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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

STEPHEN LUNA,

Plaintiff and Respondent,

v.

ALMA CARPENTER,

Defendant and Appellant.

D055218

(Super. Ct. No. GIN054356)

ORDER MODIFYING OPINION  
AND DENYING PETITIONS FOR  
REHEARING

NO CHANGE IN JUDGMENT

THE COURT:

The opinion filed October 25, 2012 is modified as follows:

1. Page 5, first full paragraph, second sentence, is modified as follows: "They left behind the two Oceanside properties, as rentals, ~~for Alma to manage for them.~~" It shall now read: "They left behind the two Oceanside properties as rentals."

2. Page 5, second full paragraph, first sentence, is modified as follows: "During 2000-2005, Ann Luna periodically visited Alma in Oceanside, ~~both as a friend and~~

~~financial consultant, and to check~~ also checked on the rental properties." It shall now read: "During 2000-2005, Ann Luna periodically visited Alma in Oceanside and also checked on the rental properties."

3. Page 9, fourth full paragraph, first sentence, is modified as follows: "In June 2006, Alma sold the Sherbourne property to a ~~fellow employee at her real estate brokerage~~ work acquaintance, Ian Balesky." It shall now read: "In June 2006, Alma sold the Sherbourne property to a work acquaintance, Ian Balesky."

The petitions for rehearing are denied.

THERE IS NO CHANGE IN JUDGMENT.

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McCONNELL, P. J.

Copies to: All parties

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APPEAL from a judgment of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed as modified with directions to the trial court to prepare a third amended judgment, including offsets.

Defendant and appellant Alma Carpenter (Appellant or Alma) appeals the judgment after jury verdict requiring her to pay compensatory and punitive damages in the amount of \$400,100, plus interest, costs and attorney fees in favor of Plaintiff and Respondent Stephen Luna (Plaintiff), who is acting as administrator for the estate (the

Estate) of his mother Ann Luna, on her surviving causes of action.<sup>1</sup> This July 2006 complaint for damages was based on fraud and other theories arising out of Alma's activities as a real estate agent and financial advisor in two real estate transactions with Ann and Ben Luna (the Lunas), the now-deceased parents of Plaintiff, involving Alma's efforts to purchase, in a refinancing and remodeling transaction, the Lunas' two Oceanside residences. Alma's husband David Carpenter was also a named defendant on a conspiracy theory, but the jury ruled in favor of David, and the verdict was rendered against Alma alone.

Although Plaintiff also sued several other real estate professionals who were involved in the transactions, for negligence or negligent supervision and related theories, Plaintiff settled before trial with two sets of those participants.<sup>2</sup> As to several others, a mistrial was declared.<sup>3</sup>

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<sup>1</sup> Where convenient and for simplicity, we will sometimes refer to the parties involved by their first names. Plaintiff is pursuing the surviving claims of his parents in the name of his mother Ann, who died in 2005, days after his father Ben was killed and she was injured in a motorcycle accident. (Code Civ. Proc., §§ 366.1, 377.20; all further statutory references are to this code unless noted.)

<sup>2</sup> The trial court allowed an offset to the judgment for settlement monies received from other parties in the lawsuit, escrow agent Nubia Britton and her company, Seaside Escrow (together Britton). However, no offset was allowed after trial for the \$80,000 paid to Plaintiff by another set of codefendants involved in one of the transactions, as will be described in part III, *post*.

<sup>3</sup> The jury did not reach a verdict as to the claim of negligent supervision against defendants American Mortgage Professionals, Terry Oliver Portwood, and Kenneth Terrill (former associates of Alma). As to those defendants, a mistrial occurred, and those defendants were dismissed. They do not participate in this appeal.

On appeal, Alma agrees that most of the significant facts in the case are undisputed, and the issues relate to why the parties did what they did. She accordingly argues the jury verdict's findings of her fraud and breach of fiduciary duty, causing financial harm to the Lunas, are unsupported by any reasonable inferences that can be drawn from the evidence, nor by any substantial evidence. She claims the evidence showed that she disclosed and the Lunas were well informed of all the necessary and relevant factors in the transactions, including the two properties' fair market values, which were above the sales prices that they agreed to, such that the record does not support any award of compensatory or punitive damages.

Alma further claims that with respect to the earlier of the two property transactions (a house on Parnassus Street, sold and refinanced in 2002), any claims are barred by the three-year statute of limitations, based on the knowledge that the Lunas obtained from participating in the transactions (or knowledge that Plaintiff, as their administrator, could have gained after they died). (§§ 338, subd. (d); 366.1; 377.20.) Finally, Alma contends the trial court erred as a matter of law in denying her posttrial motion for an offset to the judgment for certain pretrial settlement monies received by Plaintiff, from one set of codefendants involved in one of the transactions, Ian Balesky et al. (§ 877, subd. (a).)

