2d Civil No. B191608

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 5

HLC PROPERTIES, LTD. and THOMAS E. O'SULLIVAN
as TRUSTEE for the WILMA WYATT CROSBY TRUST,

Plaintiffs and Appellants,

vs.

MCA RECORDS, INC., MCA, INC.,
UMG RECORDINGS, INC., UMG RECORDS, INC.,
UNIVERSAL STUDIOS, INC., and GRP RECORDS, INC.,

Defendants and Respondents.

Appeal from the Superior Court of Los Angeles
Superior Court Case No. SC062601
Honorable Terry Friedman, Judge

APPELLANTS' OPENING BRIEF

LAW OFFICES OF MARK A. BRODKA
Mark A. Brodka, State Bar No. 105516
12100 Wilshire Boulevard, Suite 700
Los Angeles, California 90025
Telephone: (310) 820-4597

GREINES, MARTIN, STEIN & RICHLAND LLP
Kent L. Richland, State Bar No. 51413
Cynthia E. Tobisman, State Bar No. 197983
5700 Wilshire Blvd., Suite 375
Los Angeles, California 90036
Telephone: (310) 859-7811

Attorneys for Plaintiffs and Appellants

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This disclosure statement is made pursuant to California Rules of Court, rule 8.208, subdivision (d). Other than the heirs to Bing Crosby's estate and the beneficiaries of HLC Properties, Ltd. and the Wilma Wyatt Crosby Trust, there are no other persons or entities with a financial interest in the outcome of this case.

Dated: June __, 2007

LAW OFFICES OF MARK A. BRODKA
Mark A Brodka

GREINES, MARTIN, STEIN & RICHLAND LLP
Kent Richland
Cynthia E. Tobisman

By: ______________________________________
Cynthia E. Tobisman
Attorneys for Plaintiffs and Appellants,
HLC Properties, Ltd., et al.

INTRODUCTION

Bing Crosby's prolific music career spanned half a century and anchored a generation of music companies, including Decca Records. In the instant case, Crosby's heirs claimed Decca's successor-in-interest, MCA, systematically underpaid royalties. Their evidence showed that MCA not only failed to pay over $16,000,000, but that it hid its wrongdoing for decades. Plaintiffs alleged numerous claims, primarily for breach of contract and fraud.

MCA's defense was that they paid what the contracts required. Thus, the central question below was what the parties had agreed to—i.e., what contracts governed and what were the terms of those contracts.

Since the key issues in this case are legal, as opposed to equitable, Crosby's heirs had an absolute right to a jury trial. Indeed, when the trial court ruled that it would try plaintiffs' equitable accounting claim first, plaintiffs *dismissed* that claim. Nonetheless, the trial court insisted that the case would be a court trial, holding that the "gist" of the case continued to be equitable in nature—i.e., a simple accounting of whether MCA had paid Crosby what was owed. This was error.

Contract claims are actions at law, as to which there is an absolute right to jury trial. The present case is fundamentally a contract dispute, rife with hotly-contested factual questions involving contract formation, modification, interpretation, performance and breach. Even the trial court seemed to recognize this fact, characterizing breach of contract as the plaintiffs' "foundational claim" since all of their "other causes of action depend[ed]" upon it. (CT 10274 [Final Statement Of Decision].) The trial court's decision to try this essentially legal case without a jury is per se reversible error requiring a new trial.

But regardless of who—judge or jury—ultimately should have tried the merits of this case, the claims that reached trial had been badly truncated by two erroneous summary adjudication orders. First, the trial court rejected the Crosby heirs' breach of fiduciary duty claim because it concluded there could be no fiduciary relationship between Crosby and the record companies. This was error. The parties' historically joint-venture-like relationship was fiduciary in nature—or at least a jury could have found it to be so.

Moreover, the trial court erroneously ruled that the statute of limitations barred Crosby's heirs from establishing any claims that predated 1996. In so doing, it ignored substantial evidence that Crosby's heirs reasonably did not learn about their claims until they audited MCA in 1999, and that therefore under the discovery rule, they were entitled to seek recovery of the millions of unpaid royalties that were withheld before that date.

The trial court made an additional error after the trial. Despite awarding Crosby's heirs $210,762.53 in damages and nothing to MCA, the court proclaimed MCA to be the "prevailing party" and awarded it its costs. Where, as here, a plaintiff obtains a net monetary recovery, it is the "prevailing party" *as a matter of law*. Thus, at a minimum, the judgment must be reversed so that Crosby's heirs may recover *their* costs.

STATEMENT OF FACTS[1]

A. Bing Crosby And Jack Kapp Form A "Uniquely Confidential Relationship."

Bing Crosby's recording career began in 1926 and blossomed in the 1930s and 1940s with his collaboration with producer Jack Kapp. (CT 3746, 3742-3743.) Kapp selected the music for Crosby to sing—everything from gospel to Irish music. (RT W-64-65.) Crosby had "absolute" trust in Kapp's judgment. (CT 3743.) As he explained, "I felt I was in the hands of a friend and that whatever he told me to do was right." (CT 3743; see also RT W-64.) Crosby and Kapp formed "a uniquely confidential relationship" that lasted for almost two decades. (CT 3742; see also RT W-64-56.)

The Crosby/Kapp alliance yielded phenomenal success. (See CT 1532, 3803.) Crosby recorded over 1,700 songs for commercial release, and he had more chart-topping singles than either the Beatles or Elvis Presley. (CT 3803; see also CT 1988.)

B. Crosby Anchors Kapp's Decca Records.

[1] We recite the facts relevant to the summary adjudication orders in the light most favorable to appellants. (E.g., *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 [on review of summary judgment, evidence must be viewed in the light most favorable to the losing party].) The other two issues presented in this appeal—entitlement to a jury trial and the determination of identity of the prevailing party—are pure questions of law, reviewable de novo. (See *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 5 [entitlement to jury trial pursuant to "gist" analysis subjected to de novo review]; *Acosta v. SI Corp*.(2005) 129 Cal.App.4th 1370, 1374 [de novo review of order on motion for costs appropriate where issue involves the proper interpretation of a statute and its application to undisputed facts].) Accordingly, we set forth all facts relevant to those issues.

On the strength of his relationship with Crosby, Kapp started Decca Records in 1934, during the depths of the Depression. (CT 3742.) Crosby became Decca's primary asset. (CT 3742.)

Decca recognized that it owed its success to Crosby. As Crosby's biographer put it: "To emphasize Decca's debt to Crosby, the Los Angeles office was constructed at Crosby's feet," across the street from Crosby's film studio. (*Ibid*.)

C. Crosby And Decca Enter Into The 1943 Agreement.

Royalties for a given master recording are governed by the contract under which that master is recorded. (RT Z-11-12.) In 1943, Crosby entered into a contract with Decca (the "1943 Agreement") that superseded all prior contracts and governed all of the recordings that Crosby made for the next six years. (Ex. 7; CT 3746, 3833-3835.) Most of the master recordings relevant here were recorded under the 1943 Agreement. (CT 3805, 3807.)

Under the 1943 Agreement, Crosby and Decca worked together to produce master recordings. (CT 3833; Ex. 7.) Decca chose songs—subject to Crosby's veto—and then Decca and Crosby collaborated to produce a "commercially satisfactory" master. (*Ibid*.) Decca received the right to manufacture and license Crosby's masters, provided it paid Crosby for all records sold by either Decca or its licensees. (*Ibid*.)

The 1943 Agreement included a schedule of royalties that gave Crosby a different royalty rate depending upon the suggested retail list price of the record. (CT 3834; Ex. 7.) For example, Decca promised to pay Crosby a royalty of 15% of the wholesale price of double-disc 10" and 12" records, where the retail list price of the record was $1.00 or more.[2] (CT 3834, 2146, Ex. 7; see also CT 3747-3748.) For double-disc 10" and 12" records retailing at 75 cents, Crosby received a royalty of 5.25 cents. (CT 3834.)

The 1943 Agreement also provided that if the wholesale price of Crosby's records went up, Decca would increase the royalties it paid to Crosby "by 10% of such increased wholesale price for each record sold." (CT 2146, 3834; Ex. 7.) The agreement required Decca to pay Crosby 50% of all monies received for the public broadcast of his songs. (CT 1669-1670, 3835; Ex. 7.) The agreement did not mention any deductions from Crosby's royalties for the cost of packaging the records. (See Ex. 7.) The agreement did, however, give Crosby a right to regular accountings. (*Ibid*.)

D. Crosby And Decca Create Decros.

The vinylite long-playing record ("LP") was developed in 1948. (CT 1708.) In 1949, Crosby and Decca formed a joint venture devoted to producing and selling new Crosby records. (Ex. 161; CT 1671, 1955:21-22, 3935, 4135, 4136-4138.) Crosby had the controlling interest in the new company, named Decros (<u>De</u>cca + <u>Cros</u>by). (CT 1617.)

That same year, Crosby signed a contract to record songs for Decros ("1949 Agreement"). (CT 2146, 3746, 3841; Ex. 5.) The 1949 Agreement

---

[2] The 15% of wholesale royalty roughly translated to 7.5% of the retail price of records, because the ratio of retail to wholesale prices was almost exactly 2:1. (Ex. 15; RT BB-106-107; RT DD-59.) By the mid-1980s, however, that ratio had changed; the retail price was then only 130% of the wholesale price. (RT W-45 [MCA "approximate[s] the retail price of a CD" by using 130% of the wholesale price]; see also CT 3783-3790, 3938, 4918-5003.)

governed only songs recorded after its execution; it did not supersede the 1943 Agreement. (CT 1674; Ex. 5.)

