

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOSE MENDOZA,

Plaintiff and Appellant,

v.

CONTINENTAL SALES COMPANY et al.,

Defendants and Respondents.

F061624

(Super. Ct. No. VCU207573)

JOSE MENDOZA,

Plaintiff and Appellant,

v.

RAST PRODUCE CO., INC. et al.,

Defendants and Respondents.

F062749

(Super. Ct. No. VCU207573)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Williams, Jordan, Brodersen & Pritchett, Steven R. Williams for Plaintiff and Appellant.

Rynn & Janowsky, Lewis P. Janowsky for Defendant and Respondent Continental Sales Company et al.

Wild, Carter & Tipton, Russell G. VanRozeboom for Defendants and Respondents Rast Produce Co., Inc., and John Rast.

-ooOoo-

Plaintiff, claiming it was underpaid for its 2001 and 2002 pomegranate crop, sued the commission merchant that sold the fruit and also a dozen businesses that acquired the fruit from the commission merchant. The businesses obtained a judgment on the pleadings on the ground that they owed no fiduciary duties to plaintiff because they were buyers acting on their own behalf and were not subagents of the commission merchant. In *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395 (*Mendoza I*), we overturned that judgment, concluding that the businesses' status as buyers or subagents could not be decided at the pleading stage of the lawsuit.

After remand, the trial court held a bench trial and issued a statement of decision holding the businesses that obtained pomegranates from the commission merchant had no liability because they were buyers, not subagents. The court also held the commission merchant liable to plaintiff for approximately \$24,000 in damages relating to the 2002 crop.

On appeal, plaintiff contends the trial court erred by determining the businesses that obtained the pomegranates on price-after-sale (PAS) terms were buyers. In plaintiff's view, these transactions should have been viewed as a reconsignment of the fruit, and the businesses should have been treated as subagents who owed duties to plaintiff. Plaintiff also contends the amount of damages awarded against the commission merchant was too small.

We conclude that the question whether the entities were buyers or subagents was a question of fact, and the trial court's finding was supported by substantial evidence. In addition, we conclude that plaintiff failed to demonstrate the trial court committed

reversible error in its calculation of damages involving the 2002 crop. The judgment is affirmed.

### **FACTUAL AND PROCEDURAL HISTORIES**

Jose Mendoza, individually and doing business as San Joaquin Labor Services, is indentified by the third-amended complaint as plaintiff in this lawsuit. The trial court's statement of decision describes plaintiff as San Joaquin Labor Services, a partnership consisting of three Mendoza brothers—Jose, Alfonso, and Jerry. For purposes of this opinion, we will refer to plaintiff-appellant as Mendoza.

Mendoza's initial complaint named Kenneth Britten, individually and doing business as Alta Peak Packing (Britten), as a defendant. Britten, however, is no longer a party to this lawsuit because he was dismissed after paying Mendoza a settlement of \$35,000.

Mendoza also named Rast Produce Co., Inc., and John Rast (collectively, Rast) as defendants. Rast marketed Mendoza's pomegranates in 2001 and 2002.

Mendoza's third-amended complaint referred to the final group of defendants as "subagents." From this group, the following businesses received a judgment in their favor: (1) Continental Sales Company, (2) CDS Distributing, Inc., (3) Custom Produce Sales, (4) Four Seasons Produce, Inc., (5) Jacobs, Malcolm & Burt, Inc., (6) JMB International, Inc., (7) M. Levin & Company, Inc., (8) Andrighetto Produce, Inc., doing business as Shasta Produce, (9) Shapiro-Gilman-Shandler Co., (10) Val-Pro, Inc., doing business as Valley Fruit & Vegetable Co., and (11) Royal Banana Company, Inc. (collectively, the Continental Defendants).<sup>1</sup>

---

<sup>1</sup>Respondents' brief filed on behalf of the Continental Defendants includes Morita Produce Co. & Nuthouse and River City Produce Co., Inc. These entities were respondents in the first appeal (*Mendoza I, supra*, 140 Cal.App.4th at p. 1400), were named as defendants in the subsequently filed third-amended complaint, but were not listed among the Continental Defendants in the interlocutory judgment filed on October 21, 2010.

The following facts are taken from the findings made by the trial court in its statement of decision. They differ from those stated in *Mendoza I, supra*, 140 Cal.App.4th at pages 1398 through 1401, because our first opinion accepted the facts alleged in Mendoza's complaint as true, as required by the standard of review applicable to orders granting a motion for judgment on the pleadings. (*Id.* at p. 1401.)

Mendoza engaged in labor contracting, contract farming, farming crops on leased land, and buying and selling fruit on and off trees. The Mendoza brothers had many years of experience.

In 2001, Mendoza bought a crop of pomegranates from Keith Trembly with the intent of picking the crop with its own crews and selling the crop to Britten. Britten, in reliance on this intended sale to him, entered into a contract with Rast to market the pomegranates for him. In the contract, Britten represented himself as an independent contractor and the grower and owner of the fruit Rast was to market. When Mendoza and Britten were unable to agree on a price for the pomegranates, they agreed that Britten would pack the crop and have it marketed by his marketer. Despite this change in the arrangement between Mendoza and Britten, Britten never told Rast that the pomegranates were not his fruit.

Mendoza presented testimony that it was not aware that Britten had contracted with Rast to market their fruit until it received the year-end accounting, although Jose Mendoza admitted receiving monthly sales reports on Rast's letterhead. Thus, the pomegranates were grown on trees owned by Trembly. Mendoza did the farming and picking and delivered the pomegranates to Britten. Britten packed the fruit, arranged for cold storage, and delivered the fruit to the cold storage facility. The facility faxed to Rast lists of pomegranates that Britten delivered and were available for sale.

