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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LARRY PHAN,

Plaintiff and Appellant,

v.

NAM NGUYEN et al.,

Defendants and Appellants.

G045214

(Super. Ct. No. 30-2008-00109645)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, B. Tam Nomoto Schumann, Judge. Affirmed.

Johnson, Poulson & Coons and Lynn O. Poulson for Plaintiff and Appellant.

Lee Tran & Liang APLC, K. Luan Tran and Daniel Taylor for Defendants and Appellants.

Nam “Michael” Nguyen (Michael), Diane Ai-Phuong Truong (Diane), Bao-Quoc Nguyen (Bao), and Saigon Communications, Inc. (Saigon TV) (sometimes collectively referred to as Defendants), appeal from a judgment in favor of Larry Phan Ngoc Tieu (Larry) in Larry’s action arising out of his sale of Saigon TV to Michael and Diane, and the eventual termination of his post-sale employment by Saigon TV.¹ They contend: (1) the damages awarded were excessive; (2) the parol evidence rule and statute of frauds preclude enforcement of the oral post-sale employment agreement; (3) an equitable claim—breach of fiduciary duty—was improperly submitted to the jury; and (4) the evidence is insufficient to support the special verdicts on the intentional infliction of emotional distress and negligence causes of action. We reject their contentions and affirm the judgment.

FACTS²

Larry, who was 75 years old at the time of trial, is a Vietnamese immigrant who after working as a Los Angeles County social worker for 25 years, retired in 2000. Before fleeing Vietnam in 1975, Larry aspired to be a filmmaker. In 2002, after retiring, Larry founded Saigon TV, a Vietnamese language television station. Although the incorporation documents authorized issuance of 10,000 shares of stock, upon Saigon TV’s incorporation, Larry was issued 1,000 shares of stock representing one hundred percent of the outstanding shares. Larry served as Saigon TV’s president and received a salary of \$4,000 a month.

¹ Ai Nguyen (Ai), Michael and Diane’s father, was also a defendant in this action, but there was no monetary judgment entered against him, and he is not a party to this appeal.

² In summarizing the facts, we view the evidence in favor of the judgment. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, abrogated on another ground as stated in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100.)

Saigon TV operated in a facility in Westminster under a 10-year lease that Larry personally guaranteed. Larry testified that by the end of 2003, Saigon TV was debt free and running profitably because although it showed a loss of \$56,000 for tax purposes, it still had \$218,133 in accounts receivable.

In late 2003, the station manager brought in Michael, ostensibly as a part-time assistant, but Michael quickly expressed an interest in buying the station with his sister, Diane, neither of whom had prior experience in operating a television station. A price was agreed upon: \$300,000 cash in addition to Larry retaining the rights to Saigon TV's accounts receivable at the time of sale (making the total consideration \$518,133), in exchange for all outstanding shares of Saigon TV.

After agreeing to the terms, Larry advised the property owner he was selling the station and retiring. The property owner indicated he did not want to do business with Michael and Diane, calling them "troublemakers," and he indicated he would probably increase the rent if Larry was out of the business. There was also an issue with the affiliate station over which Saigon TV broadcasted concerning the change in ownership. Larry conveyed that information back to Michael.

On February 18, 2004, Michael, Diane, and their attorney, Bao, arrived at the station with a stock purchase agreement (Stock Purchase Agreement). As agreed the Stock Purchase Agreement provided for Larry to sell his 1,000 shares of Saigon TV stock to Diane and Michael (700 shares to Diane and 300 shares to Michael) for \$300,000 cash in addition to Larry retaining the rights to Saigon TV's outstanding accounts receivable. Larry signed the Stock Purchase Agreement.

At the meeting, Bao explained to Larry they had come up with a solution to the change in ownership problems with the property owner and the affiliate station. If Larry would stay on as president of Saigon TV at his same salary of \$4,000 a month and remain on the lease as guarantor until 2012 (the original term), Michael and Diane would give back to Larry 10 percent ownership of Saigon TV. Larry agreed.

After executing the Stock Purchase Agreement, which contained none of the post sale terms, Larry immediately resigned as an officer and director of Saigon TV. Michael became chief operating officer of the company. Larry continued working for Saigon TV and was paid his regular salary in February 2004.

Michael subsequently asked Larry to defer \$2,500 of his salary, and accept a reduced salary of \$1,500 per month, until Saigon TV's cash flow improved. Larry agreed to the salary deferral. In reliance on the promises and statements of Michael that he would later be paid all his deferred salary, and the representations he would be receiving 10 percent of Saigon TV's outstanding stock, Larry continued to work full time as president of Saigon TV.

Larry asked Michael several times about when he would be getting a certificate for his 10 percent of the stock; Michael always told him they had been too busy to prepare one. Finally, on August 15, 2004, Michael delivered to Larry a Saigon TV stock certificate representing 100 shares of stock, which Michael told Larry was his 10 percent share of the company, and Larry was officially elected as president of Saigon TV by board members Michael, Diane, and Ai.