The 1949 Agreement required Crosby and Decros to cooperate to create records. (See CT 3842.) Again, the record company chose the songs—subject to Crosby's veto—and the two parties worked together to create master recordings. (*Ibid*.) The 1949 Agreement also gave Crosby control over his duets; he had "the privilege to refuse to record selections in conjunction with any other artist." (*Ibid*.)

The 1949 Agreement provided for payment to Crosby of different royalties depending upon the songs and whether the record was made out of shellac or vinylite. (Ex. 5; CT 2147; Ex. 5.) Regardless of song or format, however, Decros promised to increase Crosby's royalties if the wholesale price of a record increased. (CT 1673, 2147.) It also promised to pay Crosby 25% of the net proceeds from public performances and broadcasting of records domestically, and 100% of the net proceeds for public performances outside the United States. (CT 1673-1674.) Finally, like the earlier contract, the 1949 Agreement required Decros to render regular accountings. (Ex. 5.)

In 1956, Crosby and Decros entered into a second recording contract (the "1956 Agreement"). (CT 1676, 2147.) Again, this agreement did not supersede the prior agreements. (CT 1678-1679; Ex. 8.) Again, the agreement contemplated cooperation between Crosby and the record company to create master recordings. (CT 3856-3857; Ex. 8.) And like the other agreements, the 1956 Agreement gave Crosby the right to regular accountings. (Ex. 8.) It also provided a schedule of different royalty rates applicable to different configurations. (CT 1677-1678; 3857.) For example, Decros agreed to pay a royalty of 7% of the retail price for double disc extended play 45 rpm or 33 rpm records where the suggested retail price was $1.00 or more. (CT 1677; Ex. 8.)

E. The Record Companies Unilaterally Decide To Pay Crosby A Royalty Rate Based On 7% Of The Retail Price For LPs Containing Recordings Made Under The 1943 Agreement.

In the mid-1950s, Decca and Decros privately considered how to pay Crosby royalties for masters recorded under the 1943 Agreement that were released on vinylite LPs and EPs (formats invented in the late 1940s). (See CT 1777, 1805, 1808-1809, 1956-1959, 2149.) Rather than discuss the issue with Crosby, the record companies simply *unilaterally decided* to pay Crosby a royalty based on 7% of the retail price of the records rather than the 15% of wholesale provided for in the 1943 Agreement. (CT 1708-1710, 2149; Ex. 913; Exs. 920, 921; RT DD-59.) The record companies' position was that it had no obligation to go to the artist to sort out such ambiguities. (See RT W-117-118.)

Decca and Decros thus proceeded to pay Crosby a royalty of 7% of the retail price for LPs containing masters recorded under the 1943 Agreement. (See CT 1957; see also 1812-1819.) With the exception of foreign royalty rates, however, the statements sent to Crosby never disclosed the royalty rates the record companies were paying. (Supp. CT 10458.)

F. Crosby's First Wife Dies And The Trust Is Created.

When Crosby's first wife Wilma died in 1952, the Wilma Wyatt Crosby Trust was established for the benefit of Crosby's children from that marriage. (CT 1666, 2145.) The Trust received a community property interest in the income from all Crosby recordings made before Wilma's death (i.e., 1930-1952). (*Ibid*.)

G. Crosby Performs And Settles An Audit.

In 1958, Crosby hired accountants Prager & Fenton to conduct an audit. (CT 1680-1681.) The audit report no longer exists and, at trial, the parties disputed what royalty streams the auditors examined. (CT 2150-2153.) The parties agreed that the audit examined Crosby's Decros royalties—i.e., royalties under the 1949 Agreement and 1956 Agreement due to Crosby as both a Decros shareholder and as a Decros recording artist. (See, e.g., CT 2151-2152; RT DD-59; Ex. 164; Ex. 950.) However the parties disagreed whether the auditors examined Decca royalties as well (i.e., royalties due under the 1943 Agreement). (See CT 2150, ¶ 19.)

After the audit, Crosby's business manager, Basil Grillo, discussed with record company representatives the discrepancies that had been uncovered. (See Ex. 950; CT 1827-1839, 3862-3865.) Grillo and Decca corresponded in a series of letters regarding various royalty rates and whether Crosby would sell his Decros shares for $200,000 (the "1960 Letters"). (Ex. 14, 173, 177, 178, 179.) The 1960 Letters state that "[o]n EP's and LP's, the rate will be 7% of the retail price," less taxes and packaging. (Ex. 177.) However, the 1960s Letters do not indicate which masters this royalty rate covered. Nor do they otherwise reference any of Crosby's specific recording agreements. (See *ibid*.)

At trial, the parties disputed whether Grillo had the authority to execute agreements on behalf of Crosby (i.e., to modify the 1943 Agreement). (See, e.g., CT 1616-1620, 1680, 1712, 1732-1733.) However, it was undisputed that every written recording agreement that Crosby had ever entered into was personally signed by Crosby himself. (CT 1616-1620.)

In August 1960, Crosby sold his Decros stock to Decca for $200,000. (CT 1633; Ex. 182.) Six years later, MCA acquired Decca, but continued to run it as a separate division until 1972. (CT 3999-4000.)

H. Bing Crosby Dies.

Bing Crosby died in 1977. (CT 2157.) Bank of the West collected and distributed royalties to his heirs. (RT W-63.) It also received whatever contracts and other records the Crosby estate had in its possession. (CT 1736, 2149.)

I. MCA Pays A 5% Royalty For All "Midline" Releases.

In the late 1970s, MCA approached the Crosby estate about releasing certain records at a reduced royalty rate—i.e., at a "midline" price. (Ex. 192, 193; RT DD-54, RT AA-65-66, CC-80-83.) The only written contract established that MCA sought approval to reduce royalties on *two specific records*. (Ex. 193.) MCA asserted, however, that it negotiated the lower rate for a series of records, rather than on an LP-by-LP basis. (See, e.g., RT BB-32-33.) In any event, it was undisputed that MCA paid the Crosby heirs a reduced royalty (5%) for *all* midline releases. (___.)

J. HLC Properties, Ltd. Is Created To Receive And Distribute Crosby's Royalties.

After the distribution of Crosby's estate, HLC Properties, Ltd. ("HLC") was created to manage Crosby's intellectual property rights on behalf of Bing Crosby's second wife, Kathryn Crosby, and her children. (CT 1666; RT W-51.) Kathryn was effectively the general partner of HLC and her children were its limited partners. (RT W-51.)

HLC received the Crosby files from Bank of the West and, in 1983, MCA began sending royalty statements directly to HLC. (CT 1666, 1751, 2159.) HLC, in turn, distributed to the Trust its share of Crosby's royalties. (CT 2160, 2170.)

Until 1995, the Trust received no royalty statements from HLC. (CT 10458.) The Trust received no information from MCA regarding Crosby's recording agreements or royalties until 1999. (*Ibid*.)

K. HLC Asks MCA To Provide It With Crosby's Contracts, But MCA Withholds The 1943 Agreement.

Kathryn Crosby did not understand the MCA royalty statements or how royalties were calculated. (CT 1635; RT W-54.) After a number of requests from MCA to use Crosby's songs on various projects, Kathryn began to have questions. (RT W-59-60; CT 3660.) She consulted Bill Grady, her "representative at MCA." (RT W-54, W-59-60.) When MCA responded with another letter that Kathryn did not understand, she asked her lawyer, Roy Farrow, to handle it. (RT W-60-62.)

Farrow asked MCA how it calculated royalties. (CT 3660, 3664; Ex. 118; RT DD-54.) MCA referred him to Crosby's "applicable contracts." (CT 3660, 3665; Exs. 119, 120; RT DD-54, W-62.) When Kathryn and Farrow could not find the recording contracts, Farrow asked MCA to provide them and to permit HLC's accountant to meet with MCA. (CT 3660, 3667; Ex. 121; RT DD-54, W-62.)

In 1986, MCA purported to provide all of Crosby's recording contracts. (CT 3660.) However, it did not send the 1943 Agreement. (*Ibid.*)[3]

Believing MCA had sent all of Crosby's contracts, Farrow turned the package over to HLC's accountant to conduct a limited review of MCA's royalty payments. (CT 3660-3661; see also RT X-8-9, RT X-40.) That review revealed minor discrepancies in royalty payments. (Ex. 81; RT X-40-41; RT DD-56.) Farrow subsequently met with MCA's representatives, who promised to take care of the discrepancies; Farrow left the meeting "feeling comfortable and believing that the issues raised would be fixed." (CT 3660-3661.)

L. HLC And MCA Sign The CD Amendment.

In 1986, MCA approached HLC about executing a "CD amendment." (RT W-21-23.) Before releasing an artist's masters on the newly-invented CD configuration, MCA wanted each artist to agree to be paid royalties based on the lower retail price of black vinyl rather than the more expensive CD format. (RT W-21-23.)

HLC signed a CD amendment in April 1986. (Ex. 10; RT DD-54; CT 1699.) That agreement contained a "most favored nations" clause ("MFN") providing that if "MCA uses a different basis for determining royalties on compact discs and, as a result thereof, MCA agrees to pay any artist a royalty which exceeds that artist's cent rate for top-line single-disc LPs sold through normal retail channels, MCA shall immediately commence paying [HLC] royalties determined in accordance with the use

---

[3] Two years later, on June 29, 1988, MCA transmitted copies of the 1943, 1949 and 1956 Agreements to Farrow in connection with an unrelated inquiry. (Ex. 156; RT DD-72.)

of such different basis to the extent its use would result in larger royalties being paid to [HLC].” (Ex. 10.)