Rast sold pomegranates from the list provided by the cold storage facility. When Rast made a sale, it would prepare an order form and fax it to the facility. Once the fruit was loaded on a truck for delivery (always in a mixed load because of the small quantity),

the cold storage facility would fax Rast a bill of lading with information relating to the transit to the buyer. The facility, as the grower's agent (not that of Rast or the buyer), would select the load temperature and determine how the mix of product was loaded. After receiving the fax of the bill of lading, Rast would prepare an invoice within 45 days, even if the prices had not been settled, to protect lien rights under the federal Perishable Agricultural Commodities Act, 7 United States Code section 499a et seq. (PACA).

Rast reported to Britten that there were quality problems with the pomegranates, and Britten relayed that information to Alfonso Mendoza, the partner directly involved with the crop. Also, in 2001 Jose Mendoza received from Britten Rast's "sales items by detail" monthly.

Mendoza and its partners were aware of general market pomegranate prices, the actual prices for which their pomegranates sold, and the reported fruit quality problems at all times during the 2001 and 2002 pomegranate seasons. At the end of the 2001 season, Britten received Rast's final accounting, took out his packing expenses and fees, and paid the rest to Mendoza. Britten also delivered the final accounting to Mendoza.

Britten accepted the 2001 final accounting without complaint to Rast. Mendoza accepted the accounting without complaint to Britten or Rast. Mendoza's first complaint regarding prices for the 2001 crop was at a meeting in the spring of 2003.

In 2002, Mendoza controlled the same pomegranate acreage and decided to pack the crop itself and deal directly with Rast for marketing. Rast prepared its standard contract and presented it, with a consignor's notice, to Alfonso Mendoza on August 14, 2002. Jose Mendoza later signed the marketing agreement on behalf of the partnership, dated his signature August 22, 2002, and delivered it to Rast.

Paragraph 10 of the marketing agreement gave Rast the exclusive right to market and sell Mendoza's 2002 pomegranate crop and "the right to market through or sell the Crops to any organization, if in [Rast'] sole discretion it may receive the best price by

doing so.” Paragraph 10 also obligated Rast to make a reasonable effort to sell the pomegranates F.O.B.<sup>2</sup> shipping point, but gave Rast the right to sell “to destination brokers or delivered sales, or joint accounts, or on a consignment or reconignment basis, or price after sale” if a better price was obtainable. In addition, Rast agreed to “attempt to obtain the best market prices and effect quick sales of the Crops ....”

After August 14, 2002, Mendoza’s cold storage facility faxed inventories to Rast for Rast to use in selling Mendoza’s fruit. Rast sold fruit from this inventory on August 16 and 19. None of these transactions are among those designated as troubled by Mendoza.

Mendoza’s 2002 pomegranates were small, not of top quality, and not the desired red color. Also, in some instances the fruit was not graded properly before it was packed. Bad fruit was included in the pack. Over 50 percent of the fruit sold resulted in quality complaints, compared with a normal complaint rate of about five percent.

During the 2002 season, Rast provided Mendoza regular accounts of sales in the agreed format. Mr. Hirni, representing Rast, called Alfonso Mendoza regularly regarding the status of sales, as evidenced by 58 cell phone calls and an unknown number of land-line calls from the Rast office.

Toward the end of the 2002 season, Mendoza, aware of the difficult market, asked Rast if it could sell fruit through another broker, Regatta, and Rast agreed. Mendoza was happy with Regatta’s sale prices, which were, except for one size, less than Rast’s during the same period, and Rast’s average price was higher.

---

<sup>2</sup>“F.O.B.” means free on board. (Cal. U. Com. Code, § 2319, subd. (1).) An agreement using the term “F.O.B. seller’s place of business” is known as a shipment contract, and the risk passes to the buyer when the goods are delivered to the carrier. Conversely, an agreement using the term “F.O.B. buyer’s place of business” is referred to as a destination contract, and the risk does not pass to the buyer until the goods are tendered to the buyer at the place of destination. (1 White & Summers, Uniform Commercial Code (5th ed. 2006) § 5-2, p. 339.)

Pomegranates are a limited market specialty crop. In 2001 and 2002, large pomegranates sold best and small pomegranates were far less desirable.

Rast was a small to medium broker. It did not handle enough top quality large pomegranates to sell to the big buyers such as chain supermarkets. Due to the limited market for Mendoza's pomegranates, which were mediocre in both size and quality, they were sold in small quantities (two or three pallets at 88 boxes per pallet) to so-called terminal markets, such as the Continental Defendants, across the United States and Canada. The buyers would arrange shipping in mixed loads with a few pallets of pomegranates transported with other fruits and vegetables that the buyer was having delivered from California.

The terminal market buyers would take delivery, put the product into cold storage, and resell it to their customers, who generally were small local and regional markets and food services. Terminal market buyers customarily purchased perishable commodities from the broker on the basis that the price would be negotiated after all of a lot was sold, or at least enough of the lot for the buyer to feel comfortable in setting a price.<sup>3</sup> Terminal market buyers of smaller, lower quality fruit generally will not buy F.O.B. at a fixed price and will not take the fruit on consignment.

