LEXSEE 2007 CAL. APP. UNPUB. LEXIS 5649

POINTE SAN DIEGO RESIDENTIAL COMMUNITY, L.P. et al, Plaintiffs, Cross-defendants and Appellants, v. W.W.I. PROPERTIES, L.L.C. et al., Defendants, Cross-complainants and Respondents. POINTE SDMU, L.P., Plaintiff, Cross-defendant and Appellant, v. ATLAS HOMES, L.L.C. et al., Defendants, Cross-complainants and Appellants.

D044695

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

2007 Cal. App. Unpub. LEXIS 5649

July 11, 2007, Filed

PRIOR HISTORY: [*1]

APPEALS from a judgment and orders of the Superior Court of San Diego County, Nos. GIC726145, GIC753184. Robert E. May, Judge.

DISPOSITION: Judgment affirmed in part, reversed in part and remanded with directions; orders granting partial new trial and denying attorney fees reversed.

JUDGES: McDONALD, J.; HUFFMAN, Acting P.J., IRION, J. concurred.

OPINION BY: McDONALD

OPINION

In the 1980's, plaintiff Gosnell Builders Corporation of California (Gosnell) began a real estate project known as Pointe San Diego (project) to develop approximately 1000 acres in the Spring Valley area of San Diego County into a master-planned, mixed use community that would include a commercial business park, a golf course and resort, and 911 single family homes. The property planned for residential development (the residential property) was held by plaintiff Pointe San Diego Residential Community, L.P. (Pointe), a limited partnership affiliated with Gosnell. When the lender financing the project withdrew funding, Gosnell's search for other financing led to negotiations with defendant Palomba Weingarten, and resulted in a complex series of transactions between various Gosnell-related entities and Weingarten-related entities. The goal of these transactions [*2] was to enable Gosnell to continue the project with financial assistance from Weingarten and for Gosnell and Weingarten, through their various related entities, to equally share the substantial tax-loss benefits and profits the project was expected to yield. Gosnell was to serve as the development manager of the residential property and for that purpose, entered into a Development Management Agreement (DMA) with defendant W.W.I. Properties, L.L.C. (WWI), a Weingarten-related entity that acquired ownership of the residential property as a result of the Gosnell-Weingarten transactions. The Gosnell-Weingarten transactions also resulted in the formation of plaintiff Pointe SDMU, L.P. (PSDMU), a limited partnership formed to own and develop the "mixed use" property, which was to include multiple-family residential units and commercial businesses in addition to a resort and golf course. [1]

1 "MU" presumably is an abbreviation of "mixed use."

The Gosnell and Weingarten coalition did not go

well and resulted in the instant litigation, consisting of two separate actions consolidated for trial. In the first action or "residential case," Gosnell and Pointe sued, among others, Weingarten and WWI for [*3] declaratory relief, breach of contract, intentional interference with contract, rescission, breach of fiduciary duty, constructive trust, and accounting. The breach of fiduciary duty claim was pleaded alternatively as a direct action by Pointe and a shareholder derivative action by Pointe on behalf of nominal defendant Astra Management Corporation (Astra), a corporation Weingarten controlled and through which Pointe, as a minority shareholder, expected to realize its profits from the development of the residential property. Weingarten and related entities filed a cross-complaint against Pointe, Gosnell and others alleging fraud, conspiracy to defraud, breach of contract, breach of fiduciary duty, slander, and dissolution of partnership.

In the second action or "mixed use case," PSDMU sued Atlas Homes, L.L.C. (Atlas) (an entity formed by Weingarten) and Wenner & Associates (Wenner), the company Weingarten engaged to replace Gosnell as developer of the residential property, alleging trespass, conversion and other causes of action. [2] Atlas filed a cross-complaint against PSDMU, Pointe, Gosnell and Robert Gosnell for breach of contract and quantum meruit.

2 Wenner is not a party to these [*4] appeals.

The cases were tried to the court in two phases, resulting in a final judgment that, among other things, awarded compensatory damages plus interest to Astra, and punitive damages plus interest to Pointe, against Weingarten on Astra's derivative breach of fiduciary duty cause of action; denied Pointe and Gosnell recovery on claims for breach of an agreement referred to as the "set-aside agreement;" awarded Gosnell damages against WWI and Weingarten for breach of the DMA; and awarded PSDMU damages for conversion, nonpermanent trespass and permanent trespass against Atlas and Weingarten. The judgment was based on four separate statements of decision, including one specifying the factual and legal basis for the court's order granting Pointe, Gosnell and PSDMUs' motion to amend the judgment to name Weingarten as a codebtor with respect to the damages awarded against WWI and Atlas.

Although the court ruled Pointe and Gosnell were entitled to recover attorney fees, it denied their motion for fees because it found they "failed to satisfy their burden of proving both the existence and the amount of fees to be apportioned to the recoverable claims." After it entered judgment, the court [*5] granted in part Pointe and Gosnell's motion for new trial on the issue of damages based on newly discovered evidence.

Weingarten and defendant Atlas Holding Group, Inc. (AHG), a corporation controlled by Weingarten, appeal the judgment and order granting Pointe a new trial on the issue of damages for Weingarten's breaches of fiduciary duty, contending (1) the award of damages to Astra under Pointe 's derivative cause of action for breach of fiduciary duty must be reversed because Astra did not suffer legally compensable injury; (2) the award of punitive damages to Pointe on its derivative cause of action for breach of fiduciary duty must be reversed because, as a matter of law, Pointe as a nominal plaintiff in a derivative action suffered no actual damages; (3) the court prejudicially erred by amending the judgment to make Weingarten a cojudgment debtor of WWI and Atlas based on alter ego liability; (4) the court erred by granting Pointe a new trial on the issue of damages for breach of fiduciary duty on the ground of newly discovered evidence; and (5) the cost judgment against AHG is incorrect because there is no judgment of liability against AHG.

WWI and Atlas appeal the judgment, [*6] contending (1) the damages awarded to Gosnell for breach of the DMA must be reversed because Gosnell materially breached the DMA as a matter of law and (2) the court prejudicially erred by ruling that PSDMU's complaint adequately pleads a permanent trespass claim and by not ruling that the permanent trespass claim is barred by the statute of limitations. Weingarten raises the same assignment of error regarding the permanent trespass claim in her opening brief.

Pointe and Gosnell appeal the judgment, contending the court committed reversible error by (1) not applying the "benefit-of-the-bargain" rather than the "out-of-pocket" measure of damages to Weingarten's breaches of fiduciary duty on their seventh cause of action; (2) ruling in favor of Weingarten on their claim for breach of the set-aside agreement; (3) not awarding them attorney fees; and (4) granting Weingarten's motion for judgment on Pointe's direct claims for breach of fiduciary duty.

FACTUAL BACKGROUND

By the end of 1990, Gosnell acquired the land and completed its master plan for the project and obtained entitlements and permits to proceed. Gosnell also secured an equity partner for development of the residential property [*7] and financing from Long Term Credit Bank (LTCB), a Japanese bank. By 1992 Gosnell had constructed substantial infrastructure and "vertical construction" on the residential property, including curbs and sidewalks, paving, an underground sewer, grading for 44 residential lots, six model homes, a sales office, and a recreation area and fountain.

In 1992 construction on the project stopped because a downturn in the Japanese economy caused Gosnell's equity partner to withdraw from the project. At LTCB's request, Pointe, which held the residential property, filed for Chapter 11 bankruptcy to protect its entitlements and, accordingly, the bank's security interest in the residential property. In 1995, after the bankruptcy case was dismissed, Gosnell and Pointe's search for a new equity partner led to dealings with Colony Capital and its principal, William Rogers, who introduced Gosnell and Pointe to Weingarten. At that time, Pointe owed LTCB $108 million.

Negotiations between Pointe and Weingarten (and their related entities) resulted in a series of transactions and agreements in December 1995 and January 1996, including the following: AHG purchased from LTCB the promissory note secured by the [*8] residential property for the deeply discounted sum of $3.8 million and contributed the note to Astra in exchange for 100,000 shares of Astra's common stock. Pointe contributed the residential property to Astra in exchange for 1000 shares of Astra's Class A common stock. [3] Astra sold a 31 percent tenancy-in-common interest in the residential property for $1.8 million to B.R. Family Partners (BRFP), a limited partnership of which William Rogers was the general partner. The $1.8 million from BRFP was to be used to develop the residential property.

> 3 Pointe, Gosnell and PSDMU state in their combined cross-appellant's opening and respondent's brief, and the court found, that Pointe conveyed the residential property to AHG and AHG then conveyed the residential property to Astra. However, the "AGREEMENT FOR EXCHANGE OF PROPERTY AND JOINT ESCROW INSTRUCTIONS" between Pointe and Astra and the "SHAREHOLDERS AGREEMENT" between AHG, Pointe and Astra, admitted at trial as Exhibits 45 and 57, respectively, show that Pointe conveyed the residential property directly to Astra.

Astra and BRFP formed WWI and conveyed their interests in the residential property, plus the $1.8 million BRFP invested, to [*9] WWI, which then owned 100 percent of the residential property. Astra owned 75 percent of WWI and BRFP owned the remaining 25 percent. Weingarten managed WWI, which was formed for the purpose of acquiring, owning, developing and selling the residential property. The parties intended that profits from the residential property would flow through WWI to Astra as cash distributions under WWI's operating agreement (the WWI Operating Agreement), and then be distributed by Astra as dividends to its shareholders, including Pointe. WWI entered into the DMA with Gosnell on January 17, 1996. In a letter dated January 17, 1996, which the parties refer to as the set-side letter or set-aside agreement, WWI agreed to cover certain of Pointe's ongoing expenses relating to the residential property.

The early 1996 transactions also resulted in the formation of PSDMU for the purpose of developing the mixed use property. Astra and BRFP were PSDMU's limited partners. [4] Pointe San Diego Land Corporation, an entity controlled by Robert Gosnell, was PSDMU's general partner. PSDMU retained Gosnell as development manager of the mixed use property.

> 4 Robert Gosnell testified that Weingarten and Rogers were PSDMU's [*10] limited partners. Presumably he was referring to them as the persons who controlled Astra and BRFP, respectively.

The initial business plan Gosnell presented to Weingarten and her advisors in late 1995 was entitled "Request for Loan Proposal" and contemplated that the development of the residential property would be funded in part by loans secured by the residential property. Although Weingarten rejected this business plan from the beginning because her business advisors, including Rogers, did not want WWI to assume the risk of home building, she did not communicate her rejection of the plan to Gosnell.

Four to six months after Weingarten became involved with the residential property, she stopped paying

Gosnell's expenses and bills it owed to third parties, and relieved it of accounting responsibilities for the residential property. In March 1997, WWI directed Gosnell to immediately cease all marketing efforts on WWI's behalf under the DMA and hired Wenner to replace Gosnell as development manager for the residential property.

