. Sheldon testified about his representation of the Oh parties at the mediation and settlement of the Jennifer Lee lawsuit. He did not testify about the two versions of the settlement agreement. Uk Jin Kim, who had known respondent and James for many

years, testified that he arranged a meeting between appellant and respondent in an effort to resolve any differences between them in April 2009. At that meeting, respondent said that he had given a copy of the confidential settlement in the Jennifer Lee case to George to read overnight. According to Kim, respondent said that George might have kept a copy of the agreement, and appeared upset. In his testimony at trial, respondent denied providing George a copy of the confidential settlement agreement. George also testified that he did not receive a copy of the confidential settlement agreement from respondent. He said Exhibit 1 was among the documents in 60 to 70 boxes of records from his father which he produced in discovery in the will contest.

The jury reached a special verdict, finding that respondent did not give the confidential settlement agreement to George and had not disclosed the terms and substance of the agreement in violation of the confidentiality provision. Judgment in favor of respondent was entered. Respondent was found to be the prevailing party for the purposes of an award of attorney fees and costs. Appellant filed a timely appeal from the judgment.

DISCUSSION

I

Appellant argues that the exclusion of Exhibit 4 cannot be upheld as a discovery sanction because she did not violate a court order, the trial court did not find that the delay in producing the document was willful, nor did it find appellant committed repeated and egregious discovery abuses. We agree.

Code of Civil Procedure section 2023.030 is the applicable discovery sanctions statute. Subdivision (c) provides: "The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence." Code of Civil Procedure section 2023.010 lists examples of conduct amounting to misuses of the discovery process. These include failing to respond to an authorized method of discovery or making an evasive response to discovery. (Code Civ. Proc., § 2023.010, subds. (d) & (f).) "[A]bsent unusual

circumstances, such as repeated and egregious discovery abuses, two facts are generally a prerequisite to the imposition of a nonmonetary sanction. There must be a failure to comply with a court order and the failure must be willful. (*Biles v. Exxon Mobile Corp.* (2004) 124 Cal.App.4th 1315, 1327.)" (*Lee v. Lee* (2009) 175 Cal.App.4th 1553, 1559 (*Lee*).)

The trial court has broad discretion when imposing a discovery sanction and its order will not be reversed on appeal absent a manifest abuse of discretion that exceeds the bounds of reason. (*Lee, supra,* 175 Cal.App.4th at p. 1559.) *Lee* presented circumstances similar to our case. The trial court declined to impose an evidentiary sanction under Code of Civil Procedure section 12023.030, subdivision (c) because it found that evidence supporting a claim came into the parties' possession shortly before trial and was turned over immediately to the opposition. No court order had been violated and there was no evidence that the parties had willfully failed to comply with discovery requests. The Court of Appeal affirmed, finding support for the court's findings in the record and no evidence of a willful failure to comply with discovery. (*Ibid.*)

Respondent acknowledges that a finding of willful abuse of the discovery process is a prerequisite to imposition of an evidentiary sanction. He argues appellant repeatedly and willfully failed to provide discovery, citing *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447 (*Pate*). *Pate* is distinguishable.

In that case, in response to an initial request for production of maintenance expense records, the defendant directed the plaintiffs and their counsel to a shed where he pointed out five boxes which he claimed contained all the responsive documents. After photocopying 719 documents, plaintiffs made two further written requests for production of maintenance expense documents. Defendant assured them that all had been produced. After eight days of trial, the plaintiffs rested their case in chief. The following day, the defendant's home office asset manager took the witness stand and said he had with him a box of documents to establish the validity of the maintenance charges to the plaintiffs. At a hearing on the issue, the plaintiffs noted their three requests for production of such

documents, and provided copies of written assurances by the defense that all relevant documents had been produced. They represented that they had agreed to allow the defense to reopen discovery in exchange for further written assurances that all written documents had been produced. As a final precaution, shortly before trial, counsel for plaintiffs tendered all 719 documents to the defense and asked whether any other relevant documents were in existence. The defense assured them that there were no other documents. (*Pate, supra*, 51 Cal.App.4th at p. 1452.)

