

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANNY CAVIC et al.,

Plaintiffs and Appellants,

v.

WREC LIDO VENTURE, LLC,

Defendant and Respondent.

G045611

(Super. Ct. No. 30-2008-00110288)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Hugh Michael Brenner, Judge (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), David T. McEachen, and Franz E. Miller, Judges. Affirmed.

Kring & Chung, Kenneth W. Chung, and Roland J. Amundsen for Plaintiffs and Appellants.

Pircher, Nichols & Meeks, Jeffrey N. Brown, and S. Giselle Roohparvar for Defendant and Respondent.

There have been three trials involving Nevada Atlantic Corporation's (Nevada Atlantic) contract dispute with WREC Lido Venture, LLC (WREC). The first trial was resolved in WREC's favor by this court in *Nevada Atlantic Corp. v. WREC Lido Venture, LLC* (Dec. 2, 2008, G039825) [nonpub. opn.]. This appeal concerns the second trial, which ended in a mistrial, and a third trial, which was resolved by a nonsuit motion granted in WREC's favor. On appeal, Nevada Atlantic, and its shareholder Danny Cavic, raise three issues that relate to rulings entered immediately before the third trial, and because we conclude the mistrial was erroneously granted, we conclude any purported error was harmless. The appellants also claim the court erred in granting the nonsuit, but they do not challenge the reasons the court gave for granting the motion. Instead, they contend the court should have allowed a new theory of damages to be considered by the jury. However, given their total failure to provide any legal citations or reasoned analysis on whether there was error in failing to reopen the case in chief or whether the error was prejudicial, we deem the issue waived. The judgment is affirmed.

I

The parties' predecessors in interest signed a lease in November 1985 for waterfront property used as George's Camelot Restaurant on Lido Marina in Newport Beach. Nevada Atlantic acquired the lease and the restaurant in 2001. WREC is the landlord.

In 2006, Nevada Atlantic agreed to sell the lease and restaurant to a third party and applied to WREC for consent to the assignment. WREC refused to consent and the sale fell through. In November 2007, WREC terminated Nevada Atlantic's lease pursuant to an unlawful detainer action.

Nevada Atlantic filed a lawsuit against WREC raising both equitable and legal claims. The first cause of action sought a judicial declaration that WREC give its consent, or in the alternative, show denial of consent was a reasonable business decision. The second cause of action alleged interference with prospective economic advantage.

Before trial, WREC moved to sever the legal and equitable claims. It requested the trial court rule on the equitable claims first. Over Nevada Atlantic's opposition, the court granted the motion. The parties agreed two issues would be tried by the court: (1) whether WREC had the right to refuse consent to the proposed assignment for any reason or no reason; and (2) assuming it did not, whether its refusal to consent was unreasonable.

The court considered evidence and testimony before it issued a statement of decision finding in favor of Nevada Atlantic. The trial court (Judge Kirk H. Nakamura) determined a lease term giving the landlord sole discretion was essentially not subject to any standard, and accordingly Civil Code section 1995.260 required that a reasonable standard be implied to govern the landlord's decision. Applying this rule, the court concluded the landlord unreasonably withheld its consent to the lessee's proposed assignment. Nevada Atlantic voluntarily dismissed its remaining cause of action, and the court entered judgment in its favor.

WREC filed an appeal and prevailed. This court reversed the judgment, concluding, "[A] commercial landlord may unreasonably withhold its consent to a proposed assignment where the lease requires the landlord's consent to the assignment and gives the landlord the right to withhold its consent 'for any reason whatsoever or for no reason.'" (*Nevada Atlantic Corp. v. WREC Lido Venture, LLC, supra*, G039825.) We determined "sole discretion" was an acceptable standard permitted under legal standards existing before and after enactment of Civil Code section 1995.260, as long as the provision is freely negotiated and not illegal. (*Ibid.*)

On August 7, 2008, several months before our opinion was filed, Nevada Atlantic, Milorad Cavic and Danny Cavic (hereafter referred to collectively and in the singular as Nevada Atlantic unless the context requires otherwise), filed a new lawsuit against WREC alleging causes of action for breach of contract, intentional interference with contractual relations, and negligent interference with prospective economic

relations. The factual basis for these claims was the same as the prior dismissed lawsuit, i.e., WREC's refusal to consent to an assignment causing a proposed sale of the lease and the restaurant to fall through. The most significant change from the prior action was the addition of Milorad and Danny Cavic as plaintiffs.¹ The complaint alleged Milorad was Nevada Atlantic's shareholder, and on February 10, 2008, he assigned to Danny his shares of stock, as well as all his claims for damages against WREC. Nevada Atlantic employs Danny as its chief executive officer.