HLC’s right to MFN royalty rates depended entirely upon what MCA paid to its other artists. (CT 3808, 4075-4076.) However, MCA instituted no formal tracking procedure for detecting when an artist’s MFN clause had been triggered. (See RT X-74-75, RT CC-113-114; see also CT 4047, 4074-4075, 4077.) When, over the next decade, MCA paid more favorable royalties to other artists, MCA neither notified HLC nor paid HLC based on the more favorable formulas. (See CT 3662.) Thus:

- As early as 1988, MCA began paying some of its other artists using a new method—the “constructed retail uplift” basis—that calculated CD royalties based upon 130% of the wholesale price of a CD instead of on the basis of the retail price of a black vinyl record. (CT 3783-3790, 3938, 4918-5003.) Although this method would have resulted in more royalties for the Crosby heirs, MCA continued to pay them at the lower black vinyl rate. (See RT CC-24; see also Ex. 830; RT W-93:1-15; CT 3662.)

- Between 1992 and 1997, MCA paid royalties to seven different artists based on the retail price of their CDs rather than on the retail price of black vinyl. (RT V-61, V-63-64; Ex. 832, p. 4; RT V51-V55; Ex. 229; RT DD-54; see also RT V-69.) At trial, MCA admitted these more favorable payments had occurred, yet insisted they were “mistakes” that did not trigger the MFN clause in Crosby’s contract. (RT V-51-55; see also RT AA-82-85.)

- When MCA released CDs for artists who had not signed CD amendments, they were paid CD royalties based on the rates stated in the underlying contract governing that particular song. (See RT W-110, 114; see also RT CC-23-24.) Since the 1943 Agreement gave Crosby the right to receive a royalty calculated on the basis of 15% of the wholesale price of records selling for over $1.00, Crosby should have had the right to receive that 15% of wholesale royalty rate on CDs. (See RT CC-23-24; see also RT X-86-88.)

- MCA paid other artists CD royalties based on the wholesale price of CDs, a more favorable royalty rate than HLC's. (CT 4904-4905.)
- MCA conceded that it had violated the MFN clause in Crosby's contract beginning in 2003 when it started paying other artists based on yet another new method of royalty calculation. (RT V-18-19.) However, once again, MCA neither notified HLC that the MFN clause had been triggered, nor paid it on the more favorable basis. (CT 3662.)

M. The Trust Suspects Underpayment By HLC.

Suspecting underpayment by HLC, the Trust requested royalty statements from HLC and asked MCA to pay its share of Crosby's royalties directly. (See, e.g., CT 10572- 10579, 10582-10585, 10587, 10590-10593.) When neither HLC nor MCA agreed, the Trust asked MCA to hold all Crosby royalties in suspense pending resolution of the amount due. (CT 10582.)

In 1995, HLC sent the royalty statements from 1988-1994; this was the first time the Trust had ever seen any Crosby royalty statement. (CT 10458, 10469, 10595-10596.)

In 1996, the Trust sued HLC, claiming underpaid royalties. (CT 10605-10633.) When the parties settled three years later, HLC instructed MCA to pay the Trust its share directly. (CT 3767, 10487-10488.) The Trust also agreed to participate in an audit of MCA's records. (CT 10488.)

N. The 1998-1999 Audit.

In 1998, HLC auditor Gary Cohen contacted MCA to request copies of "all Crosby recording contracts." (CT 3803-3804.) MCA sent Cohen the 1943, 1949 and 1956 Agreements, but not the 1960s Letters or the CD Amendment. (CT 3804-3805.)

After analyzing the contracts, Cohen asked why MCA had failed to pay Crosby the 15% of wholesale royalty rate for all master recordings made under the 1943 Agreement. (CT 3805; see also Ex. 153; RT DD-54.) MCA pointed to an unsigned 1948 "agreement" and to the 1960s Letters. (CT 1706, 3805-3806; Ex. 84; RT V-41.) Cohen concluded that neither "agreement" was operative. (See Ex. 153.)

Cohen's 1999 audit report concluded that MCA had significantly understated Crosby's royalties by (1) failing to apply the 15% of wholesale royalty rate embodied in the 1943 Agreement; (2) failing to calculate CD royalties properly; (3) applying an unagreed-to packaging deduction; (4) failing to calculate bonus royalties properly; and (5) failing to provide sufficient royalties for third party licensing, special markets (i.e., compilations) and foreign performances. (Ex. 153; RT DD-54.)

PROCEDURAL HISTORY

A. The Trust And HLC Sue MCA, And MCA Successfully Moves For Summary Adjudication Of Crosby's Pre-1996 Claims.

HLC and the Trust (collectively, the "Crosby heirs") sued MCA in July 2000, alleging breach of contract, fraud, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, rescission, cancellation, constructive trust, negligence, accounting and open book account. (CT 31.)

In July 2002, the trial court granted MCA's motion for summary adjudication on the basis of the statute of limitations.[4] (CT 8025.) The trial court rejected application of the discovery rule and dismissed all claims that accrued before 1996 or 1997 (depending upon the applicable statute of limitations). (CT 8030.) Because the court treated each royalty payment as "a separate installment contract," it limited the action to breaches stemming from installments made after July 31, 1996. (CT 8026, 8030.)

B. MCA Moves For Summary Adjudication Of Claims In The Amended Complaint.

During discovery, the Crosby heirs learned of MCA's breaches of the CD Amendment. (CT 2791-2793, 3933.) They subsequently amended their complaint to add allegations of breach of contract and fraud stemming from that agreement. (CT 2789-2826, 3933; RT D-6.)

MCA moved for summary adjudication of plaintiffs' claims for

---

[4] The Crosby heirs' writ petition challenging the trial court's summary adjudication order was summarily denied. (Supp. CT 12015.)

fraud, breach of fiduciary duty, open book account and punitive damages. (CT 3591.) As to the fraud claim, MCA argued that there was no evidence of fraud within the limitations period. (CT 6925.) In opposition, the Crosby heirs proffered evidence that in response to the 1986 request by HLC's accountants for all of Crosby's recording contracts, MCA intentionally omitted the 1943 Agreement: The MCA employee who had gathered the Crosby contracts offered to testify that she gave her superiors every signed contract to provide to HLC, yet MCA intentionally and as a regular practice gave artists incomplete sets of their operative contracts. (CT 3713-3716; RT V-1-3 [offer of proof].) The trial court refused to consider any evidence of fraud before 1996 based on its delayed discovery/statute of limitations ruling. (CT 8033-8034; RT V-27, DD-60.) It granted summary adjudication of the fraud claims. (*Ibid*.)

The trial court also granted summary adjudication of plaintiffs' fiduciary duty cause of action, concluding that there was no evidence of a fiduciary relationship. (CT 8032-8035.)

C. Plaintiffs Dismiss All Equitable Claims, But Are Denied A Jury Trial.

The Crosby heirs dismissed their equitable claims for constructive trust and accounting; they then moved for a jury trial of their remaining claims. (CT 8438, 8441, 8444.) The trial court denied the motion, holding that the "gist" of the remaining claims for breach of contract, breach of implied covenant of good faith and fair dealing, rescission, cancellation, negligence and open book account was equitable.[5] (CT 8530.)

[5] Again, the Crosby heirs filed a writ petition that was summarily denied. (Supp. CT 12004.)

D. The Trial.

In its opening statement, MCA admitted for the first time that the CD Amendment's MFN clause had been triggered—at least as of September 2003. (RT V-18-19.) Conceding newly-calculated CD royalties due to the Crosby heirs of approximately $200,000, MCA also claimed that set-offs reduced that number to zero. (*Ibid*.)

At trial, the parties presented conflicting evidence on the many disputed contract issues, including whether the 1943 Agreement applied only to shellacs, whether that agreement's 15% of wholesale royalty rate had been modified by the 1960s Letters, whether Basil Grillo had the authority to modify recording agreements on Crosby's behalf, whether the parties had agreed to an across-the-board reduction of royalties for all midline releases, and when the MFN clause of the CD Amendment had been triggered. (See ___; see also CT 10270-10286.)

The trial court resolved virtually every factual dispute in favor of MCA. Thus, it concluded that Crosby had always agreed to a 7% of retail royalty for "the contemporaneous primary record configuration," that the 1943 Agreement's 15% of wholesale royalty applied only to shellacs, that Grillo was authorized to modify Crosby's contracts, that the parties had agreed to a reduced royalty for all midline releases, and that the CD Amendment had been triggered only in 2003. (CT 10280-10281.)

Rejecting MCA's offset theory, the trial court awarded the Crosby heirs $210,762.53 in damages. (CT 10285-10286, 10301-10303.) Nonetheless, the court deemed MCA to be the "prevailing party" under Code of Civil Procedure section 1032 and awarded it costs totaling $77,188.12. (CT 10286, 10303, 10311.)

Judgment was entered on May 2, 2006. (42 CT 10297.) Plaintiffs filed a timely notice of appeal on June 2, 2006. (42 CT 10313; Cal. R. Ct, rule 8.104.) The appealed judgment finally disposes of all issues between the parties. (Code Civ. Proc., § 904.1, subd. (a).)

ARGUMENT

I. THE TRIAL COURT'S DENIAL OF PLAINTIFFS' REQUEST FOR JURY TRIAL CONSTITUTES *PER SE* REVERSIBLE ERROR.

A. Denial Of The Right To Jury Trial Is Inherently Prejudicial And Requires Reversal.

"Trial by jury is an inviolate right and shall be secured to all." (Cal. Const., art. I, § 16.) The right to jury trial is so fundamental that where it is improperly denied, reversal is required without a separate showing of prejudice. (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 300 ["'[t]he denial of trial by jury to one constitutionally entitled thereto constitutes a miscarriage of justice and requires reversal of the judgment'"].)[6]

Denial of the right to a jury trial is a "'structural defect[]' in the judicial proceedings that, by its nature, results in a 'miscarriage of justice.'" (*People v. Ernst* (1994) 8 Cal.4th 441, 449.) As our Supreme Court has explained, "where a case improperly is tried to the court rather than to a jury, there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error. The trial court's error thus compels reversal of the judgment." (*People v. Collins* (2001) 26 Cal.4th 297, 312, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282.)