Unbeknownst to Larry, on August 1, 2004, Michael, Diane, and Ai had executed a written consent for action without a board meeting declaring a 10 for 1 stock dividend to Diane and Michael, increasing their holdings to 7,000 shares and 3,000 shares respectively, which diluted the 100 shares subsequently transferred to Larry to represent only 1 percent of the outstanding stock of Saigon TV instead of 10 percent.

A few months later, Larry asked Michael to confirm the value of his 100 shares. On February 15, 2005, Bao, as counsel for Saigon TV, wrote a letter to Larry stating, "Based upon the sale price of [Saigon TV] on February 18, 2004, the value of your [100] shares of common stock is equivalent to 10 percent of the value of the sale price of [Saigon TV]."

Larry was re-elected by the board of directors as president of Saigon TV for the next three years, the last time being on December 18, 2007. He continued working for the company and was never criticized or counseled that his performance was in any way deficient, until he was abruptly fired in January 2008.

Travis Vuong, who was general manager of Saigon TV in February 2004, confirmed it was Michael who initially expressed interest in buying the station from Larry. During the negotiations, Larry told Vuong about the problem with the property owner and Saigon TV's affiliate station not wanting to do business with Michael, and at Larry's request Vuong conveyed that information to Michael. Michael subsequently told Vuong he had come up with a solution to the problem, the very one Bao proposed to Larry when the Stock Purchase Agreement was signed, i.e., they would ask Larry to stay on as president and Michael and Diane would return to Larry 10 percent of the company. Vuong testified that after the sale closed, he remained on as general manager for another three months during which Larry continued to work at Saigon TV full time and acted as its president.

Tony Nguyen, another Saigon TV employee, testified that beginning the day after Larry sold the company to Michael, Larry continued to come to work every day. When Larry abruptly stopped coming to the station in January 2008, Tony asked Michael why. Michael replied it was because Larry "only has 10 percent share in the company, but he goes beyond the power of his percentage as a shareholder. That's why I had to let him go."

Not surprisingly, Defendants told a very different story about Larry's post sale employment by Saigon TV and how he obtained the 100 shares. Diane and Michael both testified at trial. Bao was not present at trial, but his testimony was presented via videotape, which has not been transcribed into the record. Diane and Michael testified Larry contacted them about buying the station from him because it was a financial burden and he wanted out. There was never any discussion about Larry remaining on after the

sale or getting 10 percent of the stock back. Bao did all the talking at the meeting at which the Stock Purchase Agreement was signed. Bao prepared all the documents relevant to this litigation, including the stock split.

Defendants claimed that after the station was sold to Diane and Michael, Larry stayed away for about a month, but then started hanging around the station and telling people he was still the owner. Diane felt sorry for Larry because he had delusions of grandeur. Bao told Diane and Michael to issue all authorized stock (i.e., the full 10,000 shares) to themselves. After they did so, Diane decided to give Larry the honorary title of president and a small gift of 100 of her 7,000 shares out of the goodness of her heart so he would not keep humiliating himself when he told people he still worked at and was an owner of the station. After the sale, Larry did work as an occasional consultant for \$1,500 a month, his monthly checks had “consulting fee” written on the notation line, and for tax purposes, they issued him annual form 1099s for non-employee compensation.

On January 15, 2008, Larry was terminated from Saigon TV. His firing was done by way of a cryptic letter from Michael that Larry found taped to his office door, stating, “Given recent events, we would like to terminate your employment (and engagement) with [Saigon TV], effective as of today.” Larry went to Michael and asked for an explanation but was told to have his lawyer contact Saigon TV’s lawyer.

Larry left the Saigon TV offices in a state of shock and emotional distress leaving behind personal belongings including his diabetes medication, insulin, he kept in his office for required daily injections. The next day there was a television broadcast announcing Larry was no longer at Saigon TV, which Larry found very shameful. When Larry returned to the offices over the weekend to retrieve his insulin and personal belongings, he found the locks had been changed and he could not get inside. Michael was there but would not let Larry in.

Saigon TV's legal counsel, Bao, would not allow Larry into Saigon TV's premises until several days later at 5:30 p.m. on January 23, 2008. When Larry arrived it was dark and raining. Larry was met at the entrance by an armed security guard, who physically searched Larry before letting him inside to retrieve his medication and belongings. Larry was upset and humiliated and did not want to permit the guard to touch him, but Larry needed his medication so he allowed the search.

There was also a videographer present, Vince Pham, who had been directed by Michael to film Larry the entire time he was in the offices. Pham did as he was told, although Larry objected and was very upset about being videotaped. Pham followed Larry around and filmed him for the entire visit, which lasted about 30 minutes. Michael took the tape from Pham afterwards.