Having reviewed the record and examined the legal issues presented, we conclude the action was timely filed, and the jury findings and awards of damages are well supported in the evidence and in the legitimate inferences that may be drawn from the evidence. The Lunas were relatively unsophisticated consumers who began these transactions owning two properties that had modest loans, and with Alma's assistance in

the refinancing process, their Estate ended up with liability for two large loans and no title to the property that secured the loans, while Alma got real estate agent fees, title, and some sales proceeds.

We further determine that the trial court erred when it denied Alma's post-judgment motion for an offset against the jury's award of damages in this case, of a \$80,000 settlement amount paid to Plaintiff by codefendants. We affirm the amended judgment as modified to impose this offset, with directions to the trial court to prepare a third amended judgment accordingly.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Acquisitions of Properties; Parnassus Transaction

In the 1970's, the Lunas and family moved from Barstow to Oceanside and bought a property on Sherbourne Street. Ben Luna worked as a civil service mechanical repairman and Ann worked as a seamstress. Neither had advanced formal education. Ann was mainly in charge of the financial recordkeeping for the Lunas. Plaintiff is one of their four now-adult children.<sup>4</sup>

Alma became acquainted with Ann at their respective businesses and they became friends, and Alma assisted Ann with Luna family finances. During the 1990's, Alma had a real estate license, but she let it lapse in 1995. In 1994, the Lunas worked together with Alma to purchase the Parnassus Street property. Alma arranged documents

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<sup>4</sup> Other adult children of the Lunas, in addition to plaintiff Stephen, are his brothers Michael and Anthony and his sister Regina Badillo (Gina). Gina's deposition testimony was presented at trial, as she was unavailable. The brothers testified at trial.

allowing one of the Lunas' adult sons (Anthony) to live in the Sherbourne house and pay rent. The Lunas then moved to the Parnassus house and lived there until 2000.

In 2000, the Lunas decided to move back to Barstow during their retirement years, and bought a house in a transaction in which the owner refinanced and then granted title to the Lunas (the Hellendale or Barstow house). They left behind the two Oceanside properties, as rentals, for Alma to manage for them. Anthony and Plaintiff moved away, while Michael moved in with his parents.

During 2000-2005, Ann Luna periodically visited Alma in Oceanside, both as a friend and financial consultant, and to check on the rental properties. Ann brought Alma her tax papers for Alma to assist her in preparing the Lunas' taxes. The Lunas became interested in refinancing or selling the Parnassus property, which needed upkeep.

In 2001, Alma was in the process of getting her real estate license back, and was working for a broker, Theresa George. Alma tried to sell the Parnassus property informally but was unsuccessful. In October 2001, she used George's office to list the Parnassus property on the multiple listing service, at a price of \$350,000. The Parnassus property did not sell and was taken off the listing because Alma had not yet obtained her license and she was leaving to work elsewhere. The property required some repair, which David performed.

The Lunas discussed with Alma a plan for her to buy the Parnassus property, in combination with a refinancing arrangement and reimbursement to Alma for the repairs. The Lunas' existing \$166,143.50 loan had a due on sale clause that was not assumable.

They were familiar with refinancing because of their similar transaction with their Barstow property, in which the seller was refinancing while conducting the sale.

In 2002, the Lunas and Alma began to refinance the Parnassus property, and they obtained an appraisal in the amount of \$410,000. The Lunas and Alma agreed that as part of the transaction, Alma would buy the Parnassus property for \$300,700. Alma prepared the documents, and the purchase price was arrived at by considering how much the Lunas could borrow. Alma was to pay the Lunas the difference between the purchase price and the loan, about \$48,000. Alma was to assume or take the property subject to the Lunas' loan, make payments on the loan, and collect the rents. Alma would receive a deed to the property, but she said she would not record it. Alma told the Lunas this would allow them to remain on the title according to the refinanced loan, but allow Alma to keep the rate. Alma could not qualify for financing on her own.

The refinancing transaction was processed by Britton and her former company (who later settled with Plaintiff; see fn. 2, *ante*). There was no escrow for the sales portion of the transaction, although the form real estate contract prepared by Alma called for one. Britton asked the Lunas about the refinancing transaction and was satisfied that they understood it, even though it was a little unusual, because it involved a deed to a third party (Alma) as an accommodation. The Lunas told her Alma was a friend and almost like family. Britton's notary book showed that Ben signed the deed in favor of

Alma, although Plaintiff testified at trial that the deed signature did not look like Ben's.<sup>5</sup>

The existing loan was paid off, and a new \$252,000 loan was taken out in the Lunas' name on the Parnassus property. Alma received about \$3,000 in fees from the refinancing process. Alma started making payments on the loan.