On March 31, 1997, WWI sold a portion of the residential property known as Private Drive Estates, consisting of 300 unimproved lots plus 45 graded lots, to Whitehall [*11] Realty Corporation (Whitehall) for $3.5 million. Weingarten's friend, Gerry Ginsberg, was president and sole shareholder of Whitehall, and Weingarten's husband, Robert Weingarten, was chairman of Whitehall's board of directors. The selling price was set without a formal appraisal and the sale resulted in a tax loss that benefited Weingarten. Whitehall paid WWI a down payment of $300,000 and gave WWI a promissory note for the $3.2 million balance. Ginsberg paid the $300,000 down payment with a personal check rather than a corporate check from Whitehall.

Whitehall made no payments on the $3.2 million note and WWI did not take any steps to collect the principal balance or accrued interest of about $1 million on the note, which was in default for about four and one-half years. Weingarten testified she made no effort to collect on the note or foreclose on the property because Ginsberg was her friend. Weingarten paid delinquent taxes of more than $200,000 on the property, and Ginsberg was paid $300,000 under a consulting agreement with AHG, which in effect repaid him the down payment he made on Whitehall's purchase of residential property from WWI. The court found the consulting agreement [*12] was a method for reimbursing Ginsberg for assisting Weingarten in obtaining tax benefits from the sale.

In November 2001, Whitehall reconveyed the Private Drive Estates property to WWI. WWI had built and sold houses on the 45 graded lots, and had received all the proceeds from those sales. WWI forgave Whitehall's entire debt of $3.2 million plus interest and assumed Whitehall's financial obligations of more than $1.2 million. The court found Weingarten "obtained her benefits in 1997 with no intent to receive any additional funds from WR [*sic*] and with no intent to legally pursue the debt owed to WWI by Whitehall."

WWI hired Wenner on April 1, 1997, and Weingarten considered Gosnell fired as of that date. WWI's legal counsel sent Gosnell a letter dated April 25, 1997, stating that in accordance with the DMA, WWI had "terminated the Agreement for cause as of March 31, 1997 . . . ." Regarding cause, the letter vaguely explained: "Our client informs us that, among other things, you have failed to comply with various material terms of the [DMA] by failing to perform your duties and obligations thereunder in an efficient, expeditious and economical manner, consistent with the best interests [*13] of [WWI], as required by Article 1 of the [DMA], and otherwise failing to meet various requirements, including time deadlines and budget considerations, of the development plan, and by breaching your fiduciary duties to our client."

In August 1997, Atlas was formed with capitalization of $100,000 for the same purpose WWI was formed - to acquire, own, develop, and sell the residential property. AHG owned 85 percent of Atlas and Weingarten owned 97 percent of AHG. Weingarten's two children and grandchild owned the other 15 percent of Atlas and 3 percent of AHG. Weingarten was the sole manager of both companies.

On October 20, 1997, WWI transferred its remaining 519 residential property lots to Atlas. Weingarten executed the transaction on both sides, acting as manager of both WWI and Atlas. In exchange for the lots, WWI received Class A membership in Atlas, which entitled WWI to receive a capital contribution credit of $2.8 million (representing the value of the transferred property), plus a portion of Atlas's profits as provided in Atlas's operating agreement. On the same day, Weingarten, acting as manager of Atlas and voting AHG's 85 percent interest in Atlas, unilaterally amended Atlas's [*14] operating agreement to change the company's profit-distribution scheme. The amendment provided that the percentage interest of a nonvoting Class A member of Atlas (WWI) was 10 percent of Atlas's aggregate net profit in excess of $37 million. This amendment meant that after WWI received the first $2.8 million in profits to compensate it for the property it transferred to Atlas, [5] Atlas would receive the next $37 million and 90 percent of any additional profits, with the other 10 percent going to WWI. The court found the amendment "greatly diluted WWI's share of profit, which in turn diluted Astra and Pointe's share of any profits." Pointe and Gosnell presented evidence that the amendment diverted over $26 million in anticipated

profits from Pointe. [6]

> 5 Although the parties' omission of relevant trial exhibits from the record leaves the specific terms of this property transfer unclear, there is testimony by Weingarten that she believed the value of the property to be $6 million when WWI transferred it to Atlas and WWI was compensated in that amount by an assumption (presumably by Atlas) of liabilities (presumably WWI's) in the amount of $3.2 million plus the capital credit of $2.8 million. [*15] However, Exhibit A to the amendment to Atlas's operating agreement refers to WWI's $2.8 million capital contribution as a "Contribution of Property Having A Gross Asset Value of $2,800,000."
>
> 6 When asked why she unilaterally reduced Pointe's profit participation in the project, Weingarten testified: "First of all, they were fired as development manager. Let's start with that. That's number one. Number two, they violated their fiduciary duty during the time they were employed by [WWI] in the performance of what they were intended to perform. That's number two. Number three, it had become a contentious relationship, and in my mind I thought that their profit participation was tied to performance, as[] in the real world, most profit participations are. And as much as I was taking all of the risk, laying out all of the money, and of course it was all moot because there weren't any profits . . . . The fact of the matter is, there were no cash distributions to anyone. It's all very moot."

The court also found that the priority distribution of $37 million to Atlas coincided with a projected cash distribution of $37,451,948 to WWI set forth in WWI's "MAY 1997 BUSINESS PLAN EXECUTIVE SUMMARY." [*16] In a statement of decision, the court found that "the $37 million [distribution to Atlas] is based upon the $37 million in [the MAY 1997 BUSINESS PLAN EXECUTIVE SUMMARY]. [Weingarten], through the exchange between WWI and Atlas . . ., was attempting to secure the projected $37 million profit to her and her family members and to the exclusion of WWI, Astra and Pointe."

Because the amendment to Atlas's operating agreement also diluted BRFP's share of WWI profits and Rogers was Weingarten's friend and business associate, Weingarten and BRFP, along with Atlas, Astra, WWI, and Whitehall, entered into a purchase and sale agreement designed to protect BRFP's (i.e., Rogers's) financial interest in the project. [7] Under that agreement, made effective as of October 20, 1997, BRFP sold its 25 percent interest in WWI to AHG for $2,110,000, of which $900,000 was paid in cash. AHG gave BRFP a promissory note for the balance of the purchase price ($1,210,000), and the agreement provided the note would be secured and guaranteed by Weingarten, Atlas, and Astra. The agreement also gave BRFP's note priority over all other cash distribution and payment obligations in connection with the development and [*17] sale of the residential property, except for two loans to Atlas from East West Bank in the amounts of $5 million and $6 million, respectively. Thus, BRFP's right to payment of the full amount of its note became superior to any payment or profit-distribution right of AHG, Atlas, Astra, Whitehall, WWI or Weingarten.

> 7 Weingarten signed the agreement on behalf of AHG, Atlas, Astra, WWI and herself. She testified that she agreed to "buy out" BRFP at Rogers's insistence.

Additionally, the purchase and sale agreement gave BRFP the right to receive, for a payment of $1,000, a transferable 15 percent economic interest in the development and sale of the residential property. The agreement also provided that AHG would retain Rogers as a consultant with respect to the development of the residential property and, as compensation for his consulting services, pay him one-sixth of any compensation paid with respect to the residential property by Atlas or WWI to Weingarten, her family members, or "any entity made up directly or indirectly of . . . Weingarten or her family members, or Whitehall or anyone at Whitehall . . . ." The agreement further provided that as a gift, Weingarten would buy and transfer [*18] to Rogers "free and clear of any and all liens and taxes, a new Porsche 911 convertible of his choosing . . . ." Pointe and Gosnell were unaware of this sale before it closed in October 1999. In August 2001, Atlas sold 105 additional lots in the residential property to Centex for $13,125,000.

Between 1997 and 2000, Atlas sold about 130 homes, including the six model homes built by Gosnell, at an average sales price of about $221,000. Weingarten received a 2.5 percent commission on a number of those

sales, although she did not hold a real estate sales or broker's license. She testified that she received the commissions as a personal benefit for being the manager of WWI and Atlas.

The procedural history of this case is summarized in our introductory paragraphs. We will include additional facts and procedural background as necessary to our discussion of the legal issues.

DISCUSSION

I

Measure of Damages Applied to Weingarten's Breaches of Fiduciary Duty

The court entered judgment against Weingarten in the amount of approximately $2 million on Pointe's shareholder derivative (seventh) cause of action on behalf of Astra for breach of fiduciary duty. Pointe (in its cross-appeal) contends the court [*19] committed reversible legal error by not applying a benefit-of-the-bargain rather than out-of-pocket measure of damages to Weingarten's breaches of fiduciary duty. It argues that under case law, the benefit-of-the-bargain measure of damages set forth in Civil Code section 3333 [8] applies to a claim of breach of fiduciary duty, rather than the out-of-pocket measure set forth in Civil Code section 3343, citing a number of cases holding that Civil Code section 3333 applies to a claim of fraud by a fiduciary. (E.g., *Prince v. Harting* (1960) 177 Cal.App.2d 720, 729-730; *Pepitone v. Russo* (1976) 64 Cal.App.3d 685, 688-689; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240-1241; *Strebel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 746-747.) Weingarten contends the court did not reject benefit-of-the-bargain damages as a matter of law; it determined the evidence did not warrant that measure of damages. Weingarten argues the court's determination is a factual finding subject to substantial evidence review.

> 8 Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this [*20] code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."
>
> The measure of damages applicable to a breach of contract action is set forth in Civil Code section 3300, which provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."
>
> Neither statute expressly sets forth a benefit-of-the-bargain rule; however, it has been said that Civil Code section 3300 " 'tends to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been had the promisor performed the contract.' " (*Overgaard v. Johnson* (1977) 68 Cal.App.3d 821, 824 (*Overgaard*), italics omitted.)

We conclude the court's determination of damages under Pointe's derivative cause of action on behalf of Astra against Weingarten for breach of fiduciary duty was not erroneous. In *Overgaard, supra,* 68 Cal.App.3d at pp. 823-848, [*21] the court explained at length that Civil Code section 3333 "does *not* set forth any benefit of the bargain rule. That section simply sets out the measure of damages long recognized in torts, namely, to compensate a plaintiff for a loss sustained rather than give him the benefit of any contract bargain [citation]. [P] The concept behind Civil Code section 3333 is to make the successful plaintiff whole. On the other hand, Civil Code section 3300 sets out the contract rule. [P] Contrary to a number of cases . . ., the measure of damages in Civil Code section 3333 and Civil Code section 3300 is *not* the same (although in a given factual situation the result may be the same)." (*Id.* at pp. 823-824, fn. omitted.) *Overgaard* discussed a number of cases in which application of Civil Code section 3333 did not result in a benefit-of-the-bargain award of damages. (*Overgaard,* at pp. 824-826.)