Larry retrieved his insulin and some personal belongings from his office and was preparing to leave, but he suffers bladder control problems, and suddenly had an urgent need to use the restroom. The security guard blocked him from entering the restroom, sending him out the front door into the rain. Larry was so disoriented, upset, and distressed that he could not drive and he urinated all over himself. Distraught, he called his wife, who is disabled and does not drive, and then called a friend, who picked him up and drove him home. Larry's wife cleaned him up and got him into bed—he was in shock and very distressed.

The videotape taken by Pham was played for the jury during Pham's testimony. Pham testified the tape had been heavily edited (from the original 30 minutes down to between 10 to 15 minutes), and all the audio had been removed, by whom Pham did not know. Pham testified Larry had objected to being videotaped. Pham confirmed the security guard had searched Larry when he arrived and Larry was very upset about being searched. Pham also confirmed that Larry asked to use the restroom, and the security guard refused and made him leave the premises. All that had been edited out of the videotape.

The next day, on January 24, 2008, a local Vietnamese language magazine called “Viet Weekly” published an interview with Michael who stated the Saigon TV’s board of directors fired Larry because of “personal behavior and action[s] that harmed the station.” Larry testified the publication caused him further shock and emotional distress.

Since January 25, 2008, Larry was under the regular care of a Kaiser Permanente psychiatrist for depression. He saw the psychiatrist once a month and a therapist every two weeks, and he received regular medication for depression. He withdrew from his previously extensive community service activities and was unable to work, despite receiving some offers of employment. A board certified psychiatrist testified at trial that Larry suffers from a “Major Depressive Disorder” since the events of January 2008 and he “never had a major depression before.” The value of medical services provided by Kaiser was not less than \$27,500.

Hanh Truong, a psychotherapist, testified about Vietnamese culture. He testified about the role of respect, integrity, reputation, and “saving face” in Vietnamese culture. He explained about the complicated social customs regarding acceptable treatment of elders and showing them respect. He explained that being told you were “fired” was a tremendous attack on a person and publishing an article saying a person had been fired would impose great trauma on the person. This was particularly true for someone like Larry who had a very traumatic background as a Vietnam war refugee. From a cultural and clinical point of view, the events that occurred in Larry’s firing would have been “really detrimental to his personal and social status” Truong explained the special status afforded older people in Vietnamese culture, and Defendants’ treatment of Larry went beyond the bounds of decent treatment for an elderly person, particularly someone like Larry who had been so highly recognized in the Vietnamese community over the years.

PROCEDURAL FACTS

Larry's third amended complaint contained 14 causes of action, seven of which went to a jury trial. As to Michael, Diane, and Saigon TV, the causes of action included wrongful termination (1st cause of action); breach of the implied covenant of good faith and fair dealing (5th cause of action); defamation (9th cause of action); and intentional infliction of emotional distress (10th cause of action). Trial was also had on causes of action for breach of fiduciary duty (4th cause of action) against Michael and Diane; intentional misrepresentation/fraud (6th cause of action) against Michael, Diane, Saigon TV, and Bao; and negligence (12th cause of action) against Bao alone.³ After the trial court granted nonsuit on Larry's wrongful termination case of action, the case was submitted to the jury, which returned special verdicts in favor of Larry on the remaining causes of action. Motions for judgment notwithstanding the verdict and for new trial were denied.

The special verdicts and subsequent judgment awarded Larry the following amounts against the following defendants: (1) breach of fiduciary duty against Michael and Diane jointly and separately \$65,000; (2) breach of the implied covenant of good faith and fair dealing against Saigon TV \$113,548, plus prejudgment interest from the date Larry was fired; (3) intentional misrepresentation/fraud against Michael, Diane and Bao jointly and separately \$36,000; (4) defamation against Michael \$50,000 individually and separately, and \$22,000 against Saigon TV individually and separately (i.e., \$72,000 total); (5) intentional infliction of emotional distress against Michael, Diane, and Saigon TV individually and separately \$33,950 (i.e., \$101,850 total); and (6) negligence

³ The complaint also contained other equitable causes of action, e.g. declaratory relief and specific performance, which were deferred for subsequent disposition by the court if necessary, and ultimately dismissed as moot. It also contained causes of action for contribution and indemnification, which along with a cross-complaint were sent to arbitration before trial, and on which the arbitrator awarded no relief. None are at issue in this appeal.

against Bao \$83,950. The total award was for \$472,348. Larry was also awarded costs of \$29,132.90.

DISCUSSION

1. Excessive Damages

Defendants contend the damages are excessive, appear to overlap on various causes of action, and there is no “rhyme or reason” to the jury’s apportionment of damages between the causes of action, thus possibly giving Larry a double recovery. We reject their contentions.