#### B. Sherbourne Property Transaction

For a while in the early 2000's, the Lunas' adult daughter Gina lived in the Sherbourne house, but she did not get along with them, fell behind on the rent, and was eventually asked to leave. In 2004, the Sherbourne property was in very bad condition. The property required extensive remodeling and repair, which David performed.

In May 2004, the property was appraised at \$455,000. The Lunas and Alma began a refinancing transaction with an underlying sale to Alma, similar to that of the Parnassus property, because the existing Sherbourne loan was not assumable (for approximately \$135,500). Alma agreed to purchase the property for \$310,000, and as the agent for the Lunas, Alma processed the refinancing transaction of the existing loan, which they paid off. A second, lower appraisal was obtained during the refinance.

The refinancing transaction was again processed by escrow agent Britton at her new company. There was no escrow for the sales portion of the transaction, although the real estate contract prepared by Alma called for one. To facilitate the transaction designed by Alma, Ben made out a quitclaim deed to Ann. Ann made out a quitclaim

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<sup>5</sup> The parties hotly dispute whether Ben's signature was forged on the deeds, but the jury verdict does not clearly resolve that issue, and we need not rely on any such argument to consider the evidence on appeal. The parties also dispute whether Alma promised to file taxes on behalf of the Lunas (whose taxes were not filed from 2002-2005), but it is not disputed that Alma assisted Ann with her tax papers.

deed to Alma. Alma received about \$6,000 fees from the refinancing process. David received \$31,250 for remodeling expenses out of the loan proceeds.

The new loan was in the amount of \$341,000, in the name of the Lunas. Alma was to receive a deed to the property in her name, but she agreed with the Lunas that she would not record it. Gina learned of the sales but the Lunas' sons did not. Also, Ann's cousin, Margarita Delarosa, testified at trial that sometime in 2004, the Lunas told her about the sale.

Although the loan remained in the Lunas' name, Alma was making the payments, utilizing a bank account Alma had opened with her personal address on it, but in the name of Ann Luna as a signatory.

#### C. Death of the Lunas; Plaintiff Investigates Estate Finances

In April 2005, the Lunas were mortally injured in a motorcycle accident in Arizona. Ben died first, survived by Ann for a few days. While Ann was hospitalized, Alma was called to the hospital to consult with the four adult children, and she advised them how to avoid losing the Lunas' assets in probate, particularly the Barstow house. Together, Alma and the four adult children prepared false powers of attorney and backdated trust and estate planning documents, listing various assets including the Barstow house.

After Ann died, the adult children began to investigate their parents' finances, and asked Alma for help, as they believed she had been preparing the Lunas' taxes for them. Plaintiff asked why the Parnassus and Sherbourne properties were not placed in the Lunas' trust documents, and Alma told him about the refinances of the two properties,

and that she was making payments on the Lunas' loans, because she owned the properties. Alma had been using the account in Ann's name to make loan payments, after Ann died. Plaintiff went to the county recorder's office and found there had been no transfer of title. A credit report showed that the Lunas owed \$582,000 on the two loans, and the properties were valued at over \$750,000.

Plaintiff called the mortgage companies and the property insurance agent to ask about the Parnassus and Sherbourne properties. He was told to ask for escrow papers, but Alma would not give him any. Plaintiff learned that the Lunas had not filed any taxes between 2002 and 2005. In August 2005, the Parnassus loan went into default after Plaintiff told the company not to accept Alma's payments.

After discussing the disputes with Plaintiff, on September 27, 2005, Alma recorded the deeds for the Parnassus and Sherbourne properties that she had received from the Lunas. She made some further payments on the Sherbourne loan.

By March 2006, Plaintiff had been appointed administrator of the Estate.

In June 2006, Alma sold the Sherbourne property to a fellow employee at her real estate brokerage, Ian Balesky. He qualified for a large loan (\$550,000), escrow opened and closed, and the Lunas' \$341,250 loan balance was paid off. Balesky could not keep up the Sherbourne payments, so Alma rented it out to cover the mortgage, and Balesky moved into the Parnassus rental house.