Over the next three years, Nevada Atlantic filed several amended complaints and changed attorneys over nine times. Before trial, WREC served a Code of Civil Procedure section 2034.210 demand for exchange of experts, specifying August 23, 2010, as the exchange date. Trial was originally scheduled for October 12, but it was trailed to November 15, 2010.

Nevada Atlantic designated Richard Squar and Jason DeGraw as expert witnesses for trial. In September 2010, WREC deposed Squar, who testified about damages measured by the lost profits caused by WREC's alleged misconduct.

In October 2010, WREC filed a motion in limine to exclude evidence of time-barred damages and exclude evidence of damages incurred before WREC assumed the lease. On the first day of trial (November 15, 2010), the trial court (Judge Michael Brenner) granted the motion, effectively limiting the damages to the time period beginning June 2006 and ending in October 2010.

After a lunch recess, Nevada Atlantic's counsel, Gary E. Schreiber, requested a continuance to hire a new expert on damages in light of the court's ruling limiting damages. The court recognized the ruling "seriously impacted" the case,

¹ We refer to Milorad and Danny Cavic by their first names for ease of reading and to avoid confusion, not out of disrespect. (*In re Marriage of James M.C. and Christine J.C.* (2008) 158 Cal.App.4th 1261, 1264, fn. 1.)

however, the court denied the continuance motion on the grounds Nevada Atlantic's designated expert on damages should have analyzed all aspects of lost profits.

Schreiber noted the court's ruling essentially eliminated one cause of action and he indicated Nevada Atlantic would be willing to waive the jury as it would be proceeding with the testimony of only two witnesses and no experts. The trial commenced, and the court heard testimony from Danny for the rest of the day.

The next day of trial (November 16, 2010), Danny informed the court he could not go forward with the case because he had fired Schreiber after learning he was being bribed by WREC. Danny alleged he had called the FBI, and the district attorney, and he had reported all the attorneys to the California State Bar. Danny stated Nevada Atlantic was without representation and he could not represent the company. WREC argued the case should be dismissed or Danny could proceed in propria persona and his corporation dismissed due to lack of legal representation.

The court estimated Schreiber was the 10th attorney Danny had fired in the case and it was inclined to dismiss the case. The court explained it would not force counsel to continue representing Danny after being accused of taking a bribe, "[b]ut at the same time, to be honest with [Danny], that's too easy—that strikes me as sort of an easy way to abort proceedings that aren't going the way you want them to go, if you know what I mean. That's just an easy way to kind of throw a monkey wrench in and stop the proceedings. [¶] There is another side to this case here that's been tied up in litigation, and litigation costs money."

The court added, "So we can't have a situation where if things start looking a little bad for a litigant they can say, 'wait a minute, my attorney—my tenth attorney that has been representing me is taking bribes. So I want a mistrial declared, and I want to start all over again with yet another attorney.'"

Schreiber informed the court that based on the court's rulings the day before on the motions in limine, "we were severely limited in what we could present.

[Danny] is upset” because one cause of action was essentially eliminated and consequently Danny was not able say everything he wanted to tell the court on the witness stand. Schrieber stated Danny did not understand why his counsel had refused to ask certain questions, but Schrieber knew the questions were not relevant and would be a waste of the court’s time.

The court sought clarification, noting the motion in limine simply limited the scope of damages to a specific time frame. Schrieber replied, “Right. And we spoke to the expert, and after that, his essential response was, ‘I can’t state any damages.’ [¶] So I can’t put on a case . . . and then come to the last, most important element, damages, we don’t have any. [¶] So that’s why we’re forced to not proceed on that. And I think I made that clear yesterday, that based upon the court’s ruling as to limiting the expert’s testimony, we wouldn’t be able to proceed.”