Overgaard observed that a trial judge has discretion and flexibility under Civil Code section 3333 to fashion an award that will appropriately compensate the plaintiff for the detriment caused by the defendant's tortious conduct, whether that compensation amounts to a benefit-of-the-bargain award or some other [*22] measure of damages. (*Overgaard, supra,* 68 Cal.App.3d at p. 828 [the trial court "should have flexibility in the

measure of damages so that in certain cases . . . what amounts to the benefit of the bargain measure can properly be applied in the sound discretion of the trial judge."].)

The real issue concerning the court's award of damages to Astra for Weingarten's breach of fiduciary duty is not whether, as a matter of law, Astra is entitled to recover benefit-of-the-bargain rather than out-of-pocket damages; the issue is whether the breach of fiduciary duty damages the court awarded constitute a reasonable measure of the harm Astra suffered as a consequence of Weingarten's tortious conduct. " 'Tort damages are awarded to fully compensate the victim for all the injury suffered. [Citation.] *There is no fixed rule for the measure of tort damages under Civil Code section 3333*. The measure that most appropriately compensates the injured party for the loss sustained should be adopted. [Citation.]' [Citation.] 'A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done.' [Citation.]" (*Metz v. Soares* (2006) 142 Cal.App.4th 1250, 1255, [*23] italics added.) [9]

> 9 Another court colorfully attributed the analytical difficulty regarding the appropriate measure of damages in certain cases to " 'the veritable *gallimaufry of confusing rules* gleaned from different types of actions.' [Citation.] Some of the cases are based on contract, others on fraud, and still others on unjust enrichment. [Citation.] In addition, courts and litigants often consider the out-of-pocket and the benefit-of-the-bargain rules as 'the sole antagonists on the battlefield of damages when at times neither is truly applicable.' [Citation.]" (*Southern Union Co. v. Southwest Gas Corp*. (D. Ariz. 2002) 180 F. Supp. 2d 1021, 1038, italics added by *Southern Union*.)

Pointe's argument on this issue rests entirely on the erroneous premise that Civil Code 3333 provides a benefit-of-the-bargain measure of damages in *all cases* involving breach of a fiduciary duty, and, therefore, the court was required to apply that measure as a matter of law. The court was not required, as a matter of law, to apply a specific measure of damages to the exclusion of other measures. Rather, the court had the flexibility and discretion to award damages in whatever measure or amount would [*24] most appropriately compensate Astra for all the detriment proximately caused by the specific breaches of fiduciary duty Pointe proved at trial.

The court concluded: "Under Civil Code [section] 3333, a party is to be compensated only for the detriment proximately caused by the breach. As of the time of trial, the development is on-going [*sic*] and no net profits have been shown to the Court which would trigger the distribution provisions [of the WWI Operating Agreement]." The court found breaches of fiduciary duty by Weingarten and AHG in connection with (1) the March 1997 sale of residential property to Whitehall; (2) the sale of property to Atlas on October 20, 1997; (3) the October 20, 1997 transaction with BRFP; (3) Weingarten's receipt of real estate commissions; and (4) payment of attorney fees and costs incurred by Weingarten, Ginsberg and Rogers.

However, the court found the Whitehall sale did not damage WWI, Astra or Pointe because Whitehall allowed "its property to be developed and sold, with the proceeds going to pay down [Atlas's] obligations." The court found the sale of property from WWI to Atlas did not cause out-of-pocket damages to WWI, Astra, or Pointe because a November [*25] 7, 2001 amendment to Atlas's operating agreement allowed net profits to go to WWI instead of Atlas, WWI received certain property back, and the priority distribution to Class B members (i.e., BRFP) was vacated. The court stated: "This would appear to put the parties back to the positions they occupied before October 20, 1997." Accordingly, the court found no out-of-pocket damages had been shown other than the attorney fees and costs Pointe incurred in pursuing causes of action for rescission dismissed as a result of the November 2001 amendment to Atlas's operating agreement. [10] The court also found no damages resulting from the October 20, 1997 transaction with BRFP had been proved, and an accounting was required to determine the damages resulting from the payment of real estate commissions to Weingarten and from attorney fees and costs improperly charged to the project. Based on that accounting, the court awarded $1,591,051 for improper commission payments and improperly charged legal and accounting expenses.

> 10 The court ruled Weingarten and AHG were liable for those attorney fees and costs.

Because Pointe has not acknowledged the court's discretion to apply any measure of damages [*26] other than a benefit-of-the-bargain measure, it has not argued the court's analysis and ultimate award of damages

caused by Weingarten and AHG's breaches of fiduciary amounted to an abuse of discretion or was insufficiently supported by the evidence. We find no error in the court's approach to assessing the damages for breach of fiduciary duty.

II

Award of Damages to Astra under Pointe's Shareholder Derivative Cause of Action for Breach of Fiduciary

Weingarten and AHG contend the award of approximately $2 million in damages and prejudgment interest to Astra under Pointe's derivative seventh cause of action for breach of fiduciary duty must be reversed because Astra did not suffer legally compensable injury. [11] They argue only Astra's subsidiary WWI was injured, Astra did not sue derivatively on WWI's behalf, and even if Astra or Pointe had sued on WWI's behalf, as nominal plaintiffs neither would have been entitled to damages for injury suffered by WWI.

> 11 Pointe and Gosnell's first amended complaint states that Pointe is suing individually and derivatively on behalf of Astra. The seventh cause of action is stated to be "[b]y Astra [a]gainst Weingarten and AHG."

Pointe agues that (1) the [*27] almost $1.6 million the court found Weingarten wrongfully diverted from WWI to pay her own attorneys and accountants was "net cash flow" under the WWI Operating Agreement and, as such, should have been distributed 100 percent to Astra; (2) a direct award to a shareholder in a derivative action is proper where corporate recovery would only benefit the wrongdoer (i.e., Weingarten); and (3) the court sitting in equity had broad discretion to fashion an appropriate award.

We conclude Astra had standing to sue Weingarten and AHG (the majority shareholder of Astra) for breaches of the fiduciary duty they owed Astra and committed through their management of WWI. Although Pointe sued derivatively on behalf of Astra for alleged acts by Weingarten/AHG that directly harmed Astra's subsidiary corporation WWI, the same acts necessarily resulted in injury to Astra.

"[A]s a general proposition, injury done to a subsidiary does not create a claim that may be asserted in a direct action by the subsidiary's parent corporation because the claim is the property of the subsidiary, not the parent. *However, a parent corporation has standing to bring a direct action for breach of fiduciary duty against a defendant* [*28] *who owes duties to the parent as well as the subsidiary, as would an individual who serves as a director of both corporations*." (DeMott, Shareholder Derivative Actions: Law and Practice § 2.2 (2006), italics added, fns. omitted.)

"Where a director holds dual directorships in the parent-subsidiary context, there is no dilution of this obligation to demonstrate the entire fairness of specific board actions. Thus, '. . . individuals who act in a dual capacity as directors of two corporations, one of whom is parent and the other subsidiary, owe the same duty of good management to both corporations, and in the absence of an independent negotiating structure, or the directors' total abstention from any participation in the matter, this duty is to be exercised in light of what is best for both companies.' " (*In re Digex, Inc. Shareholders Litigation* (Del. Ch. 2000) 789 A.2d 1176, 1206, fns. omitted.) Accordingly, "a single harmful act by a defendant directed at a subsidiary corporation may give rise to separate causes of action by both the subsidiary and the [parent] corporation to whom the defendant owes a fiduciary duty." (*Qantel Corp. v. Niemuller* (S.D.N.Y. 1991) 771 F. Supp. 1361, 1367; [*29] see also *Miller v. U.S. Foodservice, Inc.* (D.Md. 2005) 361 F. Supp. 2d 470, 476-477 [director of both parent corporation and its subsidiary owed separate fiduciary duties to each corporation and therefore parent corporation had standing to sue director for alleged breaches of fiduciary duty that directly caused parent harm].)

Here, Weingarten/AHG breached a fiduciary duty to Astra by deliberately conducting WWI's business in a way that ensured Pointe would not receive dividends from Astra. The court noted in its March 4, 2002 statement of decision: "[Weingarten] and AHG controlled both Astra and WWI. Realistically, no other person or entity, other than [Weingarten] and AHG[,] exercised or sought to exercise the control. The findings, as set forth later in this decision, support the determination that [Weingarten] self dealt and utilized her friendships to the detriment of Pointe."

In the statement of decision regarding its finding that Weingarten was the alter ego of the corporate entities she controlled, the court found Weingarten owned 97 percent of AHG's shares and was its chief executive officer

(CEO), president and controlling director. She was also CEO, president and sole director [*30] of Astra, which merged with AHG in March 1996, as well as the manager and controlling director of WWI. Astra became the sole owner of WWI in 1997 when it acquired B.R. Family Partners' interest in the company. Considering that Weingarten controlled all of these related entities, we conclude it would be inequitable to allow Weingarten and AHG to escape liability to Astra for the acts giving rise to Pointe's derivative claims on the ground only WWI was injured by those acts. WWI's pursuit of the same claims against Weingarten or AHG in effect would amount to Weingarten suing herself for breach of fiduciary duty.

We conclude that a shareholder of a parent corporation may bring a derivative action against a controlling shareholder/director of the parent based on the latter's breaches of fiduciary duty owed to a subsidiary corporation also under the controlling shareholder/director's control, when the actionable conduct causes injury to the parent as well as the subsidiary. The fact that a derivative action could also be maintained on behalf of the subsidiary based on the same wrongful conduct does not necessarily bar the derivative action on behalf of the parent. Pointe, suing derivatively [*31] on behalf of Astra, had standing to maintain its seventh cause of action for breach of fiduciary duty.

Weingarten and AHG contend the judgment in favor of Astra should be reversed in any event because of several defects in the court's damages analysis. First, they argue Astra is not entitled to any funds because WWI is not in dissolution and nothing compels it to distribute its assets at this time. They assert the only source of possible distribution from WWI is the WWI Operating Agreement, and the court found WWI did not breach that agreement. Second, they argue Astra was not entitled to receive any distributions from WWI unless and until WWI realized "net cash flow." The court stated there was no finding of any net cash flow and it refused to assume there would be any in the future. Finally, they contend that even were there net cash flow resulting in a distribution to Astra, Astra would not be entitled to the $2 million it was awarded because it does not own 100 percent of WWI. They argue that under the distribution formula in the WWI Operating Agreement, the most Astra could recover is approximately $318,000.

We find no error in the court's damages analysis. The court's final judgment [*32] awarded Astra damages of $1,591,051 "representing the amounts the court finds to have been improperly diverted from the project by Palomba Weingarten in breach of her fiduciary duties owed to [Astra, WWI and Pointe]," plus prejudgment interest of $445,369.29, for a total award of $2,036,420.20. The court adopted the findings of a court-appointed accountant that Weingarten improperly diverted $1,591,051 for her own interests, that sum consisting of legal expenses of $868,727 and accounting expenses of $86,455 improperly paid on behalf of Weingarten and her related entities, and $635,869 in commissions that Weingarten received in connection with the sale of certain homes from November 1996 through June 2000. The court found these funds were diverted from Astra. In its statement of decision regarding amendment of the judgment to add Weingarten as a judgment debtor, the court noted that if the diverted $1,591,051 plus interest were returned to Astra, "it would be theoretically true that Astra has recouped its loss and, therefore, would be made whole." Because the court found these funds were improperly diverted from Astra and recoupment of the funds plus interest by Astra would make it [*33] whole, the court properly awarded those amounts to Astra as the derivative plaintiff, regardless of whether it would have constituted net cash flow under the WWI Operating Agreement.