The judgment awarded separate damages to Larry on each of the specified causes of action. The case had been submitted to the jury with numerous lengthy special verdict forms—one for each cause of action and on the intentional infliction of emotional distress cause of action, one for each defendant. Each special verdict form asked the jury to answer questions predicate to finding liability for that cause of action and also asked the jury to designate the damages for that particular cause of action. It is not clear who prepared the special verdict forms, and Defendants did not raise any objections to them.

The special verdict forms awarded Larry a total of \$217,548 in economic damages; \$182,800 in noneconomic damages; and \$72,000 in “assumed damages” for defamation broken down as follows: (1) breach of fiduciary duty against Michael and Diane jointly and separately \$27,000 for past economic damages (“lost profits”) and \$38,000 for past non-economic damages (pain and suffering) ; (2) breach of the implied covenant of good faith and fair dealing against Saigon TV \$70,000 past economic damages and \$43,548 in future economic damages; (3) intentional misrepresentation/fraud against Michael, Diane, and Boa jointly and separately \$27,000 for past economic damages and \$9,000 for past non-economic damages (pain and suffering); (4) defamation against Michael \$50,000 for “assumed damages” (i.e., damages to reputation) and against Saigon TV \$22,000 for assumed damages; (5) intentional infliction of emotional distress Michael, Diane, and Saigon TV

individually and separately \$32,125 for past non-economic damages (pain and suffering) and \$1,825 for future non-economic damages (pain and suffering); and (6) negligence against Bao \$50,000 for past economic damages (“other”), \$32,125 for past non-economic damages (pain and suffering), and \$1,825 for future non-economic damages (pain and suffering).

Defendants may not contend for the first time on appeal that the damage award was excessive. “A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court. [Citation.] The power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. [Citation.] Thus, a party who first challenges the damage award on appeal, without a motion for a new trial, unnecessarily burdens the appellate court with issues that can and should be resolved at the trial level. [Citation.] Consequently, if ascertainment of the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions, the award may not be challenged for inadequacy or excessiveness for the first time on appeal. [Citation.]” (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719-720.)

Here, although Michael, Diane, and Saigon TV filed a new trial motion (Bao did not move for new trial), the motion did not assert excessive damages as a ground. They cannot raise on appeal issues that could and should have been resolved in the trial court.

We invited supplemental briefing on this point. Defendants replied that they had raised excessive and overlapping damages in their new trial motion. They point to a passing comment in their written motion concerning sufficiency of evidence for intentional infliction of emotional distress in which after arguing there was no evidence of outrageous conduct, they added that “[f]urthermore” because the jury “found liability against [Michael] and [Saigon TV], for defamation . . . [Larry] is essentially getting a

double recovery” And they point to the trial court’s on the record rejection of this passing point, saying the two causes of action involved “different primary rights.”

That hardly suffices to preserve the issue. Indeed, we note that on appeal, although Defendants are ostensibly attacking the entire judgment as excessive, their brief only attempts to analyze the economic damage award. They make no cogent arguments regarding the non-economic damages and the damages awarded for defamation other than the same single passing sentence unsupported by any analysis stating the damages for defamation and intentional infliction of emotional distress “overlap.”

Even were we to conclude Defendant’s excessive damage argument is not waived due to their failure to move for a new trial on this ground, we would still reject it on appeal. First and foremost, as to non-economic damages and assumed damages for defamation, Defendants’ total failure to meaningfully analyze those damages or to cite any law supporting the claim they overlap, waives the issue on appeal.

As to economic damages, Defendants argue there were only two categories of economic damages suggested by Larry: (1) his lost wages; and (2) the value of the Saigon TV stock transferred to Larry. Defendants essentially concede Larry presented evidence he suffered \$239,000 in past economic losses related to wages (i.e., the difference between the \$4,000 a month he was promised and the \$1,500 a month he was paid until his termination, plus \$4,000 a month from his firing until trial), and \$98,973 in future economic losses (i.e., \$4,000 a month from trial until 2012, when the lease guaranty would terminate). Additionally, they concede there was evidence that had the 100 shares of Saigon TV given to Larry in fact represented 10 percent of the value of the company when sold to Michael and Diane, the shares would have been worth about \$52,000. They ignore there was also evidence of Larry’s medical damages: A medical expert testified he would recommend that if Larry did not snap out of his intense depression, he undergo electroshock therapy that would cost between \$30,000 and

\$50,000, and he indicated the psychiatric services Larry had already received were valued at several thousand dollars.

Defendants complain it is likely the jury awarded the same economic damages for each of the two damage components (lost wages and stock value) on each cause of action in which economic damages were awarded (breach of fiduciary duty, implied covenant of good faith and fair dealing, fraud, and negligence). In *Tavaglione v. Billings* (1993) 4 Cal.4th 1150 (*Tavaglione*), our Supreme Court explained that “[r]egardless of the nature and number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. [Citation.]” (*Id.* at pp. 1158–1159.)