#### D. Action Filed; Trial and Verdict

In July 2006, Plaintiff filed this lawsuit against Alma and others for damages for fraud, breach of fiduciary duties and constructive fraud. He requested decrees of quiet

title, declaratory and injunctive relief, cancellation of deeds, etc. (See fns. 2, 3, *ante.*) He alleged discovery of the claims occurred in April 2005, or alternatively, in September 2005 when the deeds were recorded. He claimed the Sherbourne property was wrongfully sold.

Alma pled numerous affirmative defenses, including the bar of the relevant statute of limitation regarding any claims about the 2002 Parnassus transaction. (§ 338, subd. (d) [three years].) Britton settled with Plaintiff before trial for \$25,000. Balesky and the related financing defendants from the 2006 transactions settled for \$80,000. (See fn. 2, *ante.*)

At the November 2008 trial, extensive testimony was taken from the parties and witnesses, and documentary evidence was admitted. The parties presented expert testimony from real estate attorneys and experts about the fair market value of the homes at the relevant times, and about the various risks of such creative financing. Plaintiff's real estate expert testified that the fair market value of the Parnassus property in 2001 had been about \$410,000, and that the market was such that there should have been no difficulty selling it at the original \$350,000 sale price (when the property was first listed by Alma). In 2004, the Sherbourne property was appraised at \$455,000.

The jury deliberated and returned into court with its verdict. First, the jury found in favor of Plaintiff, against Alma, on the causes of action for fraud, regarding both the Parnassus property and the Sherbourne property. The same result against Alma was reached on the issues of breach of fiduciary duty and constructive fraud, regarding both properties.

In special verdicts against Alma, damages on the Parnassus property were set in the amount of \$89,300. On the Sherbourne property, damages against Alma were set in the amount of \$150,000. Also, as damages for rents, profits or commissions on either or both properties, the amount of \$35,800 was awarded against Alma. The jury then set the amount of punitive damages awarded against Alma at \$150,000.

#### E. Posttrial Motions

Alma filed motions for new trial and judgment notwithstanding the verdict on several grounds. As relevant here, she argued that the claims about the Parnassus transactions in 2002 were barred by the applicable statute of limitations. Alma further sought a set off against the verdict amount for monies received from other settling joint tortfeasors or co-obligors. (§ 877, subd. (a).)<sup>6</sup>

After argument on May 1, 2009, the court took the matter under submission and issued its ruling denying the motions, except for granting it in part as to one setoff for the Britton settlement. The court first stated that when the evidence was correctly viewed in the light most favorable to Plaintiff, there was substantial evidence to support the jury's finding by clear and convincing evidence that Alma had acted with fraud, as well as malice and oppression. Sufficient evidence was produced at trial to establish that Alma served in a dual capacity as agent and buyer in the Sherbourne transaction.

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<sup>6</sup> Alma previously argued that Plaintiff's claims on the Sherbourne property should fail because the evidence did not establish that Alma was an agent of the Lunas. On appeal, Alma now concedes that she had a fiduciary duty toward the Lunas as their real estate agent.

On the limitations argument, the court determined that since the Lunas died before expiration of the statutes of limitation as to the fraud and breach of fiduciary causes of action, their causes of action survived, pursuant to section 366.1. Plaintiff filed the action in a timely manner, before the expiration of the later of either six months after their deaths or the limitations period that would have been applicable if they had not died. The delayed discovery rule applied, based on Plaintiff's reasonably timely discovery of the fraud after the deaths. (*Estate of Young* (2008) 160 Cal.App.4th 62, 77 (*Young*).

The amended judgment accordingly allowed to Alma an offset of only \$25,000 for the payments by joint tortfeasors Britton and Seaside. (§ 877, subd. (a).) No offset was allowed for the settlement monies paid to Plaintiff by Balesky and associated defendants (\$80,000). A second amended judgment was entered against Alma in the amount of \$400,100, plus attorney fees and costs and interest.<sup>7</sup> Alma appeals the judgment.<sup>8</sup>

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<sup>7</sup> We previously denied Plaintiff's motion to strike and/or disregard parts of the reply brief, brought on the grounds that new arguments were being made on appeal without good cause, and no opportunity to respond was afforded. We are well aware of the mudslinging in the briefs and the motions and have confined our review to the record. The arguments in the reply brief are variations on the themes raised in the opening brief and fall within the appropriate scope of discussion of the issues actually being appealed. (See *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.)

<sup>8</sup> Four bankruptcy stays for Alma and David have been imposed but lifted throughout the pendency of this appeal (from 2009-2012).