III

Punitive Damages Awarded to Pointe on Its Derivative Cause of Action

Weingarten and AHG contend Pointe cannot recover punitive damages on its derivative seventh cause of action for breach of fiduciary duty because as a nominal plaintiff in a derivative action, as a matter of law it suffered no actual damages. Pointe notes the court found it suffered damages in the amount of the attorney fees and costs to pursue rescission causes of action. It argues punitive damages may be recovered without actual damages when defendant's commission of a tortious act is established.

We conclude the court erred by awarding punitive damages to Pointe on a derivative cause of action as to which it was merely a representative, nominal plaintiff on behalf of Astra. [12] "In California, as at common law, actual damages are an *absolute predicate* for an award of exemplary or punitive damages. [Citations.] Even nominal damages, which can be used to support an award of punitive damages, require actual injury." (*Kizer v.*

County of San Mateo (1991) 53 Cal.3d 139, 147, [*34] italics added; *Jackson v. Johnson* (1992) 5 Cal.App.4th 1350, 1355 [punitive damage award was invalid because jury awarded no actual damages]; *Sole Energy Co. v. Petrominerals Corp*. (2005) 128 Cal.App.4th 212, 238.)

12 Pointe was awarded punitive damages of $3 million plus accrued interest of $330,821.91.

Pointe did not suffer actual damages under its shareholder derivative cause of action because it was not a party to that cause of action in its individual capacity. A shareholder derivative cause of action belongs to the corporation, not to the plaintiff shareholder, who acts purely in a representative capacity to enforce the rights of the corporation. (*First Security Bank of Cal. v. Paquet* (2002) 98 Cal.App.4th 468, 474.) Accordingly, the plaintiff shareholder cannot be considered a party to the cause of action; the corporation is the real party and the shareholder plaintiff is merely the real party's representative. (*Id.* at pp. 474-475; *Whitten v. Dabney* (1915) 171 Cal. 621, 630-631.)

The fact that Pointe may have recovered actual damages or redress under some other cause of action is immaterial, because the punitive damages were awarded under only the derivative seventh cause of action [*35] and thus were "mere incidents to the [seventh] cause of action . . . ." (*Clark v. McClurg* (1932) 215 Cal. 279, 282; *Mother Cobb's Chicken T., Inc. v. Fox* (1937) 10 Cal.2d 203, 206 ["[P]unitive damages are never more than an incident to a cause of action for actual damages, and, when allowed, are allowed only in addition to recovered actual damages."]; see also *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1084; *Diamond Woodworks, Inc. v. Argonaut Ins. Co*. (2003) 109 Cal.App.4th 1020, 1056, fn. 35, disapproved on another ground in *Simon v. San Paolo U.S. Holding Co., Inc*. (2005) 35 Cal.4th 1159, 1182-1183 [consideration of the disparity between compensatory damages and punitive damages for purposes of assessing the constitutionality of a punitive damage award must focus solely on the compensatory damages awarded on the causes of action providing a basis for punitive damages].)

Because Pointe recovered no compensatory damages under the seventh cause of action, we reverse the portion of the judgment awarding punitive damages to Pointe and remand the matter for a determination of whether Astra is entitled to an award of punitive damages under the seventh [*36] cause of action and, if so, the amount of the award. [13]

13 Considering our reversal of the punitive damage award and remand, we need not consider defendants' contention that the award is unconstitutionally excessive.

IV

Amendment of the Judgment to make Weingarten a Codebtor of WWI and Atlas Based on Alter Ego Liability

The court granted in part Pointe, Gosnell and PSDMU's motion to amend the judgment to name additional cojudgment debtors. The court ordered Weingarten coliable for the damages awarded against WWI and Atlas. The effect of this ruling is to make Weingarten jointly and severally liable under the judgment for the award of $394,068.73 to Gosnell against WWI for breach of the DMA and the awards of $966,752.86, $152,990.22, and $2,985,304.66 to PSDMU against Atlas for conversion, nonpermanent trespass and permanent trespass, respectively.

Weingarten contends it violates a person's constitutional due process rights to amend a judgment to add the person as a judgment debtor on the ground he or she is the alter ego of a defendant corporation when the pleadings provide no notice of the alter ego claim. In any event, she contends the court erred by deeming her the alter ego of her corporate [*37] entities because Pointe, Gosnell and PSDMU did not make the required showing that there would be an inequitable result were she not made a judgment debtor.

California case law has long authorized the amendment of a judgment under Code of Civil Procedure section 187 [14] to add an alter ego of a corporate defendant as a judgment debtor, as long imposing liability on the alter ego party does not offend due process. Cases have held that the alter ego's due process rights are not violated if there is substantial evidence that he or she controlled the litigation. [15] (See *Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 44-46 [rejecting due process challenge]; *Jack Farenbaugh & Son v. Belmont Construction, Inc*. (1987) 194 Cal.App.3d 1023, 1029-1031.) Accordingly, we are not persuaded by Weingarten's due process challenge.

14 Section 187 of the Code of Civil Procedure

provides: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, [*38] any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

15 Cases generally have applied the substantial evidence standard of review to a court's decision to *pierce the corporate veil* by an order granting a motion to amend a judgment. (*Baize v. Eastridge Companies, LLC* (2006) 142 Cal.App.4th 293, 302, citing *NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App. 3d 772, 777 (orders amending judgments); *McClellan v. Northridge Park Townhome Owners Assn., Inc*. (2001) 89 Cal.App.4th 746, 751-752 (order amending judgment).)

However, we conclude the order amending the judgment was erroneous because Pointe, Gosnell and PSDMU did not satisfy the requirement of showing there would be an inequitable result were Weingarten not added as a judgment debtor. "In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the [*39] corporation alone. [Citations.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538. Without evidence of injustice resulting from the recognition of the corporation's separate identity, the alter ego doctrine cannot be invoked. (*Id.* at p. 539.)

The court's statement of decision on its order finding Weingarten to be the alter ego of WWI and Atlas Homes and amending the judgment does not include an inequitable-result finding or address the inequitable-result requirement. The court's failure to make a finding on that issue is a basis to reverse the order amending the judgment.

Pointe, Gosnell and PSDMU argue the inequitable result consideration is "obvious in the context of this case," and the "inequitable result" is established through various other findings the court made in its several statements of decision. They state that "the equity inquiry was focused on Weingarten's ability and her willingness - indeed, her *determination* - to maliciously and fraudulently manipulate the finances of *each* of her entities to prevent The Pointe from ever receiving a penny." They argue they should be able to collect on their judgment from WWI, Astra or *directly* from Weingarten, and [*40] it would be unjust to allow her to escape or delay "judgment day" by further manipulating her accounting.

Essentially, Pointe, Gosnell and PSDMU are arguing the inequitable result of not making Weingarten coliable with WWI and Atlas Homes under the judgment would be difficulty in executing the judgment. However, under case law, difficulty in collecting on a judgment is insufficient to invoke the alter ego doctrine. "The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. *Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard*. [Citations.]" (*Sonora Diamond v. Superior Court, supra,* 83 Cal.App.4th at p. 539, italics added; *VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc*. (2002) 99 Cal.App.4th 228, 245 ["[E]ven if the unity of interest and ownership element is shown, alter ego will not be applied absent evidence that an injustice would result from the recognition of separate corporate identities, and '[d]ifficulty in enforcing a judgment or collecting a debt does not satisfy this standard.' [*41] [Citation.]"].) Because Pointe, Gosnell and PSDMU did not show, and the court did not find, denying their motion to amend the judgment to make Weingarten liable for the damages awarded against WWI and Atlas would cause an inequitable result, we reverse the portions of the judgment imposing alter ego liability on Weingarten.

V

PSDMU's Permanent Trespass Claim

PSDMU's mixed use complaint against Atlas included a cause of action for trespass based on allegations that Atlas, without permission, had entered the mixed use property and removed valuable soil and fill material, [16] created and used numerous access roads across the mixed use property, stockpiled and dumped

building materials, dumped trash, "and otherwise disturbed the Pointe Mixed-Use Property." PSDMU alleged that "[t]he unauthorized creation of roads, dumping, storage of materials and other wrongful incursions jeopardize the preservation of the fragile ecological habitats with which the Pointe Mixed-Use Property must coexist . . . ." PSDMU also alleged these acts hindered its ability to attract investors.

16 The alleged removal of soil from the mixed use property was the basis of PSDMU's cause of action for conversion.

In a trial [*42] brief filed less than a week before the second phase of trial, PSDMU for the first time alleged Atlas had committed *permanent* trespass on PSDMU's property by performing grading on the residential property that encroached on the mixed use property at two locations. Atlas responded with a brief requesting that the court not consider any evidence regarding PSDMU's permanent trespass claims because the mixed use complaint did not allege encroachment or permanent trespass. Atlas argued that to the extent PSDMU was requesting leave to amend its complaint to allege permanent trespass, the request should be denied on the grounds it was untimely and prejudicial to Atlas.

Three days later, PSDMU filed a motion to amend its complaint to conform to proof, in which it stated: "As [PSDMU] only recently learned, and as the evidence produced at trial has now demonstrated, 'other wrongful incursions' into the [mixed use] property includes two substantial encroachments onto [PSDMU's] future golf course and the future parking lot of the 'Different Pointe of View' restaurant." PSDMU argued leave to amend should be granted and Atlas would not be prejudiced by the amendment because the permanent trespass [*43] claims "are potentially encompassed within the broad notice pleading of the original [PSDMU] complaint, and because only defendants were aware of these encroachments at or shortly after the time [PSDMU's] complaint was originally filed." PSDMU argued its delay in seeking leave to amend was excusable because "[i]t was only in consulting with its experts in preparation for trial and through the development of evidence in trial that the extent of the encroachment, the scope of the impact that it would have on the planned development, and the extensive measures that will be required to repair the encroachments and render the property usable as planned, were established."

During trial, Atlas continued to object to the complaint amendment and argued the permanent trespass claims were barred by the three-year statute of limitations of Code of Civil Procedure section 338, subdivision (b). The court did not rule on PSDMU's motion to amend. In its February 25, 2003 statement of decision filed after the second phase of the trial, the court noted Atlas's position that the permanent trespass claims were not properly before it, but decided the claims were sufficiently encompassed by the trespass [*44] allegations in PSDMU's complaint. [17] The court awarded PSDMU damages of $2,688,800 plus interest against Atlas and Weingarten on the permanent trespass claims. [18]

17 The court stated: "The Court notes that the complaint of [PSDMU] alleges the unlawful and unauthorized entry onto plaintiff's property, including 'other wrongful incursion[s]' that have 'otherwise disturbed the mixed-use property' . . . . The Court finds that the allegations are sufficient to allow the permanent trespass issues to remain."