The court first contemplated dismissing the case, stating, “[M]y inclination, if you’re unable to go forward at this time, would be to dismiss this case. It’s been pending for a long time. Everything that’s been said here this morning suggests to me there’s something about—well let’s see, how can I say this—there’s just some problems with the case that are not going to be resolved in the future. [¶] If you’ve reported all the attorneys to the state bar, and you have a perfect right to do that . . . but you have to understand from my perspective, that [it] seems like maybe you’re never going to be happy finding somebody to represent you in this case. [¶] I’m somewhat familiar with the facts of the case, and my inclination is that this case just simply cannot go forward today. It’s been a couple of years, a series of attorneys and continuances, [and] the case at this point would have to be dismissed.”

After Danny asserted he was merely asking for a short continuance to hire another attorney, the court considered granting a mistrial, stating, “Well, I’ll tell you what. Let me reflect on this just a minute. I mean, the easy way out is to declare a mistrial and send it back to Judge [David T.] McEachen, where it’s pending now.

Certainly there [are] grounds for a mistrial, because the relationship between counsel and his client has broken down. [¶] But it's an odd thing because, you know, whatever status the case is in today, [Danny], versus yesterday morning . . . those rulings that I made on . . . a motion in limine, really, that ruling is sort of going to become law of the case in a way. I don't know, I'm not sure about that, but I think that's probably in concrete."

WREC's counsel argued, "My client has been litigating this for too long. This does need to end as to my client, and it should end today. We are in the middle of trial. If Nevada Atlantic cannot go forward, let's dismiss the claims. [¶] If Nevada Atlantic or [Danny have] claims against me or [their] former attorneys, let him turn their cannons on us. But it's time to get this over with for my client. This case is in trial, this case should either go forward or be dismissed. It shouldn't be put off."

The court took a recess and telephoned one attorney Danny claimed he had contacted about hiring. After returning to the courtroom, the trial judge reported the attorney could not be reached. The court determined it was going to relieve Danny's counsel because "[t]hey have been accused of bribery," and then the court stated it would declare a mistrial and reset the case for trial. The court explained this would give Danny time to find a new attorney. Judge Brenner stated it would schedule a trial setting conference in front of Judge McEachen. Judge Brenner warned Danny that he would talk to Judge McEachen "not about all this background, only the idea that I expect that you're going to have an attorney there to represent you . . . that's going to be ready to pick a trial date."

Two months later, Nevada Atlantic (represented by a new attorney) filed a fifth amended complaint. This complaint alleged breach of contract, breach of the implied covenant of quiet enjoyment, breach of the implied covenant of good faith and fair dealing, fraud or deceit, and economic interference. The trial court (Judge McEachen) sustained without leave to amend WREC's demurrer as to all causes of action except for breach of contract.

A few weeks later, on February 18, 2011, Nevada Atlantic sought to amend the complaint through a motion for reconsideration of the order granting the demurrer to the fifth amended complaint. On March 22, 2011, the court denied the motion. Trial was set for April 18, 2011.

On March 24, 2011, Nevada Atlantic filed an ex parte motion for leave to augment the expert witness list to include John A. Gordon to testify about lost profit damages. In the motion, Nevada Atlantic argued, “Exceptional circumstances exist for the motion to augment [the] expert witness list because . . . [WREC’s] attorney of record, Todd Green, improperly and repeatedly communicated with [Nevada Atlantic’s expert] . . . Squar.” Nevada Atlantic stated Squar changed his opinion regarding the existence of lost profits after communicating with Green.

To support the motion, Nevada Atlantic’s new attorney, Allan Liang, submitted his declaration stating he was hired in January 2011, and after reviewing the case file, he discovered e-mails between Squar and Green, and it was improper for them to communicate ex parte. Liang stated Squar changed his opinion about damages “shortly before the last trial” and Liang believed it was due to his communications with Green. He omitted any discussion of the unfavorable motion in limine ruling limiting damages. Liang declared he retained Gordon on February 19, 2011, approximately one month before filing the motion to augment.