---

<sup>3</sup>The parties have used the phrase "price after sale" to describe these transactions. The phrase is not defined by the PACA or the California Uniform Commercial Code, but it is a type of "open price" agreement. (*A.P.S. Marketing, Inc. v. R.S. Hanline & Co., Inc.* (2000) 59 Agric. Dec. 407, 410-411 [2000 WL 33420230]; see generally, *Tom Lange Co., Inc. v. A. Gagliano Co., Inc.* (7th Cir. 1995) 61 F.3d 1305, 1310 [distinguishing "price after arrival" from "price after sale" arrangements, both of which involve open-price terms].) Open-price agreements are enforceable under section 2305 of the California Uniform Commercial Code, which provides: "The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if [¶] (a) Nothing is said as to price; or [¶] (b) The price is left to be agreed by the parties and they fail to agree ...."

After the terminal market buyer sells a lot, the buyer reports the average price by size to Rast, less shipping paid by the buyer and negotiates a “spread,” which is the buyer’s gross margin. Rast pays the grower that price, less Rast’s 8.5 percent commission, plus palletizing and precooling charges incurred by the grower. The palletizing and precooling charges in this case often are given in the referee’s report as \$1.85 per box. Sometimes the margin on smaller, less valuable, fruit is not enough to cover the buyer’s handling and storage costs.

The terminal market buyers typically are not paid by their resale customers until after the buyers settle with Rast. As a result, the terminal market buyers bear any collection loss and bear any adjustment with their resale customers after settlement with Rast.

Once Rast and the terminal market buyer settled the price, Rast sent the buyer an invoice and was paid for the fruit plus reimbursement to the grower for palletizing and precooling charges. Rast often generated sales invoices before the price was settled to comply with the PACA’s 45-day requirement and preserve lien rights in the event the buyer did not pay. Sometimes, these Rast invoices had a “0” price. Other times, even on a price-after-sale transaction, the invoices gave a “target” price, to advise the buyer what the grower was expecting.

It was commercially reasonable for Rast to sell the pomegranates on price-after-sale terms to a long-time trusted buyer with a good blue-book rating because (1) terminal market buyers refused to buy pomegranates at a fixed price F.O.B. shipping point; (2) the fruit was perishable and its quality declined in storage; (3) the cost for cold storage accumulated while the fruit was unsold; and (4) there was a risk that the pomegranates might not be sold at all under another arrangement.

The trial court addressed part of the dispute regarding market prices by finding that the United States Department of Agriculture’s Market News Report was not an accurate, reliable basis for determining the actual market value of Mendoza’s

pomegranates. This was because the reports did not cover all of the applicable time periods, was based on asking prices rather than actual sales, and did not account for quality, variety, age, or packing style.

On October 30, 2003, Mendoza filed the complaint that began this lawsuit. In July 2004, the complaint was challenged by the Continental Defendants' motion for judgment on the pleadings, which asserted that they were buyers and not subject to the duties imposed on consignees. The parties do not dispute that one of the duties imposed on consignees and reconsignees is the duty to provide to the consignor an accounting of all sales. The trial court granted the motion and, in September 2004, entered judgment in favor of the Continental Defendants.

In June 2006, we filed a decision that reversed the judgment and directed the trial court to deny the Continental Defendants' motion as to four causes of action and grant it with leave for Mendoza to amend as to three other causes of action. (*Mendoza I, supra*, 140 Cal.App.4th at pp. 1406-1407.) Among other things, we stated: "At the pleading stage of this action, we cannot make a final determination that all of the transactions were, in fact, sales and not reconsignments." (*Id.* at p. 1403.)

Our decision led to the filing of a second-amended complaint and, in December 2006, a third-amended complaint, which was the operative pleading when the case went to trial. The third-amended complaint set forth causes of action for breach of contract, breach of the covenant of good faith and fair dealing, negligence, conversion, accounting, breach of fiduciary duty, and fraud. Mendoza claimed it sustained damages in excess of \$50,000 and also requested punitive damages.

The third-amended complaint included allegations that (1) Rast, under the guise of an "open price" sale, reconsigned the pomegranates to the Continental Defendants, who would sell the pomegranates at a high price before negotiating a final price with Rast, and (2) the Continental Defendants, "by accepting [the pomegranates] for sale without first

contracting for its purchase at a designated price, became commission merchants with the attendant common law and statutory duties.”

In April 2007, the trial court appointed a referee to examine the documents from the transactions that Mendoza disputed. The referee was charged with (1) determining which transactions, if any, failed to comply with Food and Agriculture Code sections 56271 through 56283; (2) identifying each noncomplying transaction and stating the nature of each noncompliance; (3) determining the loss Mendoza suffered from each noncompliance and specifying the method used for computing any such loss; (4) determining which defendant or defendants were liable for any such loss; and (5) preparing a detailed summary report of his findings and determinations.

The referee held conference calls with counsel for the parties, obtained copies of the documents generated by Rast’s transactions involving Mendoza’s pomegranates, received position statements from the parties, and issued a 22-page referee’s report in August 2007. The referee rejected Mendoza’s argument that the price-after-sale transactions were the equivalent of consignments. Based on this determination, the referee concluded that Rast’s customers (the Continental Defendants) were not liable for damages to Mendoza and had no responsibility to provide detailed accountings or inspections. The referee also determined that Rast was responsible to operate in the best interests of Mendoza in negotiating prices with the Continental Defendants. In particular, pursuant to Food and Agricultural Code section 56283, the referee concluded that Mendoza was required to “exercise reasonable care and diligence in disposing of the product in a fair and reasonable manner.” When the referee determined Rast breached this duty by settling for too low a price on the transactions challenged by Mendoza, the referee made a determination of damages based on his calculation of an average sale price and sometimes referenced prices in the Market News Report. The referee’s report concluded that Rast was liable to Mendoza for \$38,028.71.

In December 2007, the referee received from Mendoza a list of 85 additional transactions that the trial court allowed to be submitted for the referee's review. In January 2008, the referee issued an amendment to referee's report and supplemental report.<sup>4</sup> The referee analyzed the additional transactions and increased his determination of Rast's liability to \$93,105.74.