B. Because The Gist Of This Action Was Legal, Plaintiffs

[6] Accord: *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698; *Collins Development Co. v. D.J. Plastering, Inc.* (2000) 81 Cal.App.4th 771, 778; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 50; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 527.

Had The Absolute Right To Trial By Jury.

1. Where the "gist" of a case is legal rather than equitable, there is a right to a jury trial.

"'[T]he jury trial is a matter of right in a civil action at law, but not in equity.'" (*C & K Engineering, supra,* 23 Cal.3d at p. 8.) In making the determination whether a party has a right to jury trial in a particular case, "'the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the *gist* of the action.'" (*Id*. at p. 9, original emphasis, quoting *People v. One 1941 Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 299.)

"[A]n issue is 'legal' so as to create a right to jury trial when its resolution involves the ascertainment and determination of legal rights, or justifies a remedy traditionally granted by common law courts." (*Martin*, *supra*, 51 Cal.App.4th at p. 697.) Thus, the right to a jury trial "is the right as it existed at common law in 1850, when the [California] Constitution was first adopted." (*C & K Engineering*, *supra*, 23 Cal.3d at p. 8.)

Whether a case is legal or equitable frequently depends on the remedy. Where "a court of law can afford complete relief," "an action is fundamentally legal and the parties are entitled to a jury trial." (*Martin, supra*, 51 Cal.App.4th at p. 697; *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 517 [courts look at the remedy sought to determine whether a claim is legal or equitable].)

As we now show, the gist of the present lawsuit was "legal," because plaintiffs sought purely legal remedies and its resolution turned on purely legal questions of contract formation, modification, interpretation, enforcement and breach.

2. The gist of this lawsuit was legal because all claims hinged on breach of contract issues.

It is settled that "breach of contract is an action at law in which a right to jury trial ordinarily exists." (*Raedeke v. Gibraltar Sav. & Loan Assn*. (1974) 10 Cal.3d 665, 671.) Indeed, Code of Civil Procedure section 592 expressly provides that breach of contract issues "must be tried to a jury." (Civ. Proc., § 592.)

Here, the trial court recognized that breach of contract was the Crosby heirs' "foundational claim," since "[t]he other causes of action depend[ed] entirely, or in part, on the determination whether MCA breached a contract with HLC." (CT 10274.) MCA agreed. It acknowledged that "[t]he gravamen of this lawsuit is that MCA has been breaching its contracts with Bing Crosby." (CT 1367-1368.)

The record supports this conclusion. Most of the trial was devoted to litigation of core contract questions, including which agreements applied, what their ambiguous terms meant, whether they had been amended by later oral agreements, whether the parties' representatives had the authority to modify those agreements, and whether (and when) MCA had breached the agreements. (See pp. __, *supra*.)

These issues were hotly disputed. For example, as to the 1943 Agreement alone, the parties offered conflicting evidence on the intent and scope of the contract, whether it was operative in later years, whether the 15% of wholesale royalty applied to vinylite records (or just to shellacs), whether that royalty rate had been modified by the 1960s Letters, and whether Crosby's business manager had the authority to modify Crosby's contracts. (See pp. __, *supra*.)

The parties also presented conflicting evidence on whether MCA had performed its contractual obligations and when it had breached them. For example, the Crosby heirs showed the CD Amendment's MFN clause had been triggered numerous times starting in 1988, while MCA claimed the MFN had not been triggered until 2003. (See pp. __, *supra*.)

These and all of the other disputed contract questions should have been decided by a jury:

- A jury should have decided which of the numerous putative contracts governed, what their terms meant, and whether they had been modified. (See *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1560 [jury must determine conflicting facts regarding disputed interpretation of contract]; *Wade v. Diamond A. Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [question of the parties' intent, including whether the parties intended to modify their agreement, is a factual matter for a jury].)
- A jury should have decided whether MCA had performed its contractual obligations, including honoring the MFN clause, and when and how it had breached its agreements. (See *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 526-527 ["defendants herein were wrongfully deprived of their right to trial by jury on the issue of liability, i.e., contractual performance"].)
- A jury should have determined what damages plaintiffs suffered as a result of MCA's breaches. (See *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12 ["The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of

fact"].)

In deciding these disputed contract questions, the Crosby heirs were entitled to have a jury weigh the credibility of the parties' witnesses. (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1049 ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"].) For example, a jury should have weighed the critical testimony of Crosby's business manager, whose explanation that the 1960s Letters were not modifications of Crosby's recording contracts was central to the question of the royalty rate to which plaintiffs were entitled. (See CT 1617-1620.) A jury should have evaluated the credibility of the executives who testified that MCA's payments to other artists using more favorable methods of royalty calculation were simply "accidents" that did not trigger Crosby's MFN clause. (See pp. __, *supra*.) And a jury should have heard the MCA employee who gathered Crosby's contracts, who testified that MCA not only intentionally hid the 1943 Agreement from the Crosby heirs, it *routinely* refused to provide artists with complete sets of their recording contracts. (See pp. __, *supra*.)[7]

In sum, because contract issues permeated every aspect of this case, its gist was legal. Accordingly, the Crosby heirs had an absolute right to a jury trial.

[7] The trial court also erred in excluding that testimony on the ground that the statute of limitations barred the trier of fact from considering any malfeasance outside the limitations period. (____, *infra*; see also RT V-1-3.)

3. The trial court erroneously concluded that the gist of the case was equitable.

Although the trial court acknowledged that breach of contract was the plaintiffs' "foundational claim," it concluded that the gist of the case was equitable. (CT 8531, 10274.) The court reasoned that even though no accounting claim was pleaded, the case was essentially for an accounting because it "appears primarily to turn on a determination of the amount of royalties due. For example, there can be no breach of contract or fraud if the Court determines that the amount of royalties paid has been proper." (CT 8531.)

But in purporting to simply perform an accounting, the trial court decided all of the parties' disputes about their recording contracts. It determined which contracts governed, what terms they contained, what those terms meant, whether the contracts had been modified, whether the parties' representatives had the power to make such modifications, whether conditions precedent to the parties' performance had occurred and whether (and when) the contracts had been breached. (See CT 10270-10287.) This was reversible error per se.

a. Differences between accounting and breach of contract.

The central distinction between an accounting and a contract action is whether the action is based primarily on the defendant's *books* or on the parties' *contracts*. Where a case hinges on questions of contract formation, modification, interpretation, enforceability, performance and breach, it is fundamentally a contract case. (See ___, *supra*.) An accounting case, in contrast, revolves around "the accuracy of the books and records maintained by defendant [and] and the propriety of charges against income." (See *Heber v. Yaeger* (1967) 251 Cal.App.2d 258, 266.)

For the trial court to do an accounting, it needs only "the accounting records at issue," and knowledge of "the proper accounting methodology to be applied." (*De Guere, supra*, 56 Cal.App.4th at p. 499.) To determine "the proper accounting methodology to be applied," the court looks to "established and accepted standards of accounting principles, such as those prepared by the American Institute of Certified Public Accountants," and occasionally to industry custom and practice. (See *id*. at p. 499.)

As we next explain, determination of the Crosby heirs' claims depended chiefly upon the construction of the parties' contracts, not "the accuracy of the books and the propriety of charges against income." (See *Heber, supra*, 251 Cal.APp.2d at p. 266.)

b. The case hinged on contract issues, not accounting ones.

Resolution of the vast majority of plaintiffs' claims depended upon the determination of which base royalty rate applied to LPs and CDs. (See CT 3807 ["Approximately 92% of the compensatory damages in this case are based on MCA's failure to apply the 15% royalty rate to all masters recorded under the 1943 Contract"]; RT D-5 [defense counsel: CDs constitute "95% of all sales of music sold in recorded format today"; "CDs have always been the focus of this case"].) That determination depended upon what the parties had agreed to—not whether MCA's books were accurate.

The Crosby heirs generally did not claim that royalty underpayment resulted from improper accounting techniques, such as "overstat[ing] production and distribution costs, and understat[ing] revenues."[8] (See *De Guere*, *supra*, 56 Cal.App.4th at p. 489.) Rather, they argued that MCA breached its agreements—i.e., that MCA disregarded the 15% royalty rate in the 1943 Agreement, as well as the MFN clause in the CD Amendment. (See ___, *supra*.)

Put differently, both parties *agreed* that MCA's books accurately reflected both the amount of money that had been paid in royalties and the basis for those payments. The parties' disagreements arose over whether the *contracts* required that more be paid.

C. A Jury Trial Was Required Because Remedies At Law Would Have Been Adequate.

The fact that the Crosby heirs sought only remedies at law—money damages and return of specific personal property (the master recordings)—also demonstrates the fundamentally legal nature of this case. (See __, *supra*.)

As discussed above, the fulcrum of the parties' dispute was breach of contract—the remedy for which is money damages. Money damages are indisputably a legal remedy. (See *Martin, supra,* 51 Cal.App.4th 688, 696.)