## DISCUSSION

### I

#### *INTRODUCTION; STATUTE OF LIMITATIONS ARGUMENTS ON PARNASSUS PROPERTY*

On appeal, Alma mainly contends (1) there is no substantial evidence of fraud or breach of fiduciary duty supporting the judgment, since she believes the evidence shows the Lunas were well informed of all the relevant factors in the transactions, including the two properties' fair market value, for purposes of agreeing to the purchase price and sale; (2) the record does not adequately support any award of punitive damages; and (3) the trial court incorrectly limited the offset allowed as to the Balesky pretrial settlement monies. (§ 877, subd. (a).)

Before addressing those substantial evidence and offset arguments, we dispose of Alma's preliminary argument that all causes of action based upon the 2002 Parnassus transaction were barred by section 338, subdivision (d), which provides that ordinarily, an action for relief on the ground of fraud or mistake must be filed within three years of accrual. However, that subdivision continues, "The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (*Ibid.*)

Alma claims that since the Lunas were well advised of all of her activities and all the relevant factors, and they made a decision not to assert any claims during their lifetimes, Plaintiff should be barred from doing so on behalf of the Estate, which in any case suffered no financial injury from Alma's actions. Alma further contends that even if

any "delayed discovery rule" may be applied, this plaintiff-administrator could only have taken advantage of an additional six months to file an action, and the July 2006 filing of the complaint postdated any such extension that would be available under section 366.1.<sup>9</sup>

"Statutes of limitation are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. [Citation.]" (*Parker v. Walker* (1992) 5 Cal.App.4th 1173, 1188-1189 (*Parker*).) Although a plaintiff is required to use ordinary diligence to discover any facts supporting a cause of action, this rule applies only where there is a duty to inquire and it would be negligent not to do so. The applicable limitations statute does not begin to run if the circumstances, including a confidential relationship, do not give rise to a duty to investigate. (*Lee v. Escrow Consultants* (1989) 210 Cal.App.3d 915, 921; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, §§ 662-663, pp. 876-878.)

"Where the facts adequately allege breach of fiduciary duty or undue influence, the courts will allow a date-of-discovery rule to be applied, ' "when strict adherence to the date of injury rule would result in unfairness to the plaintiff and would encourage wrongdoers to mislead their fiduciary to delay bringing suit. It is particularly appropriate when the defendant maintains custody and control of a plaintiff's property or interests. [Citation.]" ' " (*Young, supra*, 160 Cal.App.4th at p. 77.)

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<sup>9</sup> Section 366.1 sets forth this rule regarding the claim of an estate: "If a person entitled to bring an action dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced before the expiration of the later of the following times: [¶] (a) Six months after the person's death. [¶] (b) The limitations period that would have been applicable if the person had not died."

For purposes of applying the limitations statute, we read these pleadings as making out a case, at least, for Alma's constructive fraud and concealment of information that was material to the Lunas' decision to sell the Parnassus property, such as the proper effect of the appraisals of fair market value upon the determination of a selling price. (See Civ. Code, § 1573 [fiduciary's failure to share material information with her principal is constructive fraud].) Both the evidence and pleadings showed that Alma had a special, trusted role in the Lunas' personal life and financial affairs. When the Lunas were dying, the adult children asked Alma for help, as they thought she knew about their finances.

Plaintiff adequately alleged delayed discovery of some facts giving rise to the Estate's suspicions about the refinancing deals in April 2005, or of other crucial facts that did not occur until September 2005, when the deeds were recorded. The Estate could also reasonably claim that it did not discover all the relevant facts about financial injury to the Estate until June 2006, when Alma sold the Sherbourne property. Plaintiff's allegations are sufficient to invoke the delayed discovery rule, because he was reasonably investigating the entire situation, while Alma was continuing to withhold pertinent facts about the title status as well as the fair market value of the properties, as compared to the documented purchase price.

Issues are also raised about the propriety of Alma's advice to the Lunas to combine the refinancing and title transfer deals, in her capacity as their agent, even in light of the Lunas' allegedly similar transaction with their Barstow property, of which the evidence is incomplete. As their real estate agent in the Parnassus transaction, both before and after

she regained her license, Alma concededly undertook special duties to disclose all relevant factors to the Lunas, including her dual role as agent and purchaser of the property. The manner in which these unusual refinancing transactions were structured, including a transfer deed to a nonparty to the refinance, made it difficult for family members, either the Lunas or Plaintiff, to fully evaluate responsibility for any flaws in the deals in a more timely manner. A relaxed duty to inquire was in place, related to any claim of fraud or breach of fiduciary duty regarding the Parnassus transactions. The trial court correctly took into account all of the evidence about the underlying circumstances of Plaintiff's delayed discovery of these causes of action, and its ruling that there was no time bar under section 338 was well supported.