Liang submitted the following evidence to support the claim there was improper ex parte communications between Green and Squar: On September 28, 2010, Green sent an e-mail to Squar and “cc’d” Jerry Stark (Nevada Atlantic’s counsel at the time). In the e-mail Green stated, “[Squar], would you please e-mail to me the expert report that you prepared in the Thagard case?”

In response to this e-mail, Squar sent an e-mail, dated September 29, 2010, to Stark and complained, “This is one of several direct contacts by email and phone . . . Green keeps attempting to do [regarding] the Cavic case. This direct contact is highly

unusual. In fact, I have never had this happen. I understand that opposing counsel needs to make any and all requests directly through you. [¶] I do not intent to respond to . . . Green directly. I wanted you to be aware of the situation. [¶] The Thagard case is still in trial and I have been instructed by counsel in that case to not produce anything. I will follow his instructions.”

The final piece of evidence is an e-mail Stark sent to Green a few days later. On October 3, 2011, Stark informed Green the request for the report was not appropriate but, “I told you that it was okay to contact [Squar] to set-up the deposition.” Green immediately replied by e-mail that he believed it was appropriate to contact witnesses because they are not represented parties. He also noted Squar should produce the report from the Thagard case because it was not privileged. This short chain of e-mails comprise the sole basis for Nevada Atlantic’s request to designate a new expert, based on the theory the e-mails show Green improperly influenced Squar to change his opinion and conclude there were no lost profit damages. The court denied the ex parte motion to augment the witness list.

Three days later, Nevada Atlantic filed an ex parte application and motion for relief under Code of Civil Procedure section 473, subdivision (b). Nevada Atlantic sought relief from the order denying its request to designate a new expert on damages. It explained that due to “attorney error” Nevada Atlantic “erroneously believed that one month was ample time for [WREC] to depose one proposed expert” Nevada Atlantic later filed two other ex parte motions, including one seeking to disqualify Green and his law firm based on the allegation he obtained privileged attorney-client information from Nevada Atlantic’s expert. This motion is based on the same evidence of pre-trial e-mail communications between Green, Squar, and Stark described above.

Judge McEachen denied all the ex parte motions and on April 19, 2011, jury trial commenced before Judge Franz E. Miller. At trial, Nevada Atlantic presented evidence the premises were in terrible shape for many years, WREC failed to make

repairs or maintain the common areas, it raised the rent, and it failed to advertise for its tenants. Relying on tax returns dating back to 2001, Danny presented evidence the restaurant was profitable until 2007 and he attributed the downturn on several factors, including WREC's failure to maintain the premises and lack of advertising.

Before Danny could offer an opinion about how much of the lost profits could be attributed to the purported breach (failure to maintain and advertise), the court met with the attorneys and questioned how Danny could prove a portion of lost profits in 2007 were caused by WREC's breach without resorting to speculation. In addition, the court expressed concern about whether Nevada Atlantic should be entitled to damages for the lease default before it actually complained about WREC's failure to maintain and advertise the premises. The court also questioned whether Nevada Atlantic would seek lost profits after it had been evicted from the premises in November 2007.

Nevada Atlantic's counsel stated they would "proceed in terms of damages just proving what [was] lost from the date after [Danny] gave notice until the date [Danny] was evicted" (April 2007 to November 2007). Counsel proposed they would prove damages by having Danny testify about the "overall sales in 2007 and what his profits were that year compared to what his sales and profits were in the prior year." Counsel explained it was their theory the restaurant made a \$7,313 profit in 2006 and lost \$96,000 in profits in 2007, which would be a total loss of approximately \$103,000. Counsel asserted Danny could testify that if nothing had happened (if there had not been further deterioration) in 2007, the business would have made the same \$7,313 profit in 2007. The court stated, "I don't see how anybody could attribute that to that. . . . It would have to be an economist with substantial experience to say how that happens" Counsel asserted the jury should simply be asked to weigh the evidence presented by Danny.