In February 2008, Mendoza and Rast filed objections to the amended report. Subsequently, the defendants filed a motion requesting a ruling on the objections to the amended report and a judicial directive as to the role the amended report would have at trial. In October 2008, the trial court filed an order ruling on the objections stating that, pursuant to Code of Civil Procedure section 644, the referee's recommendations were advisory only and the court might modify or disregard the amended report.

In November 2009, the trial court conducted a three-day bench trial on the accounting cause of action and other issues, but excluded Mendoza's claims for consequential and punitive damages. Four representatives of the Continental Defendants were among the witnesses who testified. The parties stipulated to the use of deposition testimony from other witnesses.

The parties submitted posttrial briefing and, in June 2010, the trial court filed an intended decision stating that (1) the Continental Defendants were buyers and had no liability, and (2) Rast was liable to Mendoza for net damages of \$23,198.64. Mendoza filed objections to the intended decision.

---

<sup>4</sup>Among other things, the amended report provided an expanded explanation of how the referee determined an average sale price for use in calculating damages. The referee stated that it was his "experience that the use of average sales prices taken from sales of the individual grower's product is the best measure of the amount the grower could reasonably expect to receive for that product." He also described situations where he would use prices from the Market News Report.

In July 2010, the trial court filed its statement of decision. The trial court restated its determinations that the Continental Defendants were buyers and had no liability to Mendoza, Rast had no liability to Mendoza in connection with the marketing of the 2001 crop, and Rast was liable to Mendoza for damages involving the 2002 crop.

On October 21, 2010, the trial court filed an interlocutory judgment stating that the “Continental Defendants, and each of them, have no liability to [Mendoza] and [Mendoza] shall take nothing ... as to the Continental Defendants.” It also provided that (1) Rast had no liability to Mendoza for the 2001 crop year; (2) Rast breached its duty as a commission merchant as to certain sales concerning the 2002 crop year; and (3) Mendoza’s direct damage from this breach of duty was \$23,932.45, a sum constituting the direct damages on all causes of action.

In December 2010, Mendoza filed a notice of appeal concerning the interlocutory judgment. The appeal became case No. F061624 in this court and involved the Continental Defendants as respondents.

In May 2011, Mendoza and Rast filed a stipulated pro forma judgment as to Rast after a bifurcated trial and stipulated to the dismissal of remaining consequential and punitive damages claims. Mendoza and Rast agreed that Mendoza retained the right to reassert such damage claims if the interlocutory judgment was reversed or remanded for further proceedings against Rast.

In June 2011, Mendoza filed a notice of appeal from the May 2011 judgment. The appeal became case No. F062749. Shortly after the second appeal, the parties requested the consolidation of case Nos. F061624 and F062749. In September 2011, we granted the request, consolidated the appeals for all purposes, identified case No. F061624 as the lead case, and set the date on which appellant’s opening brief was due.

## **DISCUSSION**

### ***I. Continental Defendants as buyers, not subagents***

#### ***A. Trial court's findings and judgment***

The trial court considered the liability of the Continental Defendants and framed the question as whether “the evidence adduced at trial prove[d] that the Continental Defendants were [Mendoza’s] agents.” The statement of decision provided a description of price-after-sale transactions before answering the question by finding:

“While the PAS sale practice here certainly has some characteristics of a consignment, it does not have all. It was, as between Rast and the Continental Defendants, intended as a sale, and consistent with industry practice.

“Thus, the PAS contracts with the Continental Defendants were not consignments, and [t]he Continental Defendants were not sub-agents with fiduciary duties to [Mendoza]. The Continental Defendants were buyers, and have no liability to [Mendoza].”

The interlocutory judgment implemented these findings by stating that the Continental Defendants, and each of them, had no liability to Mendoza.

On appeal, Mendoza challenges the trial court’s determination that the Continental Defendants were buyers and not subagents.

#### ***B. Standard of review***

The parties disagree on the standard of review applicable to the trial court’s determination of the buyers-versus-subagents issue. Mendoza argues for an independent (i.e., de novo) standard of review. Mendoza contends questions of law are subject to independent review and also asserts: “Because there is dispute over the events of this case, the proper standard of review is de novo.” The Continental Defendants contend there is a presumption that the judgment of the trial court is correct and that the de novo standard of review does not apply.

We conclude that, when an appellate court reviews a statement of decision issued after a bench trial, the trial court’s findings of fact are reviewed under the substantial

evidence standard, and the trial court's resolution of a question of law is subject to independent review. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935.) Thus, the trial court's findings of fact will be upheld if there is substantial evidence to support the finding. (*Ibid.*) In evaluating the support for a finding, we view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Ibid.*) In addition, evidence is defined as "substantial" for purposes of this standard of review if it is of ponderable legal significance, reasonable in nature, credible, and of solid value. (*Id.* at pp. 935-936.)

Appellants challenging a finding of fact under the substantial evidence standard bear the burden of demonstrating that the record does not contain sufficient evidence to sustain the challenged finding of fact. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) "In furtherance of its burden, the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. [Citation]." (*Ibid.*) In other words, the appellants are required to include in their brief all the material evidence on the point and not merely their own evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) California Rules of Court, rule 8.204(a)(2)(C), provides that an "appellant's opening brief must: [¶] ... [¶] [p]rovide a summary of the significant facts limited to matters in the record." The failure to meet these requirements results in the forfeiture of the claim of error. (*Foreman & Clark Corp., supra*, at p. 881; *In re S.C.* (2006) 138 Cal.App.4th 396, 414-415.)