However, in explaining the application of the rule, our Supreme Court went on to state: “Thus, for example, in a case in which the plaintiff’s only item of damage was loss of commissions, two awards of damages identical in amount—one for breach of contract and the other for bad faith denial of the same contract—could not be added together in computing the judgment. Plaintiff was entitled to only *one* of the awards. [Citations.] [¶] In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories. (See *Pat Rose Associates v. Coombe* (1990) 225 Cal.App.3d 9, 20 [*Pat Rose Associates*]), disapproved on other grounds in *Adams v. Murakami* (1991) 54 Cal.3d 105, 116 [recovery of sum of (1) out-of-pocket loss recovered under fraud theory and (2) lost profits damages recovered under contract theory permissible where damage items were distinct and entire amount of injury was compensable under fraud theory in any event].)” (*Tavaglione, supra*, 4 Cal.4th at p. 1159.)

Here, there were multiple items of economic damage and multiple causes of action. Defendants did not object to the case being submitted to the jury on special verdict forms that invited the jury to separately award economic damages on each cause of action. The jury awarded economic damages on four causes of action in varying amounts. The total economic damage award was \$217,548, whereas Larry presented evidence that could have justified an award of over \$300,000. Defendants have not demonstrated the jury awarded the same damages on each cause of action as opposed to different damages on each.

2. *Enforceability of Oral Agreement: Parol Evidence Rule*

Defendants contend the jury's finding an oral agreement existed between Larry and Michael, Diane, and Saigon TV, concerning his post-sale employment by Saigon TV and/or to reconvey a 10 percent interest in Saigon TV as consideration for that employment, violates the parol evidence rule. They contend the Stock Purchase Agreement was a fully integrated writing and evidence of the terms of the oral agreement could not be used to vary or contradict its terms. We reject their contention.

“The parol evidence rule is codified in Civil Code section 1625 and Code of Civil Procedure section 1856. [Citation.] It ‘generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument.’ [Citation.] The rule does not, however, prohibit the introduction of extrinsic evidence ‘to explain the meaning of a written contract . . . [if] the meaning urged is one to which the written contract terms are reasonably susceptible.’ [Citation.] [¶] Although the rule results in the exclusion of evidence, it ‘is not a rule of evidence *but is one of substantive law.*’ [Citation.]” (*Casa Herrera, Inc v. Beydown* (2004) 32 Cal.4th 336, 343, fns. omitted (*Casa Hererra*)).

“Unlike traditional rules of evidence, the parol evidence rule ‘does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to

contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the “integration”), *becomes the contract of the parties*. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement.’ [Citation.] Thus, ‘[u]nder [the] rule[,] the act of executing a written contract . . . *supersedes* all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.’ [Citation.] And ‘[e]xtrinsic evidence cannot be admitted to prove what the agreement was, not for any of the usual reasons for exclusion of evidence, but because as a matter of law the agreement is the writing itself. [Citation.]’ [Citation.] ‘Such evidence is legally irrelevant and cannot support a judgment.’ [Citation.]” (*Casa Herrera, supra*, 32 Cal.4th at p. 344.)

“The parol evidence rule therefore establishes that the terms contained in an integrated written agreement may not be contradicted by prior or contemporaneous agreements. In doing so, the rule necessarily bars consideration of extrinsic evidence of prior or contemporaneous negotiations or agreements at variance with the written agreement. ‘[A]s a matter of substantive law such evidence cannot serve to create or alter the obligations under the instrument.’ [Citation.] In other words, the evidentiary consequences of the rule follow from its substantive component—which establishes, as a matter of law, the enforceable and incontrovertible terms of an integrated written agreement.” (*Casa Herrera, supra*, 32 Cal.4th at p. 344.)

The parol evidence rule is not implicated in this case. Evidence of the oral agreement was not introduced to vary the terms of the Stock Purchase Agreement. The Stock Purchase Agreement dealt with the sale of Saigon TV to Michael and Diane and did not concern Larry’s post-sale employment by Saigon TV. Larry was paid and Larry conveyed his entire interest in Saigon TV to Michael and Diane in accordance with the Stock Purchase Agreement. The oral agreement was a separate agreement—the solution to objections by both the property owner and the affiliate station to doing business with

Michael and Diane. Although it was proposed to Larry by Bao at the time he signed the Stock Purchase Agreement, it did not vary the terms of the Stock Purchase Agreement.⁴ The oral agreement was that Larry would work for Saigon TV and continue to act as guarantor on the lease until it expired in exchange for his salary and receiving 10 percent ownership of the company. “The oral agreement was a second agreement that followed the first written agreement which was fully performed. There is nothing unusual or sinister in the fact they were entered into contemporaneously.” (*Girard v. Ball* (1981) 125 Cal.App.3d 772, 785.)