18 The judgment names Weingarten as a party jointly and severally liable for the permanent trespass damages awarded to PSDMU based on the court's posttrial finding that she was the alter ego of Atlas. (See section IV, *ante*.)

Atlas and Weingarten contend the court prejudicially erred by ruling PSDMU's permanent trespass claim was adequately pleaded in its complaint and by not ruling the claim was barred by the statute of limitations. "The pleadings establish the scope of an action and, absent an amendment to the pleadings, parties cannot introduce evidence about issues outside the pleadings. [Citations.]" (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1091.) [*45] Correspondingly, "[f]indings of fact must be responsive to the pleadings. [Citations.] The admission of evidence as to matters not within the pleadings is prejudicial error. [Citation.]" (*Mayer v. Beondo* (1948) 83 Cal.App.2d 665, 668; *People v. Toomey* (1984) 157 Cal. App.3d 1, 11 ["[A] party must recover on the cause of action alleged in the complaint and not on a separate and distinct cause of action disclosed by the evidence. [Citations.]"].)

PSDMU's complaint cannot reasonably be construed as alleging the permanent trespass claims PSDMU asserted at trial. It is undisputed that PSDMU was unaware of the factual bases for those claims until shortly before trial. Although semantically, the general

allegations of trespass can be broadly construed to encompass *any* trespass by any named defendant on the subject property regardless of whether PSDMU discovered it before or after filing its complaint, far more factual specificity was required to give Atlas and Weingarten fair notice of the permanent trespass claims in question.

Pleadings are to be liberally construed "with a view to substantial justice between the parties" (Code Civ. Proc., § 452; *CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1149), [*46] but a complaint must forth "essential facts of [the] case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of [the] cause of action. [Citation.]" (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245.) A complaint's general allegations of tortious conduct cannot properly be construed to encompass distinct tort claims of which the plaintiff was unaware when the complaint was filed. " ' "The rule of liberal construction does not . . . permit the insertion, by construction, of averments which are neither directly made nor within the fair import of those which are set forth" ' [citation], and 'such a rule should not be so applied as to allow an unmeritorious cause of action to be veiled by a subterfuge of loose and equivocal statements. Substantial justice requires that the essential facts appear *at least by necessary implication* from the allegations set forth.' [Citation.]" (*Hayes v. Risk* (1967) 255 Cal.App.2d 613, 624, italics added.) " ' "[F]acts necessary to a cause of action but not alleged must be taken as having no existence." [Citations.]' [Citation.]" (*Ibarra v. California Coastal Com.* (1986) 182 Cal.App.3d 687, 692.) [*47] The essential facts underlying PSDMU's permanent trespass claims regarding the grading encroachments are not alleged in PSDMU's complaint or *necessarily* implied from PSDMU's allegations that Atlas used numerous access roads across the mixed use property, stockpiled and dumped building materials and dumped trash on the property, or "otherwise disturbed" the property.

PSDMU suggests it is Atlas and Weingarten's fault they were not aware of the encroachment facts as a basis for trespass until trial because they chose not to depose PSDMU's damages expert Robert Summers before trial. PSDMU reasons that if Atlas and Weingarten had noticed Summers's deposition, he would have conducted his investigation of the property and discovered the encroachments in preparation for the deposition well in advance of trial. Because Atlas and Weingarten chose not to depose Summers, he did not discover the encroachments until he conducted his investigation of the property in preparation for trial. [19]

> 19 In its respondent's brief, PSDMU states "Weingarten did not learn about [the encroachment] claims earlier because she did not even bother to take Mr. Summers' deposition. . . . [P] . . . [H]ad Weingarten noticed [*48] Mr. Summers' deposition before trial, he would have been *obliged* to complete his own investigation earlier; and then, had he sought to *expand* his opinion at the time of trial, Weingarten could easily have excluded the new testimony as beyond the scope of his deposition testimony."

A prudent and diligent defense requires discovery on the factual allegations and corresponding theories of liability *alleged in the complaint*; diligent defense counsel is not obliged to discover facts supporting theories of liability of which the plaintiff is unaware or has omitted from the complaint, and then defend against those unpleaded theories at trial. Atlas cannot be faulted for failing to prepare to defend at trial against a cause of action not alleged in the complaint. We conclude the court erred in allowing PSDMU to pursue its permanent trespass claims at trial because they were not pleaded in its complaint.

This error cannot be cured by remanding with directions to grant or consider PSDMU's motion for leave to amend the complaint to add the permanent trespass claims because those claims do not relate back to the original complaint and therefore are barred by the statute of limitations. Under the [*49] relation-back doctrine, an amended complaint may be deemed to relate back to the original complaint for purposes of determining whether it is barred by the statute of limitations. "The relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one. [Citations.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409.) " 'The "relation back" doctrine focuses on *factual similarity* rather than rights or obligations arising from the facts, and permits added causes of action to relate back to the initial complaint so long as they arise factually from the *same injury*. [Citations.] A new cause of action rests upon the same set of facts when it involves the *same accident* and the *same*

offending instrumentality.' [Citation.]" (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 266, italics added.) PSDMU's permanent trespass claims do not relate back to its initial complaint because they are based on facts, injuries and instrumentalities different from those in the trespass cause of action pleaded in the initial complaint.

The three-year limitations [*50] period of Code of Civil Procedure section 338, subdivision (b) applies to a claim for permanent trespass by encroachment and commences at the time the trespass is committed. (*Rankin v. DeBare* (1928) 205 Cal. 639, 641; *Castelletto v. Bendon* (1961) 193 Cal.App.2d 64, 66-67; *Polin v. Chung Cho* (1970) 8 Cal.App.3d 673, 677-678.) [20] The last of the two grading encroachments forming the basis for PSDMU's permanent trespass theory was complete by October 1999, and PSDMU sought to amend its complaint at trial more than three years later in November 2002. Consequently, the permanent trespass claims are time-barred.

> 20 We note that *Harrison v. Welch* (2004) 116 Cal.App.4th 1084 anomalously held the statute of limitations for a cause of action for encroachment is not the three-year statute applicable to trespass actions but the five-year statute applicable to actions to recover real property. (*Id.* at pp. 1095-1096.) However, *Harrison* ignored *Rankin* and, in any event, is distinguishable from this case in that PSDMU sought *damages* for the alleged encroachments rather than recovery of the land (i.e. removal of the encroachment).

VI

Order Granting New Trial on the Issue of Damages for Breach of Fiduciary [*51] *Duty*

Weingarten and AHG contend the court erred by granting Pointe a new trial on the issue of damages under its derivative seventh cause of action for breach of fiduciary duty on the ground of newly discovered evidence. The evidence in question consisted of (1) two canceled checks suggesting AHG received about $4 million in tax benefits from the Internal Revenue Service (IRS) and (2) documents produced in another case that, according to Pointe, were relevant to real estate profit issues tried in this case.

Code of Civil Procedure section 657 authorizes a trial court to grant a new trial based on "[n]ewly discovered evidence, material for the party making the application, which he [or she] could not, with reasonable diligence, have discovered and produced at the trial." The elements that must be established to obtain a new trial based on newly-discovered evidence are (1) the evidence is newly discovered; (2) reasonable diligence was exercised in its discovery and production; and (3) the evidence is material to the moving party's case - i.e., likely to produce a different result. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161; *Horowitz v. Noble* (1978) 79 Cal. App.3d 120, 137.) [*52]

"The decision on a motion for a new trial rests largely in the sound discretion of the trial court, but the rule is more applicable to a motion made on the ground of newly discovered evidence. . . . The trial court's determination 'will not be disturbed unless an abuse of discretion is clearly shown.' [Citations.]" (*Kyle v. Stone* (1965) 234 Cal.App. 2d 286, 293.) "[T]he claim of newly discovered evidence as a ground for . . . a new trial is universally looked upon by the courts with distrust and disfavor. For reasons of public policy, a litigant is required to exhaust every diligent and reasonable effort to produce at . . . trial all existing evidence in his [or her] behalf. The fact that the [evidence] has just been discovered when it is too late to introduce it[] has been characterized as a circumstance so suspicious that the very strictest showing of diligence is required by the courts [citation.]" (*Shivers v. Palmer* (1943) 59 Cal.App.2d 572, 576.) Because "diligence" is a relative term incapable of exact definition, whether due diligence was exercised in the discovery and production of the evidence must be determined in the context of the particular circumstances of each case. [*53] (*Id.* at p. 580.) "The question of due diligence is peculiarly one for the trial judge [citation]. He [or she] can better appraise the events and atmosphere of the trial for that purpose than can [the appellate court]." (*Andersen v. Howland* (1970) 3 Cal.App.3d 380, 384.)

Weingarten and AHG argue that the evidence of canceled checks showing AHG had received about $4 million in tax benefits was not newly discovered because Weingarten had previously testified *in this case* that the Whitehall sale produced about $ 4 million in tax benefit refunds. [21] They also argue Pointe was not diligent because it did not bring the evidence to the court's attention until almost three years after Weingarten

testified about it. Finally, they argue the evidence is not material because it is "strictly cumulative of Ms. Weingarten's exact trial testimony on that subject." Weingarten and AHG contend a new trial could not properly be granted based on the evidence of real estate profits because the court correctly sustained all of the defense objections to that evidence. [22] They also contend this evidence was not newly discovered or diligently produced.

> 21 Weingarten and AHG note Pointe's damage expert, Michael [*54] Walla, testified in December 2001 that Atlas has received tax benefits in an amount less than $18 million.
>
> 22 Contrary to Weingarten and AHG's assertion, the court did not entirely exclude the subject documents showing real estate profits, attached as exhibits to plaintiffs' new trial motion; it sustained defendants' evidentiary objections only to plaintiffs' counsel's characterizations and descriptions of the contents of those documents.

Regarding the evidence of AHG's $4 million in tax benefits, the main issue is whether the court had discretion to grant a new trial on the ground of newly discovered evidence when the evidence in question was cumulative to testimony presented during trial. Weingarten testified in the first phase of the trial that the sale of residential property to Whitehall generated a loss to AHG that resulted in a tax benefit to AHG of about $4 million in the form of cash refunded by the IRS. [23] Pointe argues the court properly granted a new trial despite this testimony because, in the court's words, "there [was] no actual evidence that plaintiff was aware of this evidence *prior to trial*." (Italics added.)

> 23 The court apparently did not remember this testimony given [*55] in the first phase of the trial three years before it decided the new trial motion.