Even the rescission claim sought only a legal remedy—the return of the consideration Crosby gave for his contracts with MCA (i.e., the master recordings). As our Supreme Court has recognized, where a rescission claim seeks "the return of personal property . . . . [t]he action commonly

---

[8] Although the Crosby heirs complained about certain deductions (i.e., packaging and free goods), those claims are de minimis; the bulk of plaintiffs' claims turned on questions about what base royalty rate applied to LPs and CDs. (See CT 3807 [92% of compensatory damages are based on failure to apply 15% of wholesale royalty rate in the 1943 Agreement].)

known as claim and delivery is appropriate. This, of course, is an action at law." (See *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 524, citations omitted.) Indeed, the legislature has expressly provided that an action to recover specific or personal property gives rise to a right to a jury trial of any disputed issues of fact. (Civ. Proc., § 592 ["In actions for the recovery of specific, real, or personal property, with or without damages . . . an issue of fact must be tried by a jury"].) Specific rights to music are considered personal property. (See Rev. & T. Code § 6012(c)(10); 17 U.S.C. § 201(d)(1).)

D. Even If The Case Presented Both Legal And Equitable Issues, The Legal Issues Had To Be Tried First To A Jury.

Because the gist of this case was legal, the Crosby heirs had an absolute right to a jury trial. But even if there had been some equitable issues here—indeed, even if the gist of the case had been equitable—the legal issues had to be tried to a jury *before* any bench trial of the equitable issues.[9]

[9] The trial court initially ruled that case would be bifurcated and the equitable issues—specifically, the accounting—tried first. (CT 8458, 8475.) The Crosby heirs then dismissed their equitable claims for accounting and constructive trust. (CT 8530-8531.) The trial court ruled that equitable questions remained paramount—i.e., that the "gist" of the case was an equitable accounting—and thus the case would be tried by the court. (CT 8530-8531, 8565; RT P-14.)

1. The California Supreme Court has held that jury trial of legal issues must precede any bench trial of factually-overlapping equitable claims.

Our Supreme Court has held that where a case presents both legal and equitable issues, the legal issues must be tried first to a jury. (See, e.g., *Donahue v. Meister* (1891) 88 Cal. 121, 124-126 [endorsing the legal-first approach on constitutional grounds]; *Hughes v. Dunlap* (1891) 91 Cal. 385, 389-390 [if the right to an equitable remedy "'depends'" on or is "'based upon'" legal issues of fact, these issues must first be determined by the jury]; *Curtis v. Sutter* (1860) 15 Cal. 259, 262-263 [held, "questions purely of a legal character in relation to the title" should be tried by a jury, "before" adjudication of the plaintiff's claim to an injunction].)

The Courts of Appeal agree legal issues must be tried first. (See, e.g., *Brockley v. Moore* (2003) 107 Cal.App.4th 86, 96 ["We observe that it is generally proper for a trial court to await a jury's verdict before ruling on overlapping issues being tried to the court"]; *Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114 [plaintiff sought damages for trespass (legal) and injunction to prevent future trespass (equitable), and defendants cross-claimed to quiet title (equitable); held, requiring bench trial of equitable issues *before* trial of legal issues erroneously denied defendants right to jury trial of overlapping legal claims].)

So do the federal courts. (See, e.g., *Beacon Theatres, Inc. v. Westover* (1959) 359 U.S. 500, 510-511; *Dairy Queen, Inc. v. Wood*, *supra*, 369 U.S. 469, 472-480; see also Wright & Miller, Federal Practice & Procedure (2d ed. 1994), § 2338, p. 221 [Where "issues of fact are common to both the legal and equitable claims and a jury has been demanded on the issues material to the legal claim, a jury must be permitted to decide those issues prior to decision of the equitable claim"].)[10]

2. A judicial accounting (if any were necessary) should have occurred after a jury determination of the contract issues.

The Crosby heirs did not seek a judicial accounting; none was necessary because, as in most breach of contract cases, a jury could determine the damages plaintiffs suffered. But even if a judicial accounting *were* ultimately necessary, the trial court's placement of the accounting cart ahead of the contract horse was improper because it ignored a basic reality: A final accounting of royalties—i.e., who owed what to whom—could not occur without a predicate determination of the terms of the contracts that governed those royalties. In other words, no accounting was even possible until *after* resolution of: Which contracts applied? What did they say? Had they been modified or clarified by affirmative agreement or by subsequent conduct?

Division Four of this Court has provided a useful explanation of the relationship between accounting and substantive contract claims in *De Guere v. Universal City Studios, Inc.*, *supra*, 56 Cal.App.4th 482. De Guere was a producer who challenged a movie studio's accounting of his net profits participation. But their dispute also included questions of contract interpretation and enforceability. The trial court sent the matter to

---

[10] Although a separate line of California Supreme Court cases suggests that trial courts may try equitable issues first, in none of these cases was there a *holding* to that effect. (See, e.g., *Connell v. Bowes* (1942) 19 Cal.2d 870 [proper sequence of trial not before court]; *Raedeke, supra,* 10 Cal.3d 665, 674-675 [same].) "The subtle yet elementary precept of the common law is that the law is in the holding, i.e., in the application of doctrine and precedent on the facts of the case." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1061-1062.)

a referee, who made numerous substantive determinations, including interpreting the contract and concluding it was enforceable. (*Id*. at pp. 491-492.) Over De Guere's objection that the referee had exceeded his legal authority, the trial court essentially adopted the referee's conclusions. (*Id*. at pp. 494-495.)

The Court of Appeal reversed, holding that the trial court exceeded constitutional limits on the delegation of judicial power when it allowed the referee to resolve issues of contract interpretation and enforceability. (*Id*. at p. 501.) As to the sequence of adjudication, the court held that, where both contract and accounting issues are presented, "issues of contract interpretation are resolved first, and that resolution guides" the accounting. (*Id*. at p. 500.)

The court discussed De Guere's right to jury trial. The court acknowledged that a claim for an accounting is equitable and does not require a jury (*id*. at pp. 507-508) and that "the overwhelming gist of the action is equitable" (*id*. at p. 508). But the court nevertheless held:

> "On remand, issues relating to the interpretation and enforceability of the agreement must be decided at trial, with full opportunity for argument by counsel and the presentation of additional evidence if necessary to the resolution of factual issues. If the parties present conflicting extrinsic evidence regarding the interpretation of the contract on remand, *the credibility issues must be resolved by a jury*, if a jury is properly demanded." (*Id*. at p. 505, emphasis added.)

De Guere provides a roadmap for this case, assuming any judicial accounting is necessary. *De Guere* explains that an accounting may not be performed until *after* the contractual parameters have been established by a jury. In the present case, as in *De Guere*, those parameters involve "issues of contract interpretation and enforceability." (*Ibid*.) And because those are purely legal rather than equitable questions, a jury must decide them before the court conducts any accounting.

* * * * *

"'The right of trial by jury is too sacred in its character to be frittered away or committed to the uncontrolled caprice of every judge or magistrate in the State.'" (*Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 956.) Here, the trial court usurped the jury's fact-finding role, thereby abrogating the Crosby heirs' constitutional right. Reversal and retrial are required.

II. THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY ADJUDICATION OF THE BULK OF PLAINTIFFS' CLAIMS.

In two sweeping summary adjudication rulings, the trial court eliminated the vast majority of plaintiffs' claims. The court concluded there was no substantial evidence of either breach of fiduciary duty or fraud. It further held that the Crosby heirs were on notice of, and therefore were barred from claiming, any underpayment of royalty installments before 1996. These rulings were error: There was substantial evidence creating triable issues of fact on all of these issues.

This court reviews summary adjudication rulings de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) Like the trial court, the reviewing court "must strictly construe the moving papers and liberally construe the materials offered in opposition." (*Asplund v. Selected Investments in Financial Equities, Inc.* (2000) 86 Cal.App.4th 26, 36.)

All evidence must be viewed in the light most favorable to the non-movant and "all doubts about the propriety of granting the motion must be resolved in favor of its denial." (*Ibid*.)

A. Because Substantial Evidence Showed MCA Owed Fiduciary Duties That It Breached, Summary Adjudication Of That Claim Was Reversible Error.

Plaintiffs alleged that MCA owed them fiduciary duties that it breached numerous ways, including by intentionally underpaying royalties, concealing the existence of the 1943 Agreement and falsely representing that they were honoring all of the parties contracts. (CT 2805-2819.)

Reasoning that "a typical distribution contract, negotiated at arms length does not create a fiduciary relationship," the trial court concluded there was no fiduciary relationship between the Crosby heirs and the record companies. (CT 8030, 8034.) In so holding, the trial court ignored substantial evidence that the relationship between the record companies and Crosby (and his heirs) was anything but typical. A jury should have been permitted to weigh whether the parties' historically close professional relationship, unprecedented joint-venture-like nature and their unique contracts created a fiduciary relationship.

1. Overview.

a. The circumstances giving rise to fiduciary duties are wide-ranging and fact-specific.

Fiduciary relationships arise in a wide variety of circumstances. A fiduciary relationship may have its source in a confidential relationship or contract, where trust and confidence is reposed in a party that assumes control of the property, affairs, or interests of another. (E.g., *Vai v. Bank of America* (1961) 56 Cal.2d 329, 339; *Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 809; *Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, 322.) Similarly, a fiduciary relationship exists where one party occupies a superior position to or has unique influence over another, more dependent party. (E.g., *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 271.)

Thus, joint venturers owe fiduciary duties to each other because they "occupy a relation of trust and confidence." (*Morris v. Whittier Amusement Co.* (1932) 123 Cal.App. 121, 123-124; *Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 584 ["the existence of a partnership or joint venture between the parties placed them in a confidential relationship"].)