3. *Enforceability of Oral Agreement: Statute of Frauds*

Defendants also contend the oral employment agreement between Larry and Saigon TV violated the statute of frauds and, thus, the jury verdict on the breach of the implied covenant of good faith and fair dealing cause of action is not supported by substantial evidence. They argue the oral agreement, made in 2004, contemplated Larry’s being employed by Saigon TV until the lease guaranty expired in 2012, and therefore it could not be performed within a year and was unenforceable. We reject the contention.

The statute of frauds was listed in Defendants’ answer as one of 45 separately stated affirmative defenses. The jury was given Defendants’ special instruction number 5 that if it found there was an oral agreement Larry would receive 10 percent of Saigon TV’s outstanding stock in exchange for his being president for the remaining term of the lease, and it also found that agreement could not be performed within one year, then the agreement was not valid unless it was in writing.

⁴ Defendants’ suggestion paragraph 3.8(e) of the Stock Purchase Agreement prohibits an oral employment agreement is without merit. That section contains Larry’s representation as seller of Saigon TV’s outstanding stock that at the time the Stock Purchase Agreement was executed Saigon TV was not a party to any employment agreement. It has no bearing on whether such an agreement could be entered into.

Defendants have not demonstrated the jury's apparent rejection of their statute of frauds affirmative defense is unsupported by substantial evidence. Under the statute of frauds, a contract that by its terms is not to be performed within one year of its making is invalid unless it is "in writing and subscribed by the party to be charged or by the party's agent[.]" (Civ. Code, § 1624, subd. (a)(1).) A contract will come within the purview of this section only if by its terms *it cannot possibly* be performed, or the contract expressly precludes performance, within one year. (*White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 343, fn. 2 [“there must not be the slightest possibility that [the agreement] can be fully performed within one year’ [italics omitted]”]; *Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, 1041-1042.) Thus, “[a] promise which is not likely to be performed within a year, and which in fact is not performed within a year, is not within the [s]tatute if at the time the contract is made there is a possibility in law and in fact that full performance such as the parties intended may be completed before the expiration of a year.” (*Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 281.)

Defendants have not demonstrated that as a matter of law the oral employment agreement could not possibly have been performed in less than one year. Larry might have passed away, voluntarily retired, or resigned (see *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 671–675), or the lease could have been terminated for any number of reasons including nonpayment of rent, destruction of the premises, or eminent domain, any of which could have ended Larry's employment.

4. *Breach of Fiduciary Duty Cause of Action*

Defendants contend Larry was not entitled to a jury trial on his breach of fiduciary duty cause of action because it is an equitable cause of action. They argue the trial court erred by allowing the cause of action to be submitted to the jury for determination and should have treated the jury's special verdict as advisory. We reject their contention.

The parties' joint jury instructions included an instruction on breach of fiduciary duty and a special verdict form was submitted to the jury allowing it to decide the cause of action. Defendants did not object to the special verdict forms or to the breach of fiduciary duty cause of action being submitted to the jury; there is nothing indicating they requested the breach of fiduciary duty cause of action be tried first before the court or that an advisory jury be assembled. After the jury returned its special verdict in Larry's favor, Defendants filed a motion for judgment notwithstanding the verdict for the reason, among others, that because breach of fiduciary duty is an equitable cause of action, it should not have been submitted to the jury.

In denying the motion for judgment notwithstanding the verdict, the trial court noted Defendants' objection was waived because they consented to the matter being submitted to the jury by not objecting to the jury instructions or special verdict form. The trial court also concluded that although the cause of action was equitable, the factual issues it raised were intertwined with the factual issues raised in the legal causes of action, raised questions of fact and credibility that were properly submitted to the jury, and it would not interfere with the jury's findings.

Defendants have shown no reversible error. Defendants are correct that a plaintiff is not generally entitled to a jury trial on equitable issues (*A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 474), and an action for breach of fiduciary duty is generally considered to be an equitable cause of action (*Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546, 1555; *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 863-865.) But as Larry points out the "gist" of his action was legal and he sought only money damages for breach of fiduciary duty. (See *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 9 ["jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law"].) Where a party seeks and receives money damages as its only remedy, the "gist" of the claim is legal in nature even when equitable principles are

applied. (*Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 728 (*Lectrodryer*) [assertion that unjust enrichment claim seeking money damages should have been tried to court because it required application of equitable principles was “unavailing”]; see also *Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 912.)