The appellate court in *In re Marriage of Liu* (1987) 197 Cal.App.3d 143 decided the trial court properly denied a motion for new trial on the ground of newly discovered evidence because the appellant "fail[ed] to explain why she could not have discovered [the evidence] prior to or *during* trial." (*Id.* at pp. 154, italics added.) In *Baran v. Goldberg* (1948) 86 Cal.App.2d 506, an action for specific performance of a contract to sell real property, the appellants contended the trial court erred in not granting their motion for new trial on the ground of newly discovered evidence that comparable property purchased for $9,500 was sold about a year and one-half later for $14,500. *Baran* found the trial court acted within its sound discretion in denying the new trial motion because appellants' trial counsel had specifically referred to the $9,500 purchase price of the comparable property during cross-examination of a witness at trial and, therefore, the proposed additional evidence was not newly discovered. (*Id.* at p. 513.) *Bennington v. National Packing Co.* (1932) 122 Cal.App. 313, 318 cited " 'the well-established [*56] rule that the trial court may, in its sound discretion, refuse a new trial upon [the ground of newly discovered evidence] where the new evidence is merely cumulative, or where it tends merely to impair the credibility of the evidence of the prevailing party. [Citations.]' " Upholding the trial court's denial of the new trial motion, *Bennington* concluded the proposed new evidence only contradicted the evidence of the prevailing party and "shows not new evidence, but a new witness with the same evidence as given by the losing party." (*Ibid.*) These cases support the proposition that if additional evidence is cumulative to (i.e., makes the same showing as) evidence admitted at trial, it is not "newly discovered."

Further, evidence that is *cumulative* is not likely to be *material* for purposes of a new trial motion. "It is well settled that the evidence produced in support of a motion for new trial on the ground of newly discovered evidence must be material to the moving party's case in the sense that it is likely that the evidence will produce a different decision. [Citation.]" (*Carpenter v. Kilgour* (1965) 236 Cal.App. 2d 651, 658.) Logically, if "new" evidence is substantially the same as [*57] evidence presented at trial, it is not likely to produce a different decision. (See *Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 910, disapproved on another point in *Scala v. Jerry Witt & Sons, Inc*. (1970) 3 Cal.3d 359, 364, 366.)

Moreover, Pointe did not show diligence in the discovery and production of the new tax-benefit evidence. The court found Pointe had satisfied the diligence element because it had ordered Weingarten, in February 2002, to produce all financial documents concerning the operation and development of the residential property from January 1996 to the present and Weingarten did not produce the canceled checks in question. The court found the checks should have been included in the February 2002 order and "in numerous other discovery requests by plaintiffs." The court

concluded Pointe would not be expected to seek tax return checks as part of discovery because Weingarten had testified in deposition that she was not aware defendants had filed a tax return claiming entitlement to any remaining tax benefits.

These findings, which the court made in January 2005, reflect that the court was unaware or had forgotten Weingarten had testified about the tax benefits evidenced [*58] by the canceled checks in the first phase of the trial three years earlier. [24] Due diligence in the discovery of the newly discovered tax-benefit evidence would have required plaintiffs to pursue documentary evidence supporting Weingarten's testimony within a reasonable time after she testified. Because plaintiffs' new documentary evidence is proof of a fact as to which Weingarten testified three years earlier in the same case, we conclude the court abused its discretion by granting a new trial based on that evidence.

24 Pointe also may have been unaware or forgotten Weingarten's earlier testimony about the tax benefits at the time they brought their new trial motion. However, "[m]ere forgetfulness that the evidence existed without any showing that tends to excuse the forgetfulness does not entitle a party to a new trial. [Citation.]" (*Durbin v. Hillman* (1920) 50 Cal.App. 377, 381; *Chronister v. Brennan* (1938) 27 Cal.App.2d 509, 512.)

Regarding the newly discovered evidence of real estate profits, we note a motion for new trial on the ground of newly discovered evidence is properly denied when the new evidence is inadmissible. (See *Plancarte v. Guardsmark* (2004) 118 Cal.App.4th 640; *Fernandez v. Security-First Nat. Bank* (1962) 206 Cal.App. 2d 676, 678 [*59] [evidence of a polygraph test could not serve as basis for new trial on the ground of newly discovered evidence because it was inadmissible]; *Deeble v. Stearns* (1947) 82 Cal.App.2d 296, 301 [inadmissible opinion of municipal court appellate department could not be considered as a basis for a new trial on the ground of newly discovered evidence]; *Lesem v. Terry* (1928) 89 Cal.App. 674, 681.) In its new trial order, the court deferred ruling on the admissibility of the new evidence, suggesting the documents would likely produce a different result at trial *if they could be properly authenticated*. [25] Weingarten and AHG argue that admissibility of newly discovered evidence must be established at the time of the new trial motion.

25 In its order, the court stated, regarding both categories of new evidence: "Additional discovery should determine whether such documents can be properly authenticated to be admissible in a new trial. If ultimately these documents are admitted into evidence, it would be the type of evidence that is likely to bring about a different result in the trial court."

Although Weingarten and AHG do not cite and we have not found a case expressly holding that the admissibility [*60] of newly discovered evidence must be established as a prerequisite for obtaining a new trial, the rule makes sense and is implicit in the requirement under Code of Civil Procedure section 657 and case law that the newly discovered evidence be material. If a party moving for a new trial does not establish the newly discovered evidence is admissible at the time of the motion, then, *a fortiori,* the party has not established the evidence is material - i.e., that it would likely change the result of the trial. (Code Civ. Proc., § 657; *Sherman v. Kinetic Concepts, Inc., supra,* 67 Cal.App.4th at p. 1161; *Plancarte v. Guardsmark, supra,* 118 Cal.App.4th at p. 649.) It would be a pointless waste of time and resources to conduct a new trial based on newly discovered evidence only to have the court determine at trial that the new evidence is inadmissible. We conclude admissibility of newly discovered evidence must be established as a prerequisite for granting a new trial based on the evidence.

Because the evidence showing AHG had received about $4 million in tax benefits from the IRS is cumulative to testimony Weingarten gave at trial, and the admissibility of the documents showing real estate [*61] profits was not established, we conclude the court abused its discretion in granting a limited new trial on the ground of newly discovered evidence.

VII

Cost Judgment Against AHG

AHG contends the cost judgment against it is unlawful because there is no judgment of liability against AHG. [26] PSDMU concedes this point. AHG's inclusion in the judgment as a defendant liable for costs presumably was inadvertent. Accordingly, we reverse that portion of the judgment.

26 The judgment awards costs to PSDMU

against AHG.

VIII

Damages Awarded to Gosnell for Breach of the DMA

Article 1.2 of the DMA required Gosnell to submit to WWI by March 31, 1996, a development plan setting forth "in reasonable detail the objectives and approach for developing the [residential property], providing for a Project concept, development strategy, and a governmental approval strategy, as well as considerations relating to ultimately implementing the design, contracting, construction, financial control, public relations, management and other development activities related to the Project." WWI contends the portion of the judgment awarding Gosnell damages for WWI's breach of the DMA must be reversed and a new trial should be [*62] held on WWI's cross-claim for breach of the DMA because Gosnell, as a matter of law, materially breached the DMA by not submitting the development plan required by Article 1.2. Gosnell responds that failure to submit the development plan was not the focus of WWI's breach of contract claim in its cross-complaint, opening statement at trial, or closing statement. [27] Gosnell points out that WWI has not challenged the sufficiency of the evidence to support the many findings in the court's statement of decision supporting its ultimate finding that Gosnell did not breach the DMA.

> 27 Although WWI's counsel asserted in closing argument that Gosnell did not submit a development plan, he later defined Gosnell's breach of the DMA broadly, stating: "And what is the breach? The breach is they run the project for almost a year and it's out of money."

In its February 25, 2003 statement of decision filed after the second phase of the trial, the court expressly stated Gosnell "did not breach any material term of the DMA prior to [the termination] letter of April 25, 1997." The court noted Gosnell's obligation under the DMA to submit a development plan and found that Gosnell "did submit a business plan [*63] . . . to WWI, even though the document had initially been prepared prior to January 1996 for a different entity." The court was referring to the 220 page business plan (entitled "Request For Loan Proposal") for the development of the entire Pointe project presented to Weingarten and her advisors in late 1995 during early negotiations regarding her involvement with the project. By finding Gosnell had not *materially* breached the DMA, the court effectively found that the Pointe business plan substantially complied with the DMA's development-plan requirement. [28] WWI argues that as a matter of law, the business plan mentioned in the court's statement of decision cannot be deemed to constitute the development plan required by Article 1.2 of the DMA.

> 28 The record suggests WWI's claim that Gosnell materially breached the DMA by not submitting a development plan was an afterthought. There is no reference to Article 1.2 of the DMA or the development-plan obligation in the cross-claim for breach of the DMA. WWI's cross-claim for breach of contract alleged that Gosnell breached Articles I, 1.4, 1.5 and 1.9 of the DMA by (1) misrepresenting that the Pointe Golf Course and Pointe Resort properties [*64] are profitably developable; (2) concealing the fact that proceeding with the development of the Pointe residential property in accordance with Gosnell's original business plan was rendering the property unmarketable; (3) concealing that upon taking title to the residential property, WWI became liable to County of San Diego for more than $9 million in required public improvements; (4) refusing to maintain or clean the residential property; (5) allowing people to live free of charge in two model homes on the residential property without a certificate of occupancy from or inspection by the County, with illegally installed water heaters; and (6) refusing to provide WWI regular updates on the status of the development and marketing of any of the properties. Although the cross-complaint is not evidence, the fact it does not mention the development-plan provision of the DMA supports the court's view that Gosnell did not materially breach the DMA by not strictly complying with that provision.

We construe the court's statement of decision as effectively and impliedly finding that WWI waived strict compliance with the DMA's development-plan obligation. Any contractual term is "subject to waiver [*65] by the party for whose benefit [it is] made. [Citation.]" (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1339, fn. omitted.) Contractual provisions may be waived by conduct. (*Pease v. Brown* (1960) 186 Cal.App.2d 425, 428 [provision that time is of the

essence may be waived by conduct of the parties]; *Atkinson v. Pacific Fire Extinguisher Co*. (1953) 40 Cal.2d 192, 194-195 [obligee waives strict compliance by condoning obligor's delay in periodic performance].) A contracting party's acceptance of performance that does not strictly comply with that promised by the other contracting party constitutes a waiver of strict performance. (*Atkinson*, at pp. 194-195 [obligee waives strict compliance by condoning obligor's delay in periodic performance]; *Bohman v. Berg* (1960) 54 Cal.2d 787, 795 [when party to a contract accepts other party's performance without objection it is assumed the performance was that contemplated by the agreement].) "Waiver of a contractual right is ordinarily a question of fact. [Citation.]" (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 11.) The materiality of a breach is also primarily a question of fact. (*Asso. Lathing etc. Co. v. Louis C. Dunn, Inc*. (1955) 135 Cal.App.2d 40, 49.)