With that approach in mind, we next address Alma's substantive arguments about why the judgment lacks substantial evidence support.

## II

### *SUFFICIENCY OF EVIDENCE*

#### A. Standards of Review

When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether substantial evidence supports the judgment. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872.) Where conflicting inferences can be drawn from the evidence, we accept those chosen by the trier of fact. (*Ibid.*)

"The usual definitions of substantial evidence apply: it is 'evidence . . . "of ponderable legal significance, . . . reasonable in nature, credible, and of solid value." ' [Citation.] In determining its existence, we look at the entire record on appeal rather than simply considering the evidence cited by a party. [Citation.] "The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citation.] While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].' [Citation.]" (*Young, supra*, 160 Cal.App.4th 62, 76.)

In conducting substantial evidence review, appellate courts are mindful that the fact finder (here, the jury) has the opportunity "to observe the appearance and general bearing of the witnesses," and it is the fact finder which is in a position to determine "the value and weight to be given the testimony." (9 Witkin, Cal. Procedure, *supra*, Appeal, § 366, p. 424.) "The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.' [Citation.] 'There are many factors aiding in a reasonable conclusion which are presented to the trier of facts in the first instance and not available to one going over the cold record. There is what might be called the "feel" of the case. This embraces a consideration of the witnesses, the manner in which they testify and their general attitude in the court room.' [Citation.]" (*Ibid.*)

If the evidence is not in conflict, but conflicting inferences could reasonably be drawn to resolve the issues presented, an appellate court is bound to respect the conclusions of the jury or the trial judge. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 376, p. 434.) " 'In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment.' [Citation.]" (*Ibid.*)

#### B. Breach of Fiduciary Duty/Constructive Fraud: Support for Judgment

Since the transactional facts of what happened and when are essentially undisputed, Alma now focuses on the inferences that can reasonably be drawn from these facts. She argues that Plaintiff's only supports for imposition of liability for constructive fraud and breach of fiduciary duty, whether under common law or statutory duties, are his "unfounded inferences, argument and mischaracterizations of the record."

Alma first relies on the evidence about her friendship with the Lunas, and their previous experience in purchasing their Barstow property, to support her claims that everything was done with their agreement and knowledge. She argues she should have been exonerated on that ground, because only one inference may reasonably be drawn, that the Lunas were well able to make their own contractual decisions, even if the decisions might have been unfavorable to their overall interests. She cites language to this effect from *Los Angeles County Metropolitan Transportation Authority v. Shea-Kiewit-Kenny* (1997) 59 Cal.App.4th 676, 683, footnote 3: "[A]s with all contracts, the parties are free to agree to whatever standards they choose to impose upon themselves . . . .," and thus the question before a court should be whether the contracting

parties actually agreed to any such terms that might have been less than optimal for one side. (*Ibid.*; see 9 Witkin, Cal. Procedure, *supra*, Appeal, § 377, p. 435.)

Although Alma attempts to use her friendship with the Lunas to prove that she would not have bilked them, the same evidence about friendship could also be interpreted to show she utilized undue influence upon them, because in real estate matters, they were not shown to be so knowledgeable as to have made independent decisions on all the technical transaction details.

In short, this record contains ample evidence that the Lunas were guided by Alma's advice, and their contractual decisions were influenced by the selective manner in which she, as their fiduciary, disclosed material information to them, and this caused them financial harm they would not otherwise have chosen. There was conflicting testimony about whether the Lunas intended that Alma would assume their loans or whether she would take the property subject to their loans, and about their full understanding of the function of the title and quitclaim deeds Alma obtained. Although Alma relies on their supposed familiarity with refinancing, gained through their Barstow transaction, she has not shown it was so similar to the current transactions to justify any conclusion that the Lunas gave informed consent to all details of these transactions. The testimony that both Gina and Ann's cousin thought that the Lunas seemed happy with the transactions and were glad to be rid of the properties was not necessarily persuasive to the jury, because of the nature of those different relationships, and we will not reevaluate credibility issues. (See 9 Witkin, Cal. Procedure, *supra*, Appeal, § 366, p. 424 ["There

are many factors aiding in a reasonable conclusion which are presented to the trier of facts in the first instance and not available to one going over the cold record.' "].)

Thus, the jury could reasonably have concluded from the details of the transaction that Alma breached the duties owed by a real estate broker or agent, and she failed to deliver " 'the highest good faith and undivided service and loyalty' " to the Lunas as her clients. (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762-763 (*Michel*)). This duty exceeds the more general negligence standard of due care for a real estate licensee. (Civ. Code, § 2079.) The jury could reasonably have been persuaded that Alma concealed material facts, such as whether the evidence showed that the Lunas' properties were worth more than her purchase price of them, or that the refinancing procedures followed were irregular or harmful to the financial interests of the Lunas.