However, a relationship need not be a *formal* joint venture in order to give rise to fiduciary duties. (*Stevens v. Marco*, *supra*, 147 Cal.App.2d at p. 376 ["[i]t is not necessary to precisely define the relationship thus created as one of joint venture in order to hold it to have created a fiduciary relationship"], citing *Nelson v. Abraham*, *supra*, 29 Cal.2d 745, 750-751 [finding heightened duties beyond contractual duties despite contract provision that plaintiff had no interest in the business].)

Rather, "cooperative contractual arrangements [that] may be loosely termed joint ventures or akin thereto" give rise to fiduciary duties. (*Krantz, supra,* 89 Cal.App.4th at pp. 177-178 [a "strict approach" not necessary; held, plaintiff had "obviously raised an issue of material fact" regarding whether a fiduciary duty existed by pointing to the parties' contract and to parol evidence of the parties' joint-venture-like relationship]; see also *Universal Sales Corp., supra,* 20 Cal.2d at p. 764 [parties' "cooperation promotive of the common enterprise and involving the combination of the skill and efforts of both the plaintiff and the defendant suggests that the parties intended to establish a contractual relationship between themselves akin to that of joint adventurers"]; *Stevens, supra,* 147 Cal.App.2d at p. 375.)

These principles dictate that the presence of special circumstances—such as an historical business relationship of trust between the contracting parties or special interdependent contract rights—elevates an ordinary contractual relationship to fiduciary status. (See, e.g., *Carpenter Foundation v. Oakes* (1972) 26 Cal.App.3d 784, 788-789, 791-792, 798 [fiduciary relationship existed between book publisher and provider of content, where parties had past agency relationship and long professional relationship]; *Stevens, supra,* 147 Cal.App.2d at pp. 373-374 [fiduciary relationship between inventor and manufacturer arose where they entered into royalty agreement and cooperated to commercially exploit inventor's idea, and where manufacturer occupied superior position with respect to "furnishing honest accountings of sales" and "marketing the device"]; *Schaake v. Eagle etc. Can Co.* (1902) 135 Cal. 472, 485 [fiduciary relationship resulted when an employee assigned his inventions to his employer in exchange for a percentage of the profits].)

Because of the variety of circumstances that may give rise to fiduciary duties, the existence of a fiduciary relationship is almost invariably a question of fact. (See, e.g., *O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153 ["the existence of a confidential relationship presents a question of fact which, of necessity, may be determined only on a case by case basis (citations)"]; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 820 ["where evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury"]; *Nelson*, 29 Cal.2d at p. 750 [same].)

Consequently, the nonexistence of fiduciary duties can be resolved on summary judgment only if the uncontradicted evidence indisputably shows no fiduciary relationship. (See *Krantz, supra,* 89 Cal.App.4th at pp. 177-178.) As we explain below, that simply wasn't true here.

b. Special circumstances present here, such as a long business relationship and unique contract terms establishing confidentiality and dependence, render an artist's relationship with his marketers fiduciary in nature.

In appropriate circumstances, a fiduciary relationship may exist between an artist and the entities that bring his art to market. (See, e.g., *Parsons v. Tickner*, *supra*, 31 Cal.App. 4th at p. 529 [holding that music producers owed a recording artist's heirs duties "as fiduciaries of [the artist]"].) These relationships are fiduciary in nature when characterized by special circumstances—such as a history of closeness between the parties or contract terms requiring close collaboration and entirely mutual profits. (See pp. __, *supra*.)

For example, in *Apple Records, Inc. v. Capitol Records, Inc.* (N.Y.A.D. 1988) 137 A.D.2d 50, 529 N.Y.S.2d 279 ("*Apple Records*"), the Appellate Division considered whether the evidence showed the Beatles had a fiduciary relationship with their record company, Capitol Records.[11]

[11] California looks to New York as an analogous "entertainment capital" of the country when formulating policy for its entertainment industry. (See, e.g., *Waisbren v. Peppercorn Productions, Inc*. (1995) 41 Cal.App.4th 246, 256 [California Legislature "created the California Entertainment Commission to 'study the laws and practices of this

As here, the plaintiffs alleged that the record company had misappropriated millions in royalties. Defendants moved to dismiss the breach of fiduciary duty claim. The lower court had denied the motion because it determined that "while the contract did not establish a formal fiduciary relationship, the pleadings were sufficient to raise an issue as to the existence of an informal one." (*Id*. at p. 57.)

The Appellate Division agreed. It noted that "[a] fiduciary relationship, whether formal or informal,' is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another . . . [and] might be found to exist . . . where confidence is based upon prior business dealings." (*Ibid*.) The court concluded that an informal fiduciary relationship existed between the parties based principally on the longevity and importance of their relationship:

> "The business dealings between Capitol Records and the Beatles date back to 1962, when the still unacclaimed Beatles entrusted their musical talents to defendant Capitol Records. It is alleged that this relationship proved so profitable to defendant that at one point the Beatles constituted 25 to 30 percent of its business. Even after the Beatles attained their remarkable degree of popularity and success, they still continued to rely on Capitol Records for the manufacture and distributing of their recordings." (*Ibid*.)

The Appellate Division concluded: "It can be said that from such a long enduring relationship was borne [sic] a special relationship of trust and confidence, one which existed independent of the contractual duties."

---

state, the State of New York, and other entertainment capitals of the United States relating to the licensing of agents and representatives of artists in the entertainment industry in general"].)

(*Ibid*.)

Other cases echo this conclusion. (See, e.g., *Ahern v. Scholz* (1st Cir. 1996) 85 F.3d 774, 794-795 [music manager/recording company owed fiduciary duty to artist based on "a long history of business dealings, marked by a series of agreements and modification agreements," and fiduciary duty persisted even after defendant ceased to manage artist; held, "a directed verdict is inappropriate on the question of whether [ex-manager/recording company] owed [artist] a fiduciary duty"]; *Licette Music Corp. v. A.A. Records, Inc*. (N.Y.A.D 1993) 196 A.D.2d 467 [the "earlier business dealings between [defendant] and . . . the creative head and part owner of the plaintiff companies, created a relationship of trust and confidence, which existed independent of the contractual duties and which was violated by numerous deceptive business practices later devised by [defendant] to camouflage actual sales of songs and records for which no payments were made"].)

In addition, special contract terms—such as those giving an artist control over his projects or setting up special accounts on his behalf—can give rise to fiduciary duties. (See, e.g., *Celador Int'l Ltd. v. Walt Disney Co.* (C.D. Cal. 2004) 347 F. Supp. 2d 846, 849 [contract that gave artist reversionary rights, merchandising rights, approval rights, and consultation rights concerning television program was sufficient to support the existence of a joint venture; held, motion to dismiss fiduciary claim denied]; *CBS, Inc. v. Ahern* (S.D.N.Y.1985) 108 F.R.D. 14 [contractual provision setting up special account for plaintiff's benefit could give rise to fiduciary duty].)

As we now explain, Crosby's relationship with the record companies bears these very indicia of fiduciary status.

2. There was substantial evidence that a fiduciary relationship existed.

The evidence showed that, from the beginning, Crosby's relationship with his record companies was exceptional. (See pp. __ , *supra*.) In 1934, Crosby was the first artist to sign on to Jack Kapp's fledgling record company, Decca Records, and he quickly became its most lucrative asset. (*Ibid*.) Crosby's career, in turn, developed under Kapp's guidance; Kapp even selected the music Crosby sang. (*Ibid*.) The intimate professional relationship between Crosby and Kapp spawned Decros Corporation in 1949—a joint venture between Decca Records and Crosby devoted exclusively to producing and selling Crosby's records. (*Ibid*.) Decros' name reflected this close relationship; it used the first two letters of "Decca" and the first four letters of "Crosby." (*Ibid*.)

The agreements between Crosby and his record companies also envisioned close cooperation to create artistic content: The record company would choose the songs (subject to Crosby's veto) and then the two contracting parties would work together to "re-record each selection until a 'master'" was created. (See pp. __ , *supra*.) In other words, Crosby and the record companies worked cooperatively to create the records that the record companies then promoted.

Under the contracts, all profits were mutual. (See, e.g., CT 3844-3847.) And the record companies were obligated to use their best efforts to profitably exploit the records for the mutual benefit of the contracting parties. (See, e.g., CT 3847; compare *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 32-33 [finding no joint venture or relationship "akin" to joint venture because movie studio "was under no obligation to maximize profits from the enterprise" and parties' "contract plainly allowed an opportunity for nonmutual profit that is absent in fiduciary relationships"].)

The contracts also gave Crosby the right to control who released his albums—they provided that the record company could not assign its obligations under the contract without his written permission. (See, e.g., CT 3850.) And the contracts gave Crosby the right to an accounting—a right commonly associated with a fiduciary relationship. (See, e.g., CT 3848 ; see *Smith v. Blodget* (1921) 187 Cal. 235, 242 [plaintiff could state claim for an accounting based on defendant's breach of fiduciary duty].)

This evidence of Crosby's historically close relationship with Jack Kapp and Decca, as well as his unique contract rights, showed there was much more than an arm's length contractual relationship. It showed a cooperative arrangement akin to a joint venture.

3. Plaintiffs proffered substantial evidence that the fiduciary relationship persisted.

There was substantial evidence that the special relationship Crosby first formed with his original label/producer was handed down to later generations. For example, even after MCA took over Decca in 1966, it treated Decca as a separate division until 1972. (See pp. __, *supra*.)

The Crosby heirs testified that the changes in corporate ownership gave them no reason to think that MCA would be any less honorable than Decca. For example, Kathryn Crosby testified that she "did not even know" that MCA had acquired Decca, so minimal was its impact. (CT 1559.)