***C. Agency is a question of fact reviewed for substantial evidence***

The parties' dispute concerning the applicable standard of review requires us to decide whether the trial court's determination that the Continental Defendants were buyers and not subagents is a finding of fact or a legal conclusion.

"The existence of an agency relationship is a factual question for the trier of fact, whose determination must be affirmed on appeal if supported by substantial evidence. [Citations]." (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.*

(2007) 148 Cal.App.4th 937, 965 (*Garlock*.) Based on this precedent, we conclude that the trial court made a finding of fact when it decided the Continental Defendants were buyers and were not part of an agency relationship. It follows that the substantial evidence standard of review applies to this finding.

Our application of the substantial evidence standard to this case produces two grounds for affirming the judgment in favor of the Continental Defendants. First, Mendoza's appellate briefing did not fairly summarize the evidence in the light most favorable to the judgment. The description of the evidence contained at pages 11 through 16 of Mendoza's opening brief takes the opposite approach—presenting evidence favorable to Mendoza's position and omitting evidence favorable to the judgment. In addition, Mendoza's presentation of the evidence was not corrected in a subsequent brief as Mendoza filed no reply brief. As a result, we conclude Mendoza has failed to carry the burden of demonstrating reversible error imposed on appellants who challenge the sufficiency of the evidence. The failure to carry the burden that results from failing to set out all material evidence on the point has been described as a waiver of the error (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881) or, more recently, as a forfeiture of the error (*In re S.C., supra*, 138 Cal.App.4th at pp. 414-415).

Second, the record contains substantial evidence that supports the finding that the Continental Defendants were buyers, not subagents. Under California law, the formation of an agency relationship is a bilateral matter—both the principal and the agent must manifest their consent to the creation of the relationship through words or conduct. (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571; see Rest.3d Agency, §§ 1.01, 1.03.) Whether someone who receives goods from another for resale to a third party is an agent for the purposes of resale or is a buyer, depends upon whether the parties agree that his or her duty is to act primarily for the benefit of the person delivering the goods to him or her or is to act primarily for his or her own benefit. (Rest.2d Agency, § 14J; see *Garlock, supra*, 148 Cal.App.4th at p. 965.) For instance, “if the person takes

the goods as the property of the principal, subject to the latter's control and right of recall, and the latter has the right to receive the *proceeds* when sold less the agent's *commission*, there is an agency. [Citations.]” (4 Witkin, Summary of Cal. Law (10th ed. 2005) Sales, § 2, p. 24.)

The testimony of the representatives of the Continental Defendants demonstrates that they did not consent to the creation of an agency or subagency relationship when they agreed with Rast to acquire the pomegranates in a price-after-sale transaction. For example, Robert Hamada, an employee of Custom Produce Sales located in Parlier, California, testified that he was familiar with fixed-price sales, consignments, and price-after-sale transactions. Hamada was aware that in a consignment arrangement his employer would handle the product for the account of the grower and would have a fiduciary duty to provide a detailed accounting of the sales. In contrast, in price-after-sale transactions, Hamada and his employer would not provide an accounting of sales. Hamada also testified that sometimes the price he paid in a price-after-sale transaction would be set before he sold all of the product, which would increase the risk involved in a price-after-sale transaction. Nothing in Hamada's testimony indicated that, when he and Rast entered a price-after-sale transaction, he was consenting to being a subagent with a duty to act primarily for the benefit of the grower.

Similarly, Mark Levin of M. Levin & Company, Inc., a fruit and vegetable wholesaler located in Philadelphia, testified about the difference between price-after-sale transactions and consignments. Levin estimated that between 25 and 35 percent of his business was done on a price-after-sale basis. Also, Levin dealt with only one shipper on a consignment basis at the time of his testimony. Levin testified that the documentation for consignments was different from that of sales, with consignments involving an accounting of sales. Levin indicated that the pomegranates came in on a price-after-sale basis. Nothing in his testimony about his dealings with John Rast regarding

pomegranates indicated that Levin was consenting to a consignment or to the formation of an agency relationship.

Based on our review of the testimony of the representatives of the Continental Defendants, we conclude that substantial evidence supports the finding that Continental Defendants were not subagents because the testimony shows that they did not consent (either through words or actions) to handling the pomegranates as subagents rather than as buyers.

## ***II. Damages awarded against Rast***

Mendoza's opening brief contends that the trial court erred in assessing damages against Rast on several levels. The asserted errors involve the trial court's (1) determination of the party responsible for shipping conditions, (2) allowing improper chargebacks, and (3) inconsistent use of criteria for determining damages.

Rast contends that Mendoza has not challenged the factual or legal basis for the trial court's conclusion that Rast had no liability for its handling of the 2001 crop and, therefore, any claims of error regarding the 2001 crop are abandoned. Rast also contends that the trial court's findings of fact relating to the damages question are supported by substantial evidence, and Mendoza's arguments have not demonstrated that the trial court committed legal error in determining the damages.

### ***A. Temperature and mixed-load damaged fruit***

The parties dispute who is responsible for damage to the pomegranates caused by being shipped at the wrong temperature or with incompatible products.

A publication by the United States Department of Agricultural (USDA) recommended 41 degrees Fahrenheit as the carrying temperature for pomegranates. Another USDA publication indicated that pomegranates are susceptible to chilling injuries below that temperature, which injuries can lead to rind pitting, brown discoloration, and increased susceptibility to decay.

Mixed-load incompatibility can involve products with different carrying temperatures or other incompatibility. For instance, sulfur dioxide is used on grapes to retard decay, but sulfur dioxide enhances damage in pomegranates.