Next, Alma argues that even though the transactions were unusual, no financial harm was caused to the Estate and the sales were not adverse to the Lunas' interests. However, several experts in real estate matters testified that there was self-dealing on her part that was unacceptable under fiduciary standards, because she controlled all aspects of the refinancing. At the time of the Parnassus transaction, she did not qualify for a loan on her own behalf, and she benefited from the refinancing that the Lunas obtained and from her separate sales transaction, and she also obtained fees. When she arguably purchased the Sherbourne property, she received real estate fees, and when she sold the Sherbourne property, she made a profit of \$240,000, all to the detriment of the Estate.

The evidence sufficiently showed Alma failed to disclose or concealed from the principals certain information she possessed that was "material to the principal's interests." (*Michel, supra*, 156 Cal.App.4th at pp. 762-763.) This included the importance of the respective appraisals obtained for purposes of setting the purchase prices, the effect of the needed repairs for the properties upon the proposed purchase prices, and the propriety of utilizing a refinancing transaction to accomplish a title transfer, contrary to the terms of the original loan that was being refinanced (non-assumable loan). Alma did not show she provided the Lunas with accurate information about her dual roles, nor about the impropriety of holding a deed to be recorded at a later time, when the refinancing transaction did not disclose that detail to the lender. The Lunas were under the belief they were not responsible for the properties, but that Alma was holding it subject to their loans.

Even if the jury verdict were based on the more flexible standards of constructive fraud, it is well supported here. "[A] real estate agent, as a fiduciary, is also ' . . . liable to his principal for constructive fraud even though his conduct is not actually fraudulent. Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship." [Citation.] [¶] "[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or

should be known) to the fiduciary, may constitute constructive fraud." ' ' " (*Assilzadeh v. Cal. Fed. Bank* (2000) 82 Cal.App.4th 399, 415; *Michel, supra*, 156 Cal.App.4th 756, 762-763.)

Under either of these theories, Alma's arguments provide only her view of the correct inferences to be drawn from the evidence, but she has not attempted to show that Plaintiff's evidence about her dominant role in guiding the transactions, which was in conflict with her own showing, was inherently incredible or otherwise unworthy of belief, such that it could not support the judgment and its underlying findings. It is not enough for her to argue that different factual inferences and conclusions could "reasonably" be drawn from the same evidence, and this court does not retry the case.

The next issue is whether the evidence at trial further supported the jury's findings of actual fraud, justifying the punitive damages award.

### C. Sufficiency of Evidence: Fraud and Punitive Damages

In *Young, supra*, 160 Cal.App.4th 62, 79, we considered a substantial evidence challenge to an adverse fraud judgment by first reviewing the required elements of a claim of fraud: " '(a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" [Citation.]' " (*Ibid.*) Alma continues to argue that the Lunas were aware of all the relevant facts about the transactions and nevertheless accepted sale prices below fair market value, for reasons of their own.

Alma would have us disregard the evidence and reasonable inferences tending to show that she intentionally defrauded the Lunas through the manner in which she influenced and directed them in carrying out these transactions. The evidence suggested, and the jury believed, that Alma's participation in the transactions was more than negligent or careless, and instead amounted to her purposeful misleading of her clients, who were relatively ill-informed property owners, about any appropriate manner of establishing a purchase price in light of needed repairs for the properties, or in light of the amount of refinancing loans that could be obtained by the owners. Alma misled the Lunas, as well as their future Estate, regarding her intentions about not initially recording the quitclaim deeds that they executed in her favor, and she also misled the lenders and insurance companies that were involved on the Lunas' behalf. By opening up a checking account in Ann's name to keep the loans on the property current, and continuing to use it after Ann died, Alma demonstrated that this transaction did not comply with the appropriate forms of conducting a refinancing transaction, and that her advice to the Lunas to enter into these transactions was misleading and operated to their detriment.

Mainly, Alma contends that because the underlying compensatory damages award (totaling \$275,100 for the two properties, rents, etc.) was reached in error, so too was the award of \$150,000 punitive damages. We consider this claim according to well-established factors. "Punitive damages may be awarded only if it is proven that the defendant engaged in conduct intended to cause injury or engaged in despicable conduct with a conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subs. (a), (c).)" (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 316-317

(*PPG*) [punitive damages are "damages for the sake of example and by way of punishing the defendant"].)