For example, in *Mortimer v. Loynes* (1946) 74 Cal.App.2d 160, 168, plaintiff sought to recover from defendant secret profits defendant obtained in breach of fiduciary duties. The court found the action was legal in nature even though defendant’s conduct was measured by equitable standards: “From the fact that equitable principles are thus used to establish the alleged liability of the defendants, it does not necessarily follow that the action to enforce that liability is equitable. The law courts now recognize and apply many equitable principles and grant relief based thereon where, as here, legal relief is sought in the form of a judgment for a specific amount. [Citation.] None of the extraordinary powers of a court of equity are required in order to give plaintiff the relief that he seeks. A court of law can afford complete relief. It is thus apparent that this action is one at law.” (See also *Ripling v. Superior Court* (1952) 112 Cal.App.2d 399, 408 [“[i]t is only where the issues to be tried are exclusively equitable in nature that a suitor is deprived of the right to a jury trial”].) Accordingly, Larry had a right to a jury trial on the breach of fiduciary duty cause of action and the trial court was not required to treat its verdict as merely advisory. (*Lectrodryer, supra*, 77 Cal.App.4th at p. 728.)

Furthermore, even were we to agree Larry had no right to a jury trial on the breach of fiduciary duty cause of action, Defendants implicitly agreed to submitting the cause of action to the jury. They raised no objections to the jury being instructed and given a special verdict form asking it to resolve the cause of action and allowing it to award damages on the cause of action; they raised no objection to the matter going to the jury and made no request to bifurcate that cause of action, even though the complaint contained *other* equitable causes of action (e.g., declaratory relief and specific performance), that were bifurcated for court trial. It was not until after the jury returned

its special verdict against Defendants that they raised their claim the jury should not have been permitted to consider the cause of action in the first place. (See, e.g., *Taylor v. Union Pac. R.R. Corp.* (1976) 16 Cal.3d 893, 896, 899-901 [in reverse situation, court held “a party cannot without objection try his case before a court without a jury, lose it and then complain that it was not tried by jury. . . . ‘Defendants cannot play “Heads I win. Tails you lose” with the trial court’ .]) And as the trial court concluded, the factual issues presented by the breach of fiduciary duty cause of action were common to other legal causes of action—namely Larry’s assertion he was promised 10 percent of the outstanding stock (which at the time of the company’s sale was 1,000 shares), but that prior to delivering the stock back to him, Defendants declared a 10-1 stock dividend diluting the 100 shares to only one percent of the outstanding stock. Once the jury tried the legal causes of action, the trial court was bound by its factual findings. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 155-156 [in bifurcated trial, judge bound by jury’s prior factual determinations on common issues of fact]; Wegner et al., *Cal. Practice Guide: Civil Trials and Evidence* (The Rutter Group 2011) ¶ 2:166, p. 2-35 [when legal issues tried first, trial judge cannot ignore jury’s verdict and grant relief inconsistent with jury’s findings].)

5. Intentional Infliction of Emotional Distress

Defendants contend there is insufficient evidence to support the jury’s special verdict against Michael, Diane, and Saigon TV on Larry’s intentional infliction of emotional distress cause of action. We reject the contention.

The elements of a cause of action for intentional infliction of emotional distress are: ““(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct. . . .’ Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a

civilized community.” [Citation.]” (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.)

Defendants attack only the first element of the tort. They contend there is no substantial evidence supporting a finding their conduct was extreme and outrageous because, “The only facts established in this trial are that [Larry] was terminated (for just cause), [Larry’s] return visit to the premises was videotaped, there was a security guard posted at the premises during the return visit, [Larry’s] termination was broadcasted through a TV announcement, and there was an article which claimed that [Larry’s] conduct was harmful to the Saigon TV.”

We review jury’s findings “in accordance with the customary rules of appellate review. We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value. [Citations.]” (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.)

Defendants’ opening brief violates fundamental rules of appellate procedure in its complete failure to fairly recite the facts or to set forth all of the material evidence that supports the special verdict on the intentional infliction of emotional distress cause of action. (See Cal. Rules of Court, rule 8.204(a)(2).) “[A]n attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent. [Citation.]” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; see also *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [when appellant’s opening brief states only favorable facts, ignoring evidence favorable to respondent, court has discretion to treat substantial evidence issue as waived], *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97 [where appellant did not faithfully recite facts and skewed the facts in appellant’s favor, court deemed all of appellant’s evidentiary arguments waived].)

We conclude Defendants have waived their substantial evidence argument.⁵ Defendants' opening brief does not recite most of the facts that support the judgment, and unfairly skews the facts it does mention in Defendants' favor. Here are some notable examples. Defendants state as a fact that Saigon TV was losing money by the end of 2003 and because of its ongoing financial burden, Larry started looking for investors and approached them. They do not mention any of Larry's testimony the station was profitable by the end of 2003, and Michael and Diane approached him about investing. Defendants assert the only evidence was that after the sale of the station was complete, Larry was "invited" to consult on a part time basis; eventually Diane "invited" Larry to take the title of president; Diane gave Larry 100 shares of stock as a gift (out of the kindness of her heart); and there was no evidence there was any consideration for the gift of the shares. They simply do not mention evidence that at the time of the sale there were problems with both the property owner and the affiliate station both of whom were reluctant to do future business with Michael and Diane; that to avoid renegotiation of the lease and a substantial increase in rent, they asked Larry to remain on as president at his same salary of \$4,000 a month, and promised to give him back 10 percent of the