Mendoza contends Rast should be liable for damages from improper shipping conditions and cites the referee's report for support. For example, the referee's discussion of Rast invoice No. 23291 stated:

“As the party contributing pomegranates to a mixed load, Rast was responsible for assuring that the various products were compatible as to recommended carrying conditions. In an FOB sale the buyer is responsible for any damages caused by abnormal transit conditions only when not caused or contributed to by the shipper. I find Rast was responsible for the condition problems, and therefore is liable to Mendoza for the original invoice amount of \$1,909.60.” (Fn. omitted.)

The trial court disagreed with the referee's determination that Rast was responsible for damages caused by the conditions under which the pomegranates were shipped. The court found: “Cold storage, as [Mendoza's] agent, would select the load temperature and determine how the mix of product was loaded.” Based on this finding, the court's damage calculations “deleted the transactions identified [by the referee's report] as temperature damaged fruit, because this was the fault of [Mendoza's] other agents, not Rast.”

Mendoza challenges the trial court's decision on the issue of damages related to shipping conditions by arguing it should not have been charged with the errors caused by the buyers or Rast in establishing the shipping conditions. Mendoza further argues that if an error was attributable to the trucker, whoever hired the trucker would have a claim against the trucker, but Mendoza should have been paid for its produce.

It is difficult to analyze Mendoza's challenge to the trial court's refusal to hold Rast liable for damages caused by shipping conditions because Mendoza's opening brief does not contain a legal theory explaining why the refusal was reversible error. (See *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 70 [burden rests on appellant “to

affirmatively demonstrate the error which it asserts”].) Ordinarily, an appellant begins its attempt to carry the burden of demonstrating reversible error by indentifying the type of error that occurred. For example, if an appellant is asserting that an error of fact occurred, it will argue the evidence was insufficient to support the trial court’s findings. Alternatively, if an appellant is asserting that an error of law occurred, it usually will argue that the trial court either (1) applied the wrong rule of law to the facts of the case or (2) misapplied the correct rule of law.

In this case, Mendoza contends that the errors in shipping conditions were caused by Rast but has ignored the explicit findings of the trial court that Mendoza’s other agents would select the load temperature and determine how the mix of product would be loaded. As a result, it is unclear whether Mendoza is claiming that substantial evidence does not support the trial court’s findings that (1) the cold storage facility was Mendoza’s agent or (2) the facility would select the load temperature and determine how the mix of product was loaded. Further, we cannot determine if Mendoza is claiming an error of law occurred because Mendoza has not expressly identified a rule of law that it contends is applicable and argued that the trial court applied a different rule or misapplied the correct rule.

It is well settled that a party challenging a judgment has the burden of showing reversible error by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) Here, Mendoza has failed to meet that burden because it has not identified the basis for the reversible error. Even if we assume that Mendoza is challenging the sufficiency of the evidence underlying the trial court’s findings that the cold storage facility, not Rast, was responsible for load mix and temperature, Mendoza still has failed in its “duty to fairly summarize all of the facts in the light most favorable to the judgment. [Citation].” (*Boeken v. Philip Morris, Inc., supra*, 127 Cal.App.4th at p. 1658.) Consequently, Mendoza is deemed to have forfeited any claim of error regarding the sufficiency of the evidence. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

Alternatively, if we assume that Mendoza is claiming that the trial court committed an error of law by applying the wrong legal principle or by misapplying the correct one, Mendoza still has not met its burden of showing reversible error. When an appellant asserts a point, “but fails to support it with reasoned argument and citations to authority, we treat the point as waived.” (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) The section of Mendoza’s opening brief that discusses shipping conditions does not cite any statutes, regulations, cases, or secondary authority and does not contain a reasoned argument to support the position that the trial court committed legal error in its treatment of the issues concerning shipping conditions. Therefore, we conclude Mendoza has failed to demonstrate that a prejudicial error occurred.

***B. Calculating damages in a price-after-sale transaction***

Under the heading “Improper Chargebacks to Grower” in its opening brief, Mendoza argues that its losses in price-after-sale transactions should have been calculated using the highest market value for the pomegranates.<sup>5</sup> Mendoza references the terms of the marketing agreement between Rast and Mendoza that authorized Rast to sell the pomegranates in price-after-sale transactions if “a better price is obtainable by selling [on that basis]” and argues that Rast either was required to show that the contractual

---

<sup>5</sup>Mendoza’s presentation of this claim of error under a heading addressing improper chargebacks violates the court rule requiring that an appellate brief “[s]tate each point under a separate heading or subheading summarizing the point ...” (Cal. Rules of Court, rule 8.204(a)(1)(B).) Violations of the rule may result in the reviewing court disregarding the argument not presented under an appropriate heading. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 542 [argument regarding exhaustion of administrative remedies improperly presented]; 5 Cal.Jur.3d (2007) Appellate Review, § 629, p. 184.) As a separate and alternate ground for resolving this issue, we conclude that Mendoza’s failure to comply with California Rules of Court, rule 8.204(a)(1)(B), resulted in a forfeiture of the argument that the trial court erred in using the wrong value for the produce when calculating damages.

condition was satisfied in each price-after-sale transaction or be held liable for the loss. Mendoza contends the loss is measured by the value of the produce at the time of delivery to and acceptance by the buyer and, in cases involving perishable product, this value is the highest value on the day of the event. Mendoza supports the use of highest value by citing Civil Code section 3336 and *Elliott v. Federated Fruit & Vegetable Growers* (1930) 108 Cal.App. 412. Mendoza further contends that the highest value can be determined from the Market News Report or the highest reported resale price for similar produce.