Substantial [*66] evidence supports the court's implied finding that WWI waived strict compliance with the development-plan obligation by accepting the Pointe business plan as adequate performance of that obligation and, therefore, Gosnell did not materially breach the DMA by not submitting a different plan. [29] The court found Gosnell performed under the DMA by refurbishing model homes and improving 45 lots; continuing permit work, meeting with community planning groups, pursuing entitlements, hiring a firm to market the property, contacting development companies, setting up site visits, receiving offers from builders, re-engineering lots, and hiring a firm to perform a comprehensive evaluation of the residential property. During trial, the court asked Pointe and Gosnell's president Richard Kafka, "Did you have a plan for the development as of January 17 [of 1996 - the date of the DMA]?" Kafka answered affirmatively and explained that the development plan "was a plan that was described in the business plan book and development plan book that had been prepared preparatory to the investment taking place. There [was], by January 17, an amendment . . . to that plan that described three options that WWI [*67] would have in connection with a decision whether or not to build and sell homes or wait a . . . period before deciding to build and sell homes or elect not to build and sell homes and simply sell lots." When asked specifically whether Gosnell submitted the development plan referenced in Article 1.2 of the DMA within the time frame specified in Article 1.2 (i.e., after the date of the DMA and no later than March 31, 1996), Kafka answered affirmatively, testifying the development plan was "the plan that had been in the possession of WWI from the outset of our initial introduction of the process, modified by the cash flow projections based on the three scenarios that were presented in December [of 1995]."

> 29 We may imply this finding to support the judgment because the statement of decision is silent on the issue and the record shows no request for a finding on the issue. (*Rooz v. Kimmel* (1997) 55 Cal.App.4th 573, 587, citing *In Re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132-1134 [When a statement of decision is silent on an issue as to which the appealing party made no request for a finding, the reviewing court will imply findings on the issue to support the judgment.].)

In its statement [*68] of decision, the court stated: "The submitted [business] plan was supplemented to reflect the First Year Cash Projections (Exhibit 24 and 27) and a Two Year Cash Projection (Exhibit 39 and 2552). In February 1996, [Gosnell] submitted a revised budget (Exhibit 73 and 2583). *WWI never notified* [*Gosnell*] *that it rejected these plans/budgets*. [*Gosnell*] *operated into 1997 under these plans/budgets*." (Italics added.) WWI's termination letter dated April 25, 1997, asserted that WWI was terminating the DMA because "among other things, [Gosnell had] . . . fail[ed] to meet various requirements, including time deadlines and budget considerations, *of the development plan* . . . ." (Italics added.) The termination letter does not charge Gosnell with failing to *submit* a development plan as required by Article 1.2 of the DMA; it charges Gosnell with not adequately *performing* "the development plan." The termination letter supports the finding that WWI accepted the business plan under which Gosnell had been operating as satisfying the DMA's requirement of a development plan. There is no evidence that WWI ever communicated to Gosnell between the date of the DMA and the date of WWI's termination letter [*69] that Gosnell had breached the DMA by not submitting the development plan required by Article 1.2. Kafka testified Gosnell did not receive any notice of breach of the DMA before the April 1997 termination letter. The court could reasonably find that WWI accepted the business plan referenced in its statement of decision as constituting the development plan required by the DMA and, by its conduct, waived strict compliance with Article 1.2 of the DMA. Accordingly, we will not disturb the judgment

with respect to either Gosnell's or WWI's cause of action for breach of the DMA. [30]

> 30 Although the judgment does not expressly state Gosnell "shall have judgment" on the third cause of action (for breach of the DMA) in WWI's cross-complaint, it states Gosnell is entitled to the costs it incurred "as the prevailing party on [its] second cause of action for breach of the [DMA] and on the first, second, and third causes of action in the cross-complaint[.]"

IX

Set-Aside Claim

Pointe and Gosnell contend the court committed reversible error by ruling in favor of WWI on their claim that WWI breached the set-aside agreement. The set-aside agreement was a separate letter agreement between Pointe and WWI. [*70] The set-aside letter confirmed WWI would pay certain project expenses that Pointe was obligated to pay to certain third parties. Although the court found WWI breached the agreement by discontinuing payments and the breach caused $2.4 million in damages, it ruled Pointe did not have standing to pursue that claim because PSDMU actually made the payments WWI was supposed to make, and it was too late to add PSDMU as a plaintiff to that claim.

Pointe and Gosnell argue they both had standing because the agreement was between Pointe and WWI, and Gosnell was a third party beneficiary of the agreement. Pointe and Gosnell analogize PSDMU to a bank that might have loaned them the money. They contend it was undisputed PSDMU made the payments on behalf of Gosnell. There was evidence PSDMU made the payments in consideration of the agreement that any money Gosnell obtained under this claim would be repaid to PSDMU. Pointe and Gosnell also contend the court erred in not allowing amendment of the complaint to add PSDMU if it was a necessary party.

WWI points out that Pointe and Gosnell's third cause of action does not allege breach of the set-aside agreement. Rather, it was brought against WWI for breach [*71] of the WWI Operating Agreement, although neither Pointe nor Gosnell was a party to that agreement. [31] On the eve of trial, Pointe and Gosnell shifted theories and argued for the first time that WWI breached the agreement set forth in the set-aside letter, which WWI sent to Pointe a week after the WWI Operating Agreement was executed. Thus, in addition to arguing that Pointe and Gosnell do not have standing to enforce the set-aside agreement, WWI contends the claim for breach of the set-aside agreement is outside the scope of their pleadings.

> 31 Pointe and Gosnell's first amended complaint contains two causes of action for breach of contract: the second cause of action by Gosnell against WWI for breach of the DMA and the third cause of action by Pointe and Gosnell against WWI for breach of the WWI Operating Agreement.

The court ruled Pointe and Gosnell's first amended complaint sufficiently alleged a breach of the set-aside agreement, noting "[t]he parties were operating under the impression that Exhibit 62 [the set-aside agreement] was at issue in the lawsuit." The court alternatively ruled: "Even if the allegations are not specific enough, the Court has been asked leave to amend in [*72] order to allege a breach of the Set Aside Letter (Exhibit 62). Plaintiff did not attach a copy of the proposed amendment to their request . . . . However, the Court determines that defendants are not prejudiced based upon the lengthy discovery devoted to this issue. . . . The Court grants the verbal request to allege a violation by WWI of Exhibit 62." WWI contends the court erred by granting Pointe and Gosnell's request to amend to conform to proof because the statute of limitations had expired.

To the extent the set-aside letter is a contract between Pointe and WWI, and WWI breached the contract by not covering expenses of Pointe that it was obligated to cover, WWI is properly held liable to Pointe regardless of whether PSDMU or some other entity paid those expenses on Pointe's behalf. The first amended complaint was filed by Pointe and Gosnell, not PSDMU. The relevant question regarding standing to sue for breach of the set-aside agreement is not *who paid* the expenses WWI agreed to pay, but rather *whose expenses* did WWI agree to pay and to whom did WWI make the promise to pay? The set aside letter is addressed to Pointe and states, in relevant part: "This letter is to confirm that [*73] [WWI] agrees to and approves the inclusion of those expenses *of Pointe* . . . set forth on Schedule 1 hereto, in the budget . . . to be submitted by Pointe or its affiliate to [WWI]." (Italics added.)

Because Pointe was the party to the agreement and it

was Pointe's expenses WWI agreed to cover, it was Pointe (and arguably Gosnell as a third party beneficiary) and not PSDMU that had standing to sue for breach of the agreement. A contract may be enforced only by *a party to the contract* or a third person for whose benefit the contract was expressly made. (See *J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1018 [absent an assignment, a third party claimant cannot bring an action against insurer upon a duty the insurer owes to the insured]; Civ. Code, § 1559 ["A contract, made expressly for the benefit of a third person, may be enforced by him [or her] at any time before the parties thereto rescind it."].) Civil Code section 1559 excludes enforcement of a contract by a person only incidentally or remotely benefited by it. (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 590.) PSDMU was a third party to the set-aside letter agreement and, at most, only incidentally or remotely benefited [*74] by the agreement. Accordingly, the court erred in ruling that PSDMU rather than Pointe (or Gosnell as a third party beneficiary) had standing to enforce the agreement.

Although the court erred on the standing issue, we agree with WWI that the first amended complaint does not plead a cause of action for breach of the set-aside agreement. A plaintiff must plead the particular contract on which recovery is sought; plaintiff cannot recover on proof of a different contract or a contract substituted for or constituting a modification of the contract alleged in the complaint. (*Miller v. Cortese* (1954) 125 Cal.App.2d 656, 659.) " 'While courts should not be technical in the matter of pleading, a plaintiff should not be permitted to base his [or her] entire complaint on one theory, and then later adopt another theory which is not even hinted at in the pleading.' " (*Ibid.*, quoting *Love v. Gulyas* (1948) 87 Cal.App.2d 608, 615; *Cox v. McLaughlin* (1883) 63 Cal. 196, 207-208 [variance is fatal when contract proved at trial is essentially different from that alleged in the pleadings].) Pointe's claim for breach of the set-aside agreement is outside the scope of its pleadings because it is based on [*75] a completely different agreement from the DMA or the WWI Operating Agreement - the agreements on which of the breach of contract causes of action in the first amended complaint were based. [32]

> 32 Pointe and Gosnell state in their cross-appellant's opening brief that "the 'set aside letter' was the *separate* letter agreement executed by . . . Pointe and by Weingarten on behalf of WWI as part of the Basic Deal, obligating WWI to pay certain ongoing, identified financial expenses related to the overall project." (Italics added.)

We also agree with WWI that the court prejudicially erred by granting Pointe and Gosnell leave to amend at trial to add the cause of action for breach of the set-aside agreement because the statute of limitations had expired on that cause of action. The court found the four-year statute of limitations applicable to actions based on written instruments (Code Civ. Proc., § 337) had expired as its basis for deciding PSDMU could not be added as a plaintiff at the time of trial. The court noted the "alleged breach by WWI took place in or about February, 1998." Pointe and Gosnell requested leave to amend the first amended complaint to plead breach of the set-aside agreement [*76] in November 2002, more than four years later. Pointe and Gosnell's claim for breach of the set-aside agreement does not relate back to the filing of their complaint or first amended complaint for statute of limitations purposes because it arises factually from a different transaction and injury than those alleged in the original and first amended complaint. (*Dudley v. Department of Transportation, supra,* 90 Cal.App.4th at p. 266.) The fact the parties conducted discovery on and litigated the set-aside claim does not save the claim from the bar of the statute of limitations. "A showing that the defendant was prejudiced by the late filing of an amended complaint is not . . . a prerequisite to invoking the bar of limitations when the statute otherwise applies [citation] . . . ." (*Wilson v. Bittick* (1965) 63 Cal.2d 30, 38.)