⁵ Larry's respondent's brief suggests a different waiver argument applicable to this and several other issues Defendants raised. Defendants proceeded by way of an appellant's appendix (Cal. Rules of Court, rule 8.124), in which they did not include any of the jury instructions or special verdict forms. Larry suggests the absence of the jury instructions or special verdict forms limits our review, citing the familiar rule that an appellate court "review[s] the sufficiency of the evidence to support a verdict under the law stated in the instructions given, rather than under some other law on which the jury was not instructed. [Citation.]" (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 674-675.) Larry filed a respondent's appendix which included additional documents, but not the jury instructions or special verdict forms. (See Cal. Rules of Court, rule 8.124(b)(5) [respondent's appendix may contain any document that could have been included in the appellant's appendix].) Defendants then filed a reply appendix containing the jury instructions and special verdict forms. (Cal. Rules of Court, rule 8.124(b)(6) [appellant's reply appendix may contain any document that could have been included in the respondent's appendix].) Because the instructions and verdict forms are properly before us, we need not consider Larry's point further.

outstanding shares of Saigon TV if he continued to act as lease guarantor until the original lease term expired in 2012.

The Defendants do not mention evidence that immediately before transferring the 100 shares of stock to Larry, they approved a 10 to 1 stock split resulting in the 100 shares representing only one percent of the outstanding stock (not the 10 percent Larry was promised) and that when Larry ask for confirmation of the stock's value, he was told the 100 shares were worth 10 percent of the original sale price of Saigon TV. Defendants state the only evidence is that Larry was terminated for cause after numerous disagreements about running the station. They do not cite any of Larry's testimony that there was no explanation given for his termination, he had never been told his performance was deficient, and he was repeatedly reelected by Defendants as president of Saigon TV. Defendants state the only evidence is that when Larry came back several days later to retrieve his personal belongings an *unarmed* security guard and videographer escorted him. They simply ignore evidence Larry needed to get back into the premises to retrieve his insulin, and had been denied earlier access by Michael; the security guard was *armed*, he subjected Larry to physical search over Larry's objection, the videographer followed Larry and taped his every move for the entire 30 minute visit over Larry's objection, the security guard refused Larry access to the bathroom (resulting in Larry urinating all over himself), or that the videotape which was immediately turned over to Michael had been badly edited to remove all sound and all images of Larry's search or objections to his treatment. Defendants state the only evidence is that after Larry's firing they made a short televised announcement and there was a newspaper article about his termination. They make no mention of the comments in both, alluding to misconduct by Larry, and do not mention any of the expert testimony concerning the cultural impact of such public humiliation of an elderly Vietnamese man. Because Defendants have simply ignored any of the above evidence in their brief, needless to say, they have engaged in no reasoned analysis of whether it is sufficient to support a

judgment against them. For this reason, we conclude their substantial evidence argument is waived.

6. Negligence

Bao contends there is insufficient evidence to support the jury verdict against him on the negligence cause of action because he owed no professional duty to Larry, who was not his client. His contention is waived because he has failed to provide a complete record.

“The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion.” (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.) Thus, “there can be no [negligence] liability unless defendant owed a *duty* to plaintiffs to avoid the asserted wrongdoings. Whether such a duty existed is a question of law and depends on a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances.” (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 342 (*Goodman*)). In other words, although duty is a question of law, it is a question of law that must be decided based on the facts of the particular case.⁶ The rule is no different in the professional negligence context. Although as a general matter, an attorney has no obligation to a nonclient, there are exceptions including when “the nonclient was an intended beneficiary of the attorney’s services, or where it was reasonably foreseeable

⁶ “The determination whether in *a specific case* the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.” (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650, italics added; accord *Bily, supra*, 3 Cal.4th at p. 397; *Goodman, supra*, 18 Cal.3d at pp. 343-344.)

that negligent service or advice to or on behalf of the client could cause harm to others.”
(*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 960.)

In this case, Bao was not present at trial (apparently he moved to Vietnam by the time of trial), but his testimony was presented via videotape. The videotape was not transcribed into the record, and accordingly we have no record of Bao’s trial testimony. It is an appellant’s responsibility to include in the appellate record the portions of the reporter’s transcript relevant to the appellant’s issues on appeal. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1002.) A record is inadequate and appellant defaults, if the appellant predicates error only on part of the record but ignores or does not present to the appellate court the portions of the proceedings in the trial court which may provide grounds upon which the decision of the trial court could be affirmed. (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)⁷

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

O’LEARY, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.

⁷ Larry filed a cross-appeal challenging the trial court’s order granting nonsuit on his wrongful termination cause of action, which he argues we need consider only if we reverse the judgment. Because we affirm the judgment in its entirety, we need not address the cross-appeal.