Mendoza's arguments raise the question whether California law provides for use of the highest market value in computing the damages for which Rast was liable. In *Elliott v. Federated Fruit & Vegetable Growers, supra*, 108 Cal.App. 412, the plaintiffs prevailed on their claim that the defendants converted plaintiffs' grapes. The appellate court affirmed the judgment, concluding that market reports showing sale prices and the testimony of two witnesses regarding market values on the dates the grapes were delivered were sufficient to establish the market value of the grapes at the time they were converted by the defendants. (*Id.* at p. 419.) The court cited the measure of damages for conversion of personal property set out in subdivision 1 of Civil Code section 3336, which, at that time, provided: "The value of the property at the time of the conversion with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the *highest market value of the property* at any time between conversion and the verdict, without interest, at the option of the injured party." (*Elliott v. Federated Fruit & Vegetable Growers, supra*, at pp. 418-419, italics added.)

The current version of Civil Code section 3336 provides that the "detriment caused by the wrongful conversion of personal property is presumed to be: [¶] ... [t]he value of the property at the time of the conversion ...." Since the statute now refers to the value of the property and not the highest market value of the property, we reject

Mendoza's position that California law required the trial court to calculate the damages using the highest value on the day of the event.

The trial court's statement of decision addressed Mendoza's damages by stating: "The question of what amount of money is required to bridge the gap between sales price and market turns on what is found to be 'market.'" We conclude that the use of market value as the price that Mendoza would have received if Rast had performed its duties is a legally correct way to calculate Mendoza's damages.

With respect to the trial court's finding of market value in the various transactions, that finding has not been shown to be erroneous. The court noted that the experts disagreed and that determinations of the market were not simple because of the many characteristics that affected the price of pomegranates. Ultimately, the trial court often used an average sales price calculated by the referee from the transactions not questioned by Mendoza. Since Mendoza has not challenged the use of this average sales price on the ground that it is not supported by substantial evidence and Mendoza's view of the law is incorrect, we conclude that Mendoza has not demonstrated that the trial court committed error by using the average sales price as the market value when it calculated damages.

Mendoza's contention that the trial court should have used prices from the USDA's Market News Report also fails to establish error because Mendoza has not challenged the trial court's express finding that the Market News Report was not an accurate, reliable basis for determining the actual market value of Mendoza's pomegranates. The court found the report did not cover all of the applicable time periods, was based on asking prices rather than actual sales, and did not account for quality, variety, age, or packing style. In light of these unchallenged findings, the trial court did not err in rejecting the prices contained in the Market News Report.

***C. Damages from Rast's allowing improper chargebacks***

Mendoza argues that Rast allowed chargebacks on sales where the risk of loss had passed to the buyer, and that by allowing those chargebacks Rast was not protecting the

best interests of its client. Mendoza's opening brief describes four transactions that it contends involved improper chargebacks.

### ***1. Chargebacks in 2001***

Three of the transactions involved invoices from 2001: (1) Rast's invoice No. 41358, dated August 28, 2001, concerning the sale of 88 boxes of pomegranates to Shin Produce; (2) Rast's invoice No. 11513, dated October 3, 2001, covering 320 boxes of pomegranates; and (3) Rast's invoice No. 31246, dated August 29, 2001, concerning the sale of 616 boxes of pomegranates.

The statement of decision includes a section labeled "Liability of Defendants for 2001 Crop." In that section, the court stated that Mendoza gave Britten full authority to handle the sale of its 2001 crop, including the authority to agree to fruit sales prices. Because Britten, as Mendoza's agent, knowingly agreed and accepted the prices reported by Rast, the court concluded that Mendoza's remedy was against Britten and not Rast.

Mendoza's failure to challenge the finding that Rast had no liability for transactions involving the 2001 crop appeal leads us to conclude that Mendoza cannot establish the trial court erred when it did not award damages for allegedly improper chargebacks allowed by Rast in 2001. (*Ballard v. Uribe, supra*, 41 Cal.3d at p. 574 [appellant has burden of showing reversible error].)

### ***2. Chargebacks in 2002***

The fourth transaction mentioned in Mendoza's opening brief occurred in 2002. Rast's invoice No. 23300, dated August 30, 2002, involves the F.O.B. sale of 352 boxes of Granada pomegranates to D. J. Forry Co. of Novato, California, for \$4,171.20. The pomegranates were dumped due to discoloration. Rast granted D. J. Forry Co. a credit for the purchase price.

The referee's amended report addressed the topic of Rast's allowing adjustments to 2002 invoices as follows:

“[Mendoza] submitted for consideration 13 invoices on which Rast granted reductions to its customers off of the original agreed FOB prices. Of these there are 11 (Invoices ... 23300 ...) where, applying the criteria laid out in my original report, I find the terms of the contract between Rast and Mendoza justified the allowances Rast granted its customers. Consequently, I find no further liability by Rast to Mendoza for these transactions.”

Mendoza’s February 2008 objections to the referee’s amended report did not include an objection to the referee’s treatment of the 13 invoices to which Rast made adjustments in 2002 or, more specifically, to his treatment of invoice No. 23300.

Mendoza’s January 2009 closing trial brief did not mention invoice No. 23300 or Rast’s adjustments or chargebacks to 2002 transactions. The brief, however, did include the general contention that Mendoza should be awarded damages for 2002 in the amount of \$122,936.57 in accordance with a summary of the damages calculated by its expert. The declaration of Darin T. Judd in support of Mendoza’s closing trial brief included as an exhibit a copy of the summary of damages calculated by Mendoza’s expert for the 2002 pomegranate crop with the referee’s corresponding damage figures. Line 26 of the summary for 2002 addressed invoice No. 23300 and indicated that the referee determined no damages should be awarded for that transaction while Mendoza’s expert calculated the damages at \$7,392.00. The summary also cross-referenced the page of the expert’s written analysis of the transaction. That analysis included the expert’s opinion that Rast sold to D. J. Forry Co. below market. (Mendoza’s expert concluded that the market price was \$21 per box, rather than the \$11.85 per box charged by Rast.) In addition, the expert opined that Rast and the buyer were responsible for not protecting the product from cold temperature during shipping.