The defense in *Pate* claimed that the documents brought to court by the manager were made available to plaintiffs in the five boxes, but that plaintiffs failed to copy them. The trial court credited the plaintiff's account and found that defendant had "'played fast'" with the discovery rules. Since trial was already in progress, the court concluded that the only appropriate sanction was to preclude the defendant from introducing any document not provided by plaintiffs before trial. (*Pate, supra*, 51 Cal.App.4th at p. 1453.)

Respondent claims that the facts here are "strikingly similar" to *Pate*. He cites a statement by counsel for respondent at trial that he had sought discovery of Exhibit 4, saying "We've asked not once, not twice, about 10 different times for documents . . . ." Respondent contends that once Exhibit 4 came to light, appellant used the same excuse used in *Pate*; that respondent had the necessary information to allow him to find it himself. This is a reference to the argument on the admissibility of Exhibit 4. Counsel for appellant contended that a month before the discovery cutoff date, his firm had identified Sheldon's firm, Lim, Roger and Kim, and John Lim as knowledgeable about the settlement agreement, as well as the attorney representing the Lees in the mediation. He said that respondent did not conduct further discovery in light of this response.

Respondent claims that like the plaintiffs in *Pate*, he prepared for trial believing he possessed all relevant documents, but learned after discovery closed that he did not. He also contended that he was prejudiced by the late disclosure because appellant's entire breach of contract claim was based on the assertion that respondent had provided George a copy of the settlement agreement.

Respondent has not demonstrated an egregious pattern of discovery abuse of the magnitude addressed in *Pate*, *supra*, 51 Cal.App.4th 1447. He has not shown that he repeatedly sought discovery of the settlement agreement or that appellant continuously assured him that all responsive documents had been produced. Respondent has not demonstrated that appellant was aware of the existence of another version before it was discovered in Sheldon's files. She was not present at the mediation when the two versions of the settlement agreement were interlineated by Sheldon, although respondent was. Respondent also asserts that appellant should have been alerted to the existence of the second version of the settlement agreement by the formal discovery request he propounded seeking the settlement agreement. We disagree. The discovery propounded by respondent in itself was not sufficient to alert appellant to the existence of different versions of the settlement agreement. Respondent has not contradicted the evidence that the existence of Exhibit 4 was a surprise to appellant and her present counsel.

Respondent also recognizes that evidentiary sanctions generally require violation of a court order, but contends that there are circumstances where a prior order is not required. The cases allowing evidentiary sanctions without a violation of a prior order were collected in *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403.

In *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27 (*Do It Urself*), trial was continued based on plaintiffs' promise to complete an audit and provide a written report. The audit and report were never completed. The trial court found the plaintiffs had willfully misused the discovery process and concluded that a formal order would have been futile. The Court of Appeal affirmed an order excluding any accounting evidence in support of the complaint, finding plaintiffs repeatedly attempted to delay the trial and withhold promised items of discovery. (*Id*. at pp. 31–33, 35–36.) In *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525 (*Vallbona*), at trial, defendants attempted to introduce documents they had not produced in discovery. The court found that they had willfully misused the discovery process and granted evidence and issue sanctions. Following *Do It Urself*, the Court of

Appeal found a formal discovery order would have been futile and affirmed. (*Id*. at pp. 1545–1547.)

Respondent argues that under this line of authority, the sanction order in this case was warranted because a formal order would have been futile and because appellant engaged in repeated and egregious willful abuses of the discovery process which he does not describe. He contends appellant's failure to disclose the second settlement agreement before the discovery cutoff date was willful because she either knew or should have known of the existence of the second agreement. He cites Sheldon's testimony that one copy of the second settlement agreement was placed in his file and another copy was given to appellant. He also cites the effort appellant expended in producing over 36,000 documents in discovery, Sheldon's role representing appellant in the Jennifer Lee case and as the original attorney in this action, and Sheldon's possession of the second settlement agreement. Respondent asserts that the trial court found that appellant possessed the second settlement agreement "'all along.'" In the passage cited, the trial court observed that plaintiff had been in possession of the second settlement agreement "all along," but then explained that this was because Sheldon had the document.

Respondent contends the trial court did not abuse its discretion and that the evidence supports the trial court's finding regarding possession of Exhibit 4. He notes that appellant was a party to the agreement and claims she was present when it was signed. In support of the assertion that appellant was present when the settlement agreement was signed, respondent cites the first page of Exhibit 1, which recites that the agreement was entered into by various parties, including appellant. Both Sheldon and appellant testified that she was not present at the mediation when the case was settled.[7]

As we have seen, the trial court ruled that Exhibit 4 had been in appellant's constructive possession because it was in Sheldon's files in the Jennifer Lee action.