The court asked Danny to explain how he was going to attribute lost profits to the lack of maintenance in 2007, given Danny's previous testimony and evidence the

premises had been in poor shape for many years. Danny stated the lost profits certainly were due to lack of maintenance and advertising but also could be due to the time and money he put into defending lawsuits. The court asked how the jury could determine \$93,000 in profit losses “was due to the condition of the maintenance in [2006] as opposed to the condition of the maintenance in [2007].” Danny replied, “Because I mean common sense, benefit of the doubt. We have a situation where [a landlord has] definitely breached the lease on those two items. So now if they have breached the lease, does the benefit of the doubt goes [*sic*] on the bad guy or the good guy? [¶] I mean common sense.” He conceded it was “kind of difficult to prove” but WREC “had to pay something for their breaches.” Danny said he could not think of any reason other than maintenance and advertising for causing the large loss of profits in 2007. The court asked Danny if there was any difference between the way the shopping center looked in 2006 and 2007. He replied, “It was just more of the same, . . . I mean every year looks worse and worse and worse because of the . . . time.”

WREC’s counsel made a motion for nonsuit, arguing there was no admissible evidence on the issue of whether the purported breach *caused* damages. Counsel stated that perhaps an expert could have opined lost profits were attributable to poor maintenance after studying two similarly situated restaurants and after adjusting for different variables. Counsel pointed out Danny “freely admits that he does not and cannot say” the change in profitability between 2006 and 2007 was attributed to a breach occurring between April 2007 and November 2007.

Despite having reservations, the court denied the nonsuit without prejudice and permitted Nevada Atlantic to continue presenting its case. Nevada Atlantic’s next witness was Brian Garbutt, who became the restaurant’s tenant after Nevada Atlantic departed in 2007. Garbutt stated he visited the property in 2006 and 2007 and recalled the condition of the shopping center stayed about the same. After making significant improvements to the property and restaurant, Garbutt stated the restaurant made a profit

for the first two months. After that, the restaurant started to lose money. Garbutt stated WREC's failure to maintain the common areas "was probably one of the factors" contributing to the lost profits. On cross-examination, Garbutt admitted he was not charged rent for the first two months of occupancy.

Next, Danny was called to the stand again to testify. His counsel asked how Danny knew the \$96,000 loss of profits in 2007 could be attributed to WREC's failure to maintain the premises. Danny replied, "From my own experience being there and since there is nothing . . . different . . . that actually would cause such a problem. So if there is nothing else, then I would . . . blame everything on maintenance and advertising."

On cross-examination, Danny stated he had not run any other restaurants before he bought Nevada Atlantic. Danny admitted he did not begin operating the restaurant until midway through 2006 (when the business made a mere \$7,000 profit for the year). He also was operating the restaurant in 2007 (when it lost \$96,000 in profits). WREC's counsel asked Danny if he knew why in 2002 the restaurant made a \$31,000 profit, but in 2003 only earned a \$12,000 profit. Danny stated, "I could only guess." Counsel asked if Danny knew why the restaurant earned only \$4,000 in 2004, a "drop-off of around 66 percent." Danny did not know why. Danny admitted he was not the owner of the restaurant during those profitable years but repeated that during his first year of operation the restaurant suffered substantial losses (\$7,000 in 2006 to a loss of \$96,000 in 2007). Counsel asked if Danny had any methodology for telling what amount of profit diminution was attributable to the failure to maintain and what was caused by the failure to advertise. Danny replied he was "not guessing" and he could "say with a lot of certainty that . . . 90 percent of the . . . drop in the business was due to maintenance and advertising and maybe another 10 percent to the lawsuit that was part of it."

After Nevada Atlantic rested its case, the WREC's moved for nonsuit on three grounds: There was no showing (1) Danny, individually, was a party to the lease,

(2) WREC was adequately notified as required by the lease of a need to perform maintenance work and advertise, and (3) of non-speculative lost profit damages. The court agreed with all three points and entered judgment in favor of WREC on May 11, 2011.

II

Nevada Atlantic seeks to overturn the judgment on four grounds: (1) the trial court erred