Mendoza’s March 2010 trial brief did not mention invoice No. 23300 or, more generally, Rast’s allowance of chargebacks or adjustments to 2002 invoices. The brief did include (1) a general assertion that Rast failed in its responsibility to keep Mendoza

informed of market prices, quality of crops, or adjustments and (2) a request for the court to award the money damages reported by Mendoza's expert.

The trial court's 31-page intended decision did not address invoice No. 23300 or the claim involving chargebacks against invoices in 2002. In addition, the decision's discussion of Rast's breaches of duties mentioned no breach of duty resulting from Rast's allowance of improper adjustments or chargebacks.

Mendoza's June 2010 objections to the intended decision did not assert that it should have addressed whether Rast breached a duty to Mendoza by allowing improper chargebacks or adjustments in 2002. Mendoza's objections did assert that the court's damage figures were ambiguous because the court did not show how it arrived at those figures.

Mendoza's failure to object to the intended decision's failure to resolve whether Rast breached a duty to Mendoza by allowing improper chargebacks results in this court presuming that the trial court impliedly found that Rast did not breach any duty in allowing the chargebacks. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; Code Civ. Proc., § 634.) To establish error with respect to the 2002 invoices, including invoice No. 23300, Mendoza must demonstrate the implied finding that no breach occurred. To carry that burden, the law requires Mendoza to set out all evidence material to the implied finding of no breach. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) Since Mendoza's opening brief does not describe all of the material evidence, it follows that Mendoza has not demonstrated a reversible error involving improper chargebacks.

#### ***D. Inconsistency in damages calculations***

Mendoza contends that the trial court was inconsistent in using the criteria set by the court for damages. Mendoza contends that the trial court's use of the average sale price, as calculated by the referee, in computing the damages "effectively ignored the fact

that different varieties of pomegranates were produced by Mendoza and sold by Rast yet all varieties were effectively lumped together.”

**1. Damages for 2001**

Mendoza’s opening brief contends: “Inexplicably all of the 2001 damage determinations made by the referee were omitted from the court, even those where Rast admitted liability.” Mendoza lists 18 invoices involving 2001 transactions in which it contends Rast failed to meet its duties and yet the trial court awarded no damages.

As described earlier, the trial court found that Rast had no liability in connection with the 2001 crop. (See part II.C.1, *ante*.) The trial court’s determination of no liability explains why the court did not address damages regarding the 2001 crop. Since Mendoza has not acknowledged and challenged the underlying determination of no liability, we reject its contention that the trial court erred in not awarding damages in connection with transactions involving the 2001 crop.

**2. Damages for 2002**

Mendoza argues that the damages awarded for 2002 are suspect when compared to the trial court’s stated criteria for damages. Mendoza requests a remand so the trial court can correct the errors resulting from the misapplication of the standard the court adopted for assessing damages.

With respect to invoice No. 23420, Mendoza notes that the trial court awarded the same damages as the referee, and the referee’s assessment was based on a price from the Market News Report, a source disavowed by the trial court.<sup>6</sup> Mendoza also observes

---

<sup>6</sup>Invoice No. 23420 involved the sale of 88 boxes of pomegranates on price-after-sale terms. Rast and the buyer settled the price at \$0.75 per box. The referee stated there were insufficient sales of that size of fruit to calculate an average sales price and noted the price given in that week’s Market News Report for fruit of that size was \$9.85 per box. The referee determined Rast was liable for that price, less the amount billed and received, which came to \$800.80. The trial court held Rast liable for \$800.86.

that, for that transaction, “sales were insufficient to allow for the calculation of an average sales price.” This argument, which concedes the average sales price could not be calculated and used as the market value for calculating damages, fails to demonstrate how the court committed prejudicial error by determining the market value by an alternate method—a method used by the referee and agreed to by Rast.

With respect to invoice No. 23537, Mendoza asserts that the trial court awarded damages when the F.O.B. price was within both the price from the Market News Report and the average sales price. Unlike the trial court, the referee concluded no damages resulted from this transaction. The referee determined that the price obtained met his criteria with regard to average sales price and the prices in the Market News Report. In light of the referee’s determination of no damages and Mendoza’s failure to demonstrate how it was prejudiced by the trial court’s award of \$18.24 in damages, we conclude that Mendoza has failed to demonstrate that a reversible error occurred. (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601 [appellant must affirmatively show error and also show error is prejudicial].)

Similarly, Mendoza’s argument that the record does not include an invoice No. 23460, for which the court awarded \$125.28, fails to show how Mendoza was prejudiced by the award.<sup>7</sup>

---

<sup>7</sup>Rast contends the invoice number is a typographical error and the trial court meant to refer to invoice No. 23466. Rast settled the price at \$11.15 per box plus \$1.85 per box for precooling and palletization and the trial court award of damages of \$0.87 per box for 144 boxes based on the referee’s calculation that the average sales price for that size of pomegranate was \$12.02 per box.

**DISPOSITION**

The judgment is affirmed. Respondents shall recover their costs on appeal.

---

Wiseman, Acting P.J.

WE CONCUR:

---

Levy, J.

---

Detjen, J.