De novo review is appropriate to determine whether the original award was consistent with constitutional limits for an award of punitive damages, including a proportionality determination. (See *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204.) Three accepted "guideposts" have been established for the use of a court reviewing an award of punitive damages: " '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' " (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712.)

Under the above standards, the jury's compensatory damages award was well supported (\$275,100), and also the punitive damages assessed (\$150,000) were proportional, bearing a reasonable relationship to the actual financial harm proven. No further separate analysis of the punitive damages award is required.

### III

#### *OFFSET ISSUE*

Alma contends the trial court erred by rejecting an offset to the judgment against her, based on the \$80,000 paid to Plaintiff by the Balesky set of defendants. The parties have briefed the issues of whether the declaratory relief and quiet title claims pled against Balesky, together with general agency allegations, qualify him as a joint tortfeasor who settled his claims, within the meaning of section 877, subdivision (a). To decide the

extent of the offset required or allowed as to these monies, we outline the governing standards and apply them to these facts.

#### A. Statutory Standards

Section 877 provides in relevant part as follows: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater."

"Section 877 applies to any 'tortfeasors claimed to be liable for the same tort,' thus eliminating the distinction between joint tortfeasors and concurrent or successive tortfeasors. [Citations, including *Lopez v. Blecher* (1983) 143 Cal.App.3d 736, 739-741, holding that this section applies to persons properly joined as defendants even though they are not technically 'joint tortfeasors'; *Turcon Const. v. Norton-Villiers, Ltd.* (1983) 139 Cal.App.3d 280, 283 [same]]." (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 72, pp. 144-145.)

#### B. Application

For purposes of applying the terms of section 877, we examine Plaintiff's wide-ranging allegations against Alma, and the more limited claims against Balesky of entitlement to quiet title and related declaratory relief. Alma argues Balesky was

essentially only a fellow codefendant or joint tortfeasor, and she should receive credit for his settlement payments to Plaintiff.

In reply, Plaintiff objects to any further offset being allowed against the verdict amount, on the grounds that Alma's wrongdoing was intentional, while Balesky was only a minor player in the Sherbourne transaction. Plaintiff relies on policy considerations set forth in *PPG, supra*, 20 Cal.4th 310, 316, restricting the shifting of liability in a legal context in which one party is found guilty of intentional wrongdoing, while a fellow party defendant and cotortfeasor is found culpable of negligence or other lesser misconduct. In *PPG*, the holding was that an insured would not be allowed to shift to its insurer the responsibility to pay punitive damages ordered in a third party's action, because that "would violate the public policy against reducing or offsetting liability for intentional wrongdoing by the negligence of another." (*Id.* at pp. 316-317.)

On the whole, this complaint pleads agency and joint and several liability among the various defendants. It is not dispositive that Plaintiff only named Balesky in the causes of action for declaratory relief and quiet title, which have equitable features, rather than on the legal theory of fraud. In some cases, quiet title claims can be either legal or equitable. (See 3 Witkin, Cal. Procedure, *supra*, Actions, § 134, pp. 212-213 ["A simple action to quiet title, not involving the possession of the property, is equitable" in nature, but other quiet title actions where possession is disputed may be treated as "partly legal and partly equitable;" and, "If the plaintiff is out of possession and seeks to recover possession by a quiet title action, the action is legal. [Citations.]".])

The claims against Balesky were not so limited in nature as to make his settlement status other than that of a joint tortfeasor, with respect to the Estate. The declaratory relief sought pertained to the interest the Estate was claiming in the Sherbourne property, and when Balesky and the related financial defendants paid Plaintiff \$80,000 in settlement, it was directly attributable to Balesky's participation with Alma in the challenged transaction, which injured the Estate, which sued Balesky. (See *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 557 [offsets between equitable or tort claims].) Even if Balesky amounted only to a straw man in Alma's transaction, he was still involved in the torts that were committed.

For these reasons, we are persuaded that the \$80,000 collected from Balesky in settlement was sufficiently related to Alma's activities in breach of her duties that gave rise to the fraud and other damages imposed, for purposes of imposing an offset under section 877. Here, Balesky is equivalent to "one or more of a number of tortfeasors claimed to be liable for the same tort, or . . . one or more other co-obligors mutually subject to contribution rights." (*Ibid.*) Accordingly, Alma is entitled to a reduction of the judgment in the amount of this offset, and we affirm the judgment as so modified.

(§ 877, subd. (a).)

## DISPOSITION

The amended judgment is affirmed as modified with directions to the trial court to prepare a third amended judgment, including both offsets. Plaintiff shall recover costs on appeal on behalf of the Estate.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.