"On appeal, we review the trial court's ruling, not the reasons given for it. If the ruling is correct, it will be affirmed even if it was reached by a mistaken line of reasoning. [Citation.]" (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 547.) We conclude the court's incorrect determination that Pointe did not have standing to claim breach of the set-aside [*77] agreement was harmless error because the court's entry of judgment against Pointe and Gosnell on that claim was correct for the different reason that the claim was outside the scope of the pleadings and barred by the statute of limitations.

X

Denial of Motions for Attorney Fees

Pointe and Gosnell contend the court abused its discretion by denying their motions for attorney fees. They sought attorney fees on three distinct theories: (1)

as cost-of-proof sanctions recoverable by Pointe and PSDMU under former Code of Civil Procedure section 2033, subdivision (o); [33] (2) by Pointe under the common fund or substantial benefit theory; and (3) by Gosnell as contractual attorney fees recoverable under the DMA. [34]

33 Code of Civil Procedure section 2033 was repealed July 1, 2005 (Stats. 2004, ch. 182, § 22), as part of a nonsubstantive reorganization of the Civil Discovery Act of 1986. (Code Civ. Proc., §§ 2016 et seq.) Subdivision (o) of section 2033 was replaced, without substantive change, by section 2033.420.

34 Pointe and Gosnell filed separate motions for attorney fees. Gosnell sought contractual fees under the DMA and Pointe sought fees under the common fund and substantial benefit doctrines. [*78] However, Gosnell's notice of motion also referred to Pointe's entitlement to attorney fees by prior order of the court "through the common fund and/or substantial benefit doctrine and through 'proof of cost' [*sic*] sanctions," and Pointe's notice of motion also referred to Gosnell's entitlement to contractual attorney fees and *PSDMU's* entitlement to fees as cost of proof sanctions. Both notices of motion stated that all three plaintiffs - Pointe, Gosnell and PSDMU - sought fees incurred by them (collectively) in the amount of $2,849,802.70. The court denied fees as cost of proof sanctions on the ground that "[t]he plaintiffs failed to offer specific entries to substantiate the cost of proving each of the matters denied . . . ." However, the court concluded Pointe and Gosnell were legally entitled to recover attorney fees on other grounds. Because PSDMU does not challenge the denial of cost of proof sanctions and did not seek attorney fees on any other theory, we view the assignment of error regarding attorney fees as being raised by only Pointe and Gosnell.

At the first hearing on the attorney fee motions, the court decided it did not have a "sufficient . . . breakdown . . . to truly [*79] make a call on this." The court continued the matter to enable Pointe and Gosnell to provide a "breakdown" of the amounts sought under each particular theory and corresponding causes of action. After the parties filed supplemental briefing and declarations and presented additional argument, the court ruled Pointe and Gosnell had made an insufficient showing of the cost of proving matters to recover cost-of-proof sanctions. The court found WWI realized a substantial benefit from Pointe's litigation efforts and Pointe "may recover fees and costs under the common fund/substantial benefit theories . . . ." However, the court stated: "Although this Court was prepared to award attorney fees on the Seventh, Eighth, Ninth, Tenth and Eleventh Causes of Action from the common fund of $1,591,051, the Court has not been given an allocation by [Pointe]. Such an allocation is required as the Court finds that not all issues are so intertwined as to prevent a reasonable apportionment." Reiterating that the contract and tort causes of action were not "so intertwined as to prevent a reasonable apportionment" and the moving papers did "not assist the Court in arriving at an understanding as to a reasonable [*80] breakdown of fees attributable to the recoverable claims[,]" the court denied the motion for attorney fees.

Pointe and Gosnell filed a motion for reconsideration under Code of Civil Procedure section 1008 or, alternatively, relief under Code of Civil Procedure section 473, subdivision (b). In their moving papers, they offered to pay the cost of a court-appointed referee to perform the required fee allocation if the court decided their submitted allocation was insufficient. They argued the referee "protocol is a fairer method of providing the Court with the allocation it sought regarding the fees [attributable to] the two main issues litigated in this action than to simply deny [them] fees out of hand even after [they] established that they incurred the fees reasonably and in good faith."

At oral argument on the motion, the court began by stating: "[T]his has been a very trying issue for the Court because of the fact that I certainly believe that some attorney' fees would be in order." Pointe and Gosnell's counsel argued it "just shocks the conscience to disallow any recovery of fees under this particular circumstance[,]" and the court agreed that awarding no fees "would be . . . very [*81] upsetting." However, the court adhered to its denial of attorney fees. In its written order, the court stated: "The filed documents do not allow the Court to arrive at a non-speculative amount to award. The Court understands that this has been a long case involving multiple parties and multiple causes of [action]. For these very reasons, complications in presenting a definitive breakdown in recoverable versus non-recoverable fees would be expected.[35] Some reasonable leeway would have been acceptable.

However, the proper foundation for a reasoned award was never presented."

> 35 In a footnote at this point the court stated: "Plaintiffs contend that no case holds that a party claiming fees under different legal theories is required to apportion between not only recoverable and non-recoverable fees, but as between recoverable fees under different legal theories. Even if [there is] no [such] case, the Court recognizes that the decisions made by the Court absolutely requires an allocation of attorney fees as [opposed] to a lump sum award of fees. The fees for the fiduciary causes of action would be awarded from the common fund. The fees for the contractual [causes of action] would have different [*82] parties and pockets involved."

Pointe and Gosnell argue that an allocation of fees between causes of action was unnecessary because all the claims were intertwined - arising from a common core of facts. In any event, they contend they presented an exhaustive allocation. They argue equity required the court to award *some* fees, noting they even offered to pay for a referee to do the allocation. Weingarten, AHG, Atlas and WWI contend the court did not abuse its discretion, having given three chances to do a proper allocation. They dispute that Pointe, Gosnell and PSDMU's claims were inextricably intertwined. They argue allocation was necessary because there were three different plaintiffs asserting many different claims in two different cases, and some of the claims were won, some were lost, and some were voluntarily dismissed. "When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees." (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133; [*83] *Bell v. Vista Unified School Dist*. (2000) 82 Cal.App.4th 672.) Accordingly, apportionment of attorney fees between those incurred on a cause of action for which fees are recoverable and those incurred on other causes of action "is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units. [Citations.]" (*Bell*, at p. 687; *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493 ["Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories."].).)

The determination of whether to apportion attorney fees between claims for which they are allowed and claims for which they are not is a matter within the trial court's discretion. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111; *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1381.) "A trial court's exercise of discretion is abused only when its ruling ' "exceeds the bounds of reason, all of the circumstances before it being considered." ' [Citation.]" (*Gonzales v. Personal Storage, Inc*. (1997) 56 Cal.App.4th 464, 479.) [*84] Because the trial court is the best judge of the value of professional services rendered in a case before it, the court may exercise its discretion to allocate attorney fees "based on its [own] determination of the reasonable value of services attributed to the cause of action for which attorneys' fees are allowed." (*Track Mortgage Group, Inc. v. Crusader Ins. Co*. (2002) 98 Cal.App.4th 857, 868.)

We conclude it was not an abuse of discretion for the court to determine that an apportionment of attorney fees between the claims for which they were recoverable and the remaining claims was necessary, but it *was* an abuse of discretion to completely deny recovery of fees based on the difficulty of determining the proper apportionment. Accordingly, we reverse the order denying the motions for attorney fees.

In *Bell* this court decided the trial court abused its discretion by awarding the prevailing plaintiff attorney fees and costs without apportioning the fees between those relating to the claim for which they were recoverable and those relating to the remaining causes of action. (*Bell v. Vista Unified School Dist., supra*, 82 Cal.App.4th at p. 689.) Noting plaintiff's counsel had made no attempt [*85] in its attorney fee motion to apportion fees and counsel's blocked-billing entries made it impossible to break down hours on a task-by-task basis, this court directed that on remand, "[i]f counsel cannot further define his billing entries so as to meaningfully enlighten the court of those related to the [claim providing the basis of statutory fees], *then the trial court should exercise its discretion in assigning a reasonable percentage to the entries, or simply cast them aside*." (*Ibid.*, italics added.)

Bell supports a remand of the attorney fee matter in this case for apportionment of fees between those relating to claims for which they are recoverable and those relating to claims for which they are not recoverable. If the court is unable to meaningfully apportion fees based on the information provided by Pointe and Gosnell's counsel, it may exercise its discretion to apportion fees based on its own evaluation of the reasonable value of counsel's professional services relating to the claims for which fees may be recovered, or it may accept the offer to pay the cost of a court-appointed referee to determine the proper apportionment of fees.

XI

Judgment in Weingarten's Favor on Pointe's [*86] *Direct Claims*

Pointe contends the court erred in granting Weingarten's motion for judgment under Code of Civil Procedure section 631.8 on its sixth cause of action against her and AHG for direct relief (in contrast to derivative relief) for breach of fiduciary duty. The court ruled, in its March 4, 2002 statement of decision, that the sixth and seventh causes state the same claim and Pointe had "no separate direct claim, because damages, if any, to Pointe were subsumed in and were incidental to damage[s] . . . suffered by Astra.[36]

> 36 In a footnote at this point, the court stated: "An individual cause of action exists only if the damages were not incidental to an injury to the corporation." (Citing *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964.)

Pointe asserts there was sufficient evidence that it suffered losses separate and apart from any loss to WWI or Astra to defeat Weingarten's motion for judgment. As an "obvious example," plaintiffs cite Pointe's loss of the tax-loss benefits it was to have received as part of the "Basic Deal." Pointe also contends its direct cause of action against AHG is appropriate based on the fiduciary duty owed by [*87] a parent corporation to its majority-controlled subsidiary and the minority shareholders of the subsidiary.

However, Pointe raises this issue as a conditional assignment of error - i.e., it requests that *if the case is remanded for a retrial of its seventh cause of action for breach of fiduciary duty*, it be allowed to present both a direct and derivative claim "to afford [it] relief under whichever theory the new judge believes applies." Because we are not remanding the case for retrial of Pointe's seventh cause of action for breach of fiduciary duty (other than the issue of punitive damages), Pointe's conditional assignment of error is moot.

DISPOSITION

The portion of the judgment awarding punitive damages to Pointe is reversed and the matter is remanded for determination of whether Astra is entitled to punitive damages under Pointe's seventh cause of action for breach of fiduciary duty and, if so, the amount. The portion of the judgment awarding PSDMU damages against Atlas and Weingarten for permanent trespass is reversed. The portions of the judgment making Weingarten jointly and severally liable to Gosnell for breach of the DMA and to PSDMU for conversion and nonpermanent trespass [*88] are reversed. The portion of the judgment making AHG jointly and severally liable for costs is reversed. The judgment is otherwise affirmed. The order granting Pointe a new trial on the seventh cause of action for breach of fiduciary duty is reversed. The order denying Pointe and Gosnell's motions for attorney fees is reversed and the matter remanded for determination of the amount of attorney fees to be awarded based on an apportionment of fees between claims for which they are recoverable and claims for which they are not recoverable. The parties shall bear their own costs on appeal.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P.J.

IRION, J.