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[7] Respondent cites page 59 of the reporter's transcript to support the assertion that appellant received and retained a copy of the agreement. But the cited portion of the transcript is argument by counsel for respondent at the hearing on the admissibility of the document.

Sheldon had been appellant's counsel when this case was filed. But this is not tantamount to a finding of willful concealment of the document until shortly before the discovery period had closed. Respondent failed to demonstrate that appellant engaged in a pattern of repeated egregious discovery abuses and misleading conduct of the sort that was present in each of the cases in which sanctions were upheld absent a prior discovery order. We conclude that the sanction imposed is not justified under Code of Civil Procedure section 2033.030.

In an apparent attempt to salvage the exclusion order in the absence of either a prior court order or a finding of willful concealment, respondent argues that discovery sanctions are not precluded just because appellant was apparently unaware of the existence of Exhibit 4 during discovery. He contends that the trial court must ensure the disclosure of documents of which the party should be aware.

In support of this argument, respondent cites *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270 (*Thoren*), a personal injury action brought by a carpenter against a subcontractor. In the discovery phase of the case, plaintiff identified only one person who arrived at the scene shortly after the accident. At trial, he proferred the testimony of another person who had arrived shortly after the accident, and took photographs of the scene. This person was a representative of the plaintiff's union and was responsible for referring the plaintiff to his trial counsel. The trial court found that plaintiff or his counsel "'knew or should have known'" the witness was familiar with the accident scene, and that the failure to identify the witness was willful. It barred his testimony regarding the accident scene, resulting in nonsuit for the defendants. The Court of Appeal in *Thoren* found substantial evidence supported the finding that the answer to the interrogatory was willfully false. (*Id*. at p. 275.) It explained that the conduct was willful because counsel for plaintiff deliberately refrained from finding out about the witness until the interrogatory was answered. (*Id*. at p. 276.)

Respondent argues this case is similar because Sheldon, the attorney who found the second version of the settlement agreement, had been counsel for plaintiff and filed this action on her behalf. He argues that "Mr. Sheldon, similarly to the Thoren witness,

was the driving force behind Mr. Goldsobel, Appellant's trial counsel, receiving Appellant's case; were it not for Mr. Sheldon filing the suit, Mr. Goldsobel would likely not have tried this case. Thus, appellant here should have known of Mr. Sheldon's relevance to this case and, in turn, the alternate settlement agreement's existence." This argument is based on speculation and does not demonstrate that *Thoren* is analogous. In this case, unlike *Thoren*, the trial court did not make the requisite finding of willful conduct on the part of appellant.

Respondent also distinguishes *Biles v. Exxon Mobile Corp., supra*, 124 Cal.App.4th 1315, in which evidentiary sanctions were reversed for lack of a prior court order. The Court of Appeal distinguished cases allowing the imposition of evidence sanctions without a court order because, in the case before it, there had been no finding that the failure to disclose the witness was willful. The *Biles* court concluded that the rationale allowing an evidentiary sanction against a party who repeatedly and willfully fails to provide certain evidence in discovery "does not justify imposition of an evidence sanction based on the mere failure to supplement a response promptly when no order compelling further answers has been sought or entered." (*Id*. at p. 1327.) We agree with this rationale and conclude that the case before us does not come within the circumstances justifying evidentiary discovery sanctions absent a prior court order.

Citing *Do It Urself, supra*, 7 Cal.App.4th 27, 33 and *Vallbona, supra*, 43 Cal.App.4th 1525, 1545, respondent contends it would have been futile to seek a court order. He concedes that these cases are distinguishable because in each, the party seeking discovery knew the withheld documents existed, but the courts concluded that a motion to compel would have been futile. Here, respondent argues he cannot be required to have sought a motion compelling appellant to produce a document he had no idea existed. We note that unlike appellant, respondent was present at the mediation which resulted in the settlement agreement, including the session at which Sheldon made the interlineations on Exhibits 1 and 4, and copies were provided to counsel for the Lee and Oh participants. But on this record, it appears that the existence of Exhibit 4 came as a surprise to everyone, both appellant and respondent. In such circumstances, no order compelling its

production could be obtained. This is precisely why it was inappropriate to impose evidentiary sanctions on appellant absent a finding of willful concealment or an egregious pattern of repeated discovery abuse.