Even after she noticed the change, Kathryn testified that she regarded MCA's Bill Grady as "her representative at MCA" and that her "understanding was that MCA was working for Bing and that I was working for Bing and together we were doing something very nice—getting his music out in the world." (RT W-54; see also RT W-59-60; CT 1578-1579, 11177-11178, 11187.) In essence, other than a change in letterhead, Kathryn noticed no difference between Decca and MCA.

Moreover, the unique contracts that Crosby had entered into with his record companies remained in effect. As discussed above, those contracts, gave Crosby many more rights (collaborative creation of records, no assignment without consent, right to select songs and collaborators, right to an accounting) than a mere contingent compensation contract. Those rights persisted even after the record companies' various mergers and acquisitions.

In light of the above, there was clearly substantial evidence giving rise to triable factual questions regarding whether the special relationship first formed by Crosby and Kapp/Decca persisted. (See *Ahern v. Scholz, supra*, 85 F.3d at p. 794 [although music manager and artist had ended management relationship years earlier and were not "on speaking terms," "a reasonable juror could find" that the parties' "special relationship of trust and confidence" persisted; held, "a directed verdict is inappropriate on the question of whether Ahern owed Scholz a fiduciary duty"]; *Apple Records*, *supra*, 529 N.Y.S.2d at pp. 280, 283 [even though Beatles had broken up and John Lennon had died, it was still question of fact whether special relationship that Beatles and Capitol Records formed in 1962 still persisted]; see also *Krantz, supra,* 89 Cal.App.4th at p. 177.)

The trial court erred in refusing to permit the factual questions surrounding plaintiffs' breach of fiduciary duty claim to go to trial.

4. At the very least, there was a triable issue that MCA owed a limited fiduciary duty to render

honest accountings.

Even if the collaborative relationship of trust and confidence that Crosby formed with Decca did not give rise to a fiduciary relationship for all purposes, it nonetheless created a *limited* fiduciary obligation to render honest accountings. Indeed, where, as here, a contract requires one party to account to the other, a limited fiduciary duty arises as to that obligation. (See, e.g., *Waverly Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 734 ["RKO was not a fiduciary with respect to the performance of the terms of this contract (except as to accounting for rentals received)"]; *Recorded Picture Co. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 371, fn. 10 ["The *Waverly* court did state that the distributor owed a fiduciary duty to the producer to provide an accounting of proceeds received from subdistributors. Here, that duty would govern the relationship between the producers and Hemdale. . . ."]; *Carpenter Found. v. Oakes* (1972) 26 Cal.App. 3d 784, 796- 97 [assignee of literary property owed to its author "a fiduciary relation which has its origin in contract" to "[divide] in designated proportions" the receipts from the work: "The position of such a one is analogous in this respect to the position of a partner"]; but see *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 33-35 [no limited fiduciary duty for purposes of accounting because "[e]ither a relationship is fiduciary in character or it is not"].)

The limited fiduciary duty to account honestly stems from the fact that "fiduciaries have unusually great opportunities to cheat without detection and they have unusually great incentives to do so." (See *Wolf, supra*, 107 Cal.App.4th at pp. 40-42, concurring and dissenting opinion of Johnson, J.) The limited fiduciary duty protects against the potential for abuses resulting from the disparity in knowledge and power where a company collects money on behalf of an artist. (*Ibid*.) The limited fiduciary duty to account honestly also helps protect against the intrinsic conflict of interest present in such circumstances: Every dollar that the company pays to the artist is a dollar it did not keep for itself. (*Ibid*.)

Thus, where a contract imposes a duty to account, a record company owes a fiduciary duty as to that obligation. At the very least, the trial court erred by determining that there was no triable issue as to a fiduciary duty of any kind as a matter of law. (See CT 8034.)

B. The Trial Court Erroneously Truncated Plaintiffs' Claims On The Basis Of The Statute Of Limitations.

The trial court granted summary adjudication of all claims predating what it determined to be the statute of limitations cut-off (i.e., 1996 or 1997, depending upon the claim). It held that "[e]ach semi-annual royalty payment constitutes a separate installment contract" and that "a new statute of limitations period begins on the due date of each royalty." (CT 8026.) Thus, the Crosby heirs were barred from "asserting royalty payments made more than three or four years prior to filing suit, depending on the applicable statute of limitations." (*Ibid*.) In so holding, the trial court concluded that the Crosby heirs had not proffered evidence of delayed discovery. (CT 8029-8030.)

This was error. As we explain, the discovery rule applies where, as here, the evidence shows that a plaintiff could not reasonably have learned of its claim at an earlier time. Here, the Crosby heirs presented substantial evidence that they reasonably did not suspect MCA's underpayment of royalties until a 1999 audit was conducted.

1. The discovery rule tolls the statute of limitations where the defendant's wrong is difficult to detect or where the defendant has actively concealed his wrongdoing.

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110.) Thus, the discovery rule applies "to types of actions in which it will generally be difficult for plaintiffs to immediately detect or comprehend the breach or the resulting injuries." (*Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, 1614.).[12]

Whether the discovery rule applies to toll the statute of limitations "is essentially a *question of fact*" and "it is only where reasonable minds can draw but one conclusion from the evidence that the question becomes a matter of law." (*Baright v. Willis* (1984) 151 Cal.App.3d 303, 311, emphasis in original; see also *Brown v. Bleiberg* (1982) 32 Cal.3d 426, 436 [same]; *Krusesky v. Baugh* (1982) 138 Cal.App.3d 562, 567 ["what constitutes such notice turns on the facts of each case"].)

As we now explain, there was a triable issue of fact on the question of delayed discovery here.

2. The discovery rule applies as a matter of law to the pre-1996/97 claims brought under the CD Amendment's "most favored nations" clause.

---

[12] The discovery rule applies to plaintiffs' claims for fraud, breach of fiduciary duty and breach of contract. (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 5-6; *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1529.)

It was undisputed that the triggering of the MFN clause in Crosby's CD Amendment was entirely dependent upon MCA's payment of royalties to *other* artists on more favorable terms than those extended to Crosby. (See Ex. 10; CT 4075-4076; see also CT 3808.) As a result, knowledge of whether the MFN clause had been triggered was *exclusively* controlled by MCA. (See CT 3808.) This is a classic situation where "a plaintiff is blamelessly ignorant of his cause of action." (*April Enterprises, supra*, 147 Cal.App.3d at pp. 826-827.)

For example, in *April Enterprises*, a producer sued for breach of contract after the defendant erased videotapes of a television show he had produced. The videotapes were in the exclusive custody and control of the defendant. The Court of Appeal concluded it was unreasonable to expect the plaintiff "to continually monitor whether the other party is performing some act inconsistent with one of the many possible terms in a contract . . . especially . . . when the breaching party can commit the offending act secretly, within the privacy of its own offices." (*April Enterprises, supra*, 147 Cal.App.3d at p. 832.)

Here, as in *April Enterprises*, plaintiffs could not reasonably monitor whether the defendants were honoring all their contractual obligations. Indeed, even if the Crosby heirs had conducted an audit of royalty payments, they would not have learned whether MCA had paid *other* artists using more favorable methods of royalty calculation. In fact, it wasn't until MCA's opening statement in this lawsuit that plaintiffs learned the MFN clause had been triggered in 2003. (See __, *supra*.)

The discovery rule clearly applies to all claims stemming from the MFN clause. The statue of limitations was tolled as a matter of law. At the very least, a jury should have been permitted to determine the tolling issue regarding MFN clause claims before 1996/97.

3. A jury should have been permitted to determine whether the discovery rule applied to claims brought under the 1943 Agreement.

Plaintiffs' evidence also established delayed discovery of claims under the 1943 Agreement. That evidence demonstrated that Crosby reasonably did not know that MCA was failing to pay the 15% of wholesale royalty provided for in that agreement:

First, with the exception of foreign sales royalty rates, the applicable royalty rate was not printed anywhere on MCA's royalty statements. (See pp. __, *supra*.) This made it difficult to discern whether MCA was paying the 15% of wholesale royalty.

Second, when Crosby signed the 1943 Agreement, the ratio between the retail and wholesale price of records was almost exactly 2:1. (Fn. 2, *supra*.) The discrepancy between the royalty rate Crosby should have received (15% of wholesale—i.e., 7.5% of retail) and the royalty rate he actually received (7% of retail) was only .5%, too small to put him on notice of MCA's chronic underpayment. Although by 1988, the ratio between the retail and wholesale price had shifted from 2:1 to 1.3:1—thus resulting in a far greater discrepancy—there is no evidence that plaintiffs were ever informed that shift had occurred. (*Ibid*.)

Third, MCA repeatedly assured Crosby and his heirs that it was paying royalties in accordance with "the applicable royalty rate called for pursuant to the contract under which the master was recorded." (See, e.g., Ex. 144, 154.) Plaintiffs reasonably took MCA at its word. (See *Anderson v. Thacher* (1946) 76 Cal.App.2d 50, 70 [defendant cannot complain that plaintiff "reposed too much confidence in him" and therefore did not discover the fraud sooner].)

Fourth, there was evidence that when plaintiffs sought to audit royalty payments, MCA hid the existence of the 1943 Agreement:

(a) In 1986, when HLC asked MCA for all Crosby's recording contracts to review royalty payments, MCA purported to provide all applicable contracts; however, *the 1943 Agreement was not included in the package.* (See pp. __, *supra*.)