Respondent argues the trial court was not required to fashion a less drastic sanction if it did not abuse its discretion in excluding Exhibit 4. He contends the question is not whether less drastic sanctions could have been fashioned, but rather whether imposition of a lesser sanction would have rewarded appellant for withholding the document. This argument presupposes that appellant willfully withheld Exhibit 4, a finding not made by the trial court.

We conclude the trial court abused its discretion in excluding Exhibit 4 as an evidentiary sanction under Code of Civil Procedure section 2023.030 because appellant did not violate a prior court order compelling disclosure of the document. The circumstances under which an evidentiary sanction has been approved even without a prior court order are not present here. No finding of willful concealment was made and respondent did not demonstrate that appellant had engaged in repeated, egregious discovery abuse.

II

Respondent invokes various aspects of the inherent powers of a trial court in an effort to support the exclusion of Exhibit 4.

First, he claims the exclusion order was a proper exercise of the court's inherent power to avoid unfair surprise to a party. He relies on *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272 (*Peat, Marwick*). In that case, Peat Marwick was sued by the People of the State of California for providing a negligent audit for a thrift and loan corporation placed in liquidation by the California Commissioner of Corporations. Main Hurdman, the accounting firm retained by the People as an expert witness on professional negligence and other issues, engaged in conduct raising serious conflicts of interest, including simultaneously negotiating a merger with Peat Marwick and failing to ensure that Peat Marwick personnel were not privy to information about the

People's case. The trial court precluded Peat Marwick from introducing any evidence on the standard of care and negligence. (*Peat, Marwick, supra*, 200 Cal.App.3d at pp. 280–281.) It found that the ability of the People to prepare and present their case had been seriously eroded and that the integrity of the judicial system had been harmed because of the potential that confidential information had been compromised. (*Id*. at pp. 282–283.) The appellate court ruled the order was not a discovery sanction, but rather a remedy for abuse of the litigation process and affirmed as an exercise of the court's inherent power. (*Peat, Marwick, supra*, 200 Cal.App.3d at pp. 285–287.) It concluded that under such circumstances, the trial court may act to prevent the taking of an unfair advantage and to preserve the integrity of the judicial system. (*Id*. at p. 289.)

Respondent also relies on *Castaline v. City of Los Angeles* (1975) 47 Cal.App.3d 580 (*Castaline*), a personal injury action against the city arising from a chain reaction automobile collision caused by a street sweeper. In discovery, plaintiffs stated that they were fully recovered from any injuries suffered in the accident. In reliance, defense counsel cancelled a physical exam of the plaintiffs by a defense physician. At trial, one of the plaintiffs planned to call a physician who examined her three days previously. The appellate court found merit in the defense argument that it had been unfairly surprised by the plaintiff's physician witness. Under the circumstances, the court concluded that the exclusion of the physician's testimony was within the court's basic power to insure that all parties receive a fair trial. (*Id*. at p. 592.)

Respondent argues that the facts that supported this conclusion in *Castaline* also are present here. He contends he served contention interrogatories on appellant seeking the basis for her allegation that respondent breached the confidentiality provision of the settlement agreement by providing a copy of it to George. In response, appellant said that George had produced the settlement agreement in discovery in the will contest and subsequently, at a meeting between appellant and Eugene Kim, it was confirmed that George received his copy from respondent. Respondent cites interrogatories served on appellant asking for all documents supporting her claim that respondent gave George the confidential settlement agreement. In response, appellant listed "the Settlement

Agreement," documents and pleadings in the will contest, and a declaration filed by Kim in another action. He contends appellant never indicated an alternative settlement agreement existed or that it supported her cause of action for breach of contract. Respondent states that he "justifiably relied on Appellant's answers in preparing for trial" although he does not specify how he did so.

The weakness in this argument is that there is no showing that appellant knew of the existence of Exhibit 4 when her discovery responses were prepared. She identified the "Settlement Agreement" as a document in support of her breach of contract cause of action. Respondent does not cite to a discovery request asking appellant whether she knew of more than one version of the settlement agreement. There is no showing that appellant's conduct in this case was so misleading and unfair that the sanction was warranted. On this record, the type of misconduct exhibited in *Peat, Marwick*, *supra*, 200 Cal.App.3d 272 and *Castaline*, *supra*, 47 Cal.App.3d 580, was not demonstrated. Under these circumstances, the exclusion order is not supported as an exercise of the trial court's powers to avoid unfairness.

The parties dispute the application of *Xebec Development Partners, Inc. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501 (*Xebec*), overruled on another ground in *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1265, fn. 4. That case involved an action against an insurer by an assignee of the insured's rights under a directors and officers indemnity policy after the insurer refused to defend the assignee on claims brought by a third party. The trial court excluded evidence of fees paid to an attorney by the assignee because the assignee had asserted the attorney-client privilege as to those records during discovery. The court concluded that it would be unfair to allow the assignee to withdraw the claim of privilege once trial had begun. (*Xebec*, *supra*, 12 Cal.App.4th at pp. 567–568.) Respondent relies on language in *Xebec* that the order excluding the billing materials was "well within the court's broad inherent powers to control the proceedings before it; the technical rules of statutory discovery sanctions were inapplicable." (*Id.* at p. 569.)

Xebec is distinguishable. In that case, the party resisting discovery was well aware of the existence of the pertinent documents, but nevertheless resisted discovery of them by asserting a privilege, and then attempted to withdraw that privilege claim in order to use the documents at trial. Here, no such inconsistent behavior by appellant has been demonstrated.

Finally, respondent invokes the interests of the courts in fairly and expeditiously disposing of civil cases, and in efficiently using judicial resources. (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 306.) He argues the trial court had the power to exclude Exhibit 4 because use of the document would have caused unacceptable delay to allow additional discovery. He challenges appellant's assertion in her opening brief that the parties to the agreement could have been further deposed or questioned prior to trial after disclosure of the second agreement. Respondent asserts, without citation to the record, that depositions in the case spanned two years, and therefore the necessary depositions could not have been completed before trial. Even if depositions were possible, respondent states that too little time remained before trial to "allow respondent to integrate the new information into their trial preparation" since there were only 18 days between the disclosure and the trial date. He also contends he would have been required to retain a handwriting expert to examine the second settlement agreement, reach a conclusion, submit the expert to deposition, and then integrate the conclusions into trial preparation. According to respondent, the case was filed on July 24, 2009 and trial began on August 11, 2011. Respondent also cites the recent budget cutbacks at the trial court to demonstrate the impact of the delay which would result if appellant is allowed to use Exhibit 4 in support of her case.

Appellant asserts that any possible prejudice to respondent would have been mitigated by "a deposition or two." She also relies on the fact that counsel for respondent had an opportunity to cross-examine Sheldon about Exhibit 4 at the hearing under Evidence Code section 402. Based on these circumstances, she reasons that "no court could reasonably conclude that admission of the evidence of [Exhibit 4] would deprive [respondent] of his right to a fair trial."

The interests of the courts in avoiding delay in the disposition of civil cases must be balanced against the rights of the parties to produce relevant evidence at trial in support of their positions. We conclude that here, the trial court erred in excluding Exhibit 4 because the case could have been continued to allow respondent to conduct any additional discovery necessitated by its disclosure.

We observe that respondent does not rely here on Evidence Code section 352 in arguing that Exhibit 4 was properly excluded because of the likelihood its admission would cause delay. During the colloquy about Exhibit 4, the trial court mentioned that it was "a big 352 issue" but did not make that the basis of its exclusion order and did not find that the probability of delay or undue prejudice substantially outweighed the probative value of the exhibit. Appellant has made an adequate showing that exclusion of Exhibit 4 was prejudicial to her claim that George got the confidential settlement agreement he used in the will contest from respondent (Exhibit 1 version) rather than from his father's files (Exhibit 4 version). Under these circumstances, appellant is entitled to a new trial. As in *Xebec*, *supra*, 12 Cal.App.4th at p. 569, our determination that the case must be remanded for new trial resolves the unfairness issue. Respondent has had access to Exhibit 4 since the first trial.

DISPOSITION

The judgment is reversed. Appellant is to have her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.