(b) Because royalty rates are not printed on MCA's royalty statements, an auditor needs sufficient "discography" to review royalty payments—including all applicable contracts and the catalog of songs showing the year they were recorded. (See Supp. CT 10454-10458.) MCA knew this yet it failed to provide the single most important contract—the only contract containing the 15% of wholesale royalty and the contract that governed 92% of Crosby revenues. (See pp. __, *supra*.)[13]

"When there has been a belated discovery of the cause of action, the issue whether the plaintiff exercised reasonable diligence is a question of fact for the court or jury to decide. The drastic remedy of summary judgment may not be granted unless reasonable minds can draw *only one conclusion* from the evidence." (*Enfield v. Hunt* (1979) 91 Cal.App.3d 417,

---

[13] Plaintiffs had other strong evidence that MCA's failure to send the 1943 Agreement to HLC was intentional, including the testimony of an MCA employee that withholding contracts was a tactic MCA regularly employed. (See p. 17, *supra*.) Although this evidence was not presented before the trial court's statute of limitations ruling (and was later barred on the basis of that ruling), it will be available at any jury trial following reversal and remand.

419-420.) Here, the evidence outlined above would have permitted a reasonable trier of fact to conclude that the delayed discovery was reasonable.

C. The Trial Court Erroneously Dismissed Plaintiffs' Fraud Claims.

Plaintiffs alleged that MCA had engaged in a fraudulent plan to underpay royalties by concealing the existence of the 1943 Agreement and secretly breaching both it and the CD Amendment's MFN clause. (CT 2813-2819.) They alleged that MCA had been intentionally sending false royalty statements since at least 1972. (CT 2818.) They sought punitive damages in addition to compensatories. (CT 2825.)

The trial court dismissed the fraud claims primarily based on its conclusion that its statute of limitations ruling barred proof of any fraud prior to 1997. (See CT 8033.) For all the reasons explained above, this ruling was error.

None of the trial court's alternative grounds for rejecting the fraud claims saves that ruling.

First, the trial court relied upon the absence of any fiduciary relationship as its basis for rejecting allegations of fraud stemming from MCA's failure to send the 1943 Agreement to HLC in 1986. (CT 8034.) It reasoned that MCA had no obligation to disclose the existence of the 1943 Agreement. (*Ibid*.)

But, "the rule has long been settled in this state that although one may be under no duty to speak as to a matter, 'if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure.'" (*Rogers v. Warden* (1942) 20 Cal.2d 286, 289; *Zinn v. Ex- Cell-O Corp*. (1957) 148 Cal.App.2d 56, 68.) "Even if a fiduciary relationship is not involved, a nondisclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666.)

Here, MCA purported to provide all contracts, but it failed to send the 1943 Agreement. MCA's failure to make a "full and fair disclosure" in the face of its duty to do so requires application of the discovery rule to the fraud case. In any event, as discussed above, the record contained substantial evidence that, in fact, the parties *had* formed a special relationship giving rise to fiduciary duties. (See pp. __, *supra*.) This meant MCA had—and breached—a heightened duty to speak honestly.

Second, the trial court dismissed the fraud claims because it concluded MCA's acts caused no harm distinct from the breach of contract. (CT 8034.) But plaintiffs sought punitive damages for MCA's fraudulent conduct. (See CT 2825.) MCA's fraudulent concealment of the 1943 Agreement and its breach of its fiduciary duties constitute the requisite violations of independent duties necessary to support tort liability. (See *Robinson Helicopter Co., Inc. v. Dana Corp*. (2004) 34 Cal.4th 979, 990-991 [defendant's "tortious conduct was separate from the breach itself" and thus could support a fraud claim].)

In any event, "a tortious breach of contract . . . may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit . . . or; (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of . . . substantial consequential damages." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 553-554.) That is plainly what the evidence showed here.

III. BECAUSE THE CROSBY HEIRS WERE THE "PREVAILING PARTY" AS A MATTER OF LAW, THE TRIAL COURT ERRED IN AWARDING COSTS TO MCA AND DENYING COSTS TO THE CROSBY HEIRS.

Plaintiffs recovered $210,762.53. MCA took nothing. Yet the trial court declined to award plaintiffs their costs. Even worse, it deemed *MCA* to be the "prevailing party," entitled to *its* costs.

This was error.

A. Because Plaintiffs Received "A Net Monetary Recovery," They Were The "Prevailing Party" As A Matter Of Law.

1. Statutory language.

"[T]he fundamental authority for awarding costs in civil actions" is Code of Civil Procedure section 1032. (*Scott, supra*, 20 Cal.4th at p. 1108; see also *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1151 [same].) That was the basis for the cost award here. (CT 10311.)

Section 1032 sets out four categories of litigants who are "prevailing parties" (and therefore entitled to costs) as a matter of law: (1) "the party with a net monetary recovery," (2) "a defendant in whose favor a dismissal is entered," (3) "a defendant where neither plaintiff nor defendant obtains any relief," and (4) "a defendant as against those plaintiffs who do not recover any relief against that defendant." (Civ. Proc., § 1032, subd. (a)(4).)

If a litigant falls within any of these definitions, that party is the "prevailing party" and "is entitled as a matter of right to recover costs." (Civ. Proc., § 1032, subd. (b).)

Trial court discretion enters the picture only where *none* of the enumerated definitions applies: "[I]n situations *other than as specified*, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . ." (Civ. Proc., § 1032, subd. (a)(4), emphasis added.)

Thus, on its face, the governing statute designates the recipient of a net monetary recovery as the "prevailing party" as a matter of law. A trial court has no discretion to decide otherwise.

2. Case law.

The cases enforce the "statute's straightforward definition of prevailing party as a litigant with a net monetary recovery." (*Wakefield, supra*, 145 Cal.App.4th at p. 987.) Indeed, "[a] litigant with a straightforward net monetary recovery falls squarely within the first statutory definition and thus qualifies categorically as a prevailing party." (*Id.* at p. 976; see also *Scott Co. v. Blount, Inc.*, *supra*, 20 Cal.4th at p. 1108 ["[f]or purposes of section 1032, a party with a net monetary recovery, like plaintiff here, is a 'prevailing party'"]; *Michell*, *supra*, 49 Cal.App.4th at p. 1198 [same]; *Reveles, supra,* 57 Cal.App.4th at p. 1151 [same]; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265 [same].)

Because net monetary recovery—like the other enumerated categories in section 1032(a)(4)—is *dispositive* of the identity of the "prevailing party," trial court orders concluding that such a party is *not* a prevailing party are erroneous. (See, e.g., *Wakefield v. Bohlin, supra*, 145 Cal.App.4th 963, 981 [plaintiff received "net monetary recovery" for purposes of statute even though settlement with other parties reduced his $34,000 jury verdict to zero; held, because plaintiff "categorically qualifie[d] as a prevailing party as a matter of law under the first prong of section 1032, subdivision (a)(4)," trial court erred "in finding that he was not"]; *Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1546, 1549 [trial court had no discretion to "determine the defendants were not 'prevailing parties'" since they fell within one of the statute's defined categories; held, defendants were "entitled to recover costs as a matter of right"].)

The trial court below ignored the plain language of the governing statute and exercised discretion it did not have. Only the Crosby heirs recovered damages. The trial court made no other award of any type to anyone. Thus, the Crosby heirs are the prevailing party as a matter of law and are entitled to their costs.

B. The Fact That Plaintiffs Only Prevailed On One Claim Is Irrelevant To Their "Prevailing Party" Status.

The trial court decided that because plaintiffs won $210,762.53 (plus 10% interest) rather than the entire amount they sought, MCA was the "prevailing party" entitled to costs. As just discussed, this conclusion flies in the face of the plain language of the statute. But it also runs afoul of the settled rule that a party need not prevail on all claims to be the prevailing party as a matter of law.

Michell v. Olick (1996) 49 Cal.App.4th 1194 is directly on point. There, the question was "whether [plaintiff] was a party with a net monetary recovery" in light of the fact that she won only one of her many claims. (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1198.) The Court of Appeal held that, "Michell qualifies as the party with a net monetary recovery" because she recovered $63,000 and defendant took nothing on its cross-claims. (*Id*. at pp. 1198-1199; see also *Wakefield, supra*, 145 Cal.App.4th at p. 983 ["the fact that Wakefield succeeded on only one cause of action does not operate to deprive him of his status as prevailing party"].)

Other cases echo the conclusion that "the party recovering the net judgment is the successful party entitled to attorney's fees [and]. . . . the fact that some of [plaintiff's] claims were rejected or reduced in amount does not change the fact that he was the successful party." (*Distefano v. Hall* (1968) 263 Cal.App.2d 380, 387; *Hoyt v. Hart* (1906) 149 Cal. 722, 731 [under predecessor statute: "If the plaintiff recovers, even though only as to a portion of the title or possession involved, the right to costs follows of course under the terms of the statute"]; see also 16 Cal. Jur. 3d Costs § 35 ["It is not necessary for a party to win all the party claims in order to be entitled to costs. The party with a net monetary recovery includes a plaintiff who obtains a partial recovery"].)

CONCLUSION

For all of the foregoing reasons, the judgement should be reversed and the matter remanded for a jury trial on all issues, including those erroneously limited by the summary adjudication orders. At the very least, the cost award should be reversed and the matter remanded so the Crosby heirs, as the prevailing party, may recover their costs.

Dated: _______, 2007

LAW OFFICES OF MARK A. BRODKA
Mark Brodka

GREINES, MARTIN, STEIN &
RICHLAND LLP
Kent Richland
Cynthia Tobisman

By: ______________________________
Cynthia Tobisman

Attorneys for Plaintiffs and Appellants
HLC Properties, Ltd. and Thomas E. O'Sullivan
as Trustee for the Wilma Wyatt Crosby Trust

CERTIFICATION

Pursuant to California Rules of Court, 8.204, I certify that this Appellants' Opening Brief contains 13,414 words, not including the tables of contents and authorities, statement of interested parties, the caption page, signature blocks, or this Certification page.

DATED: June ___, 2007

____

Cynthia E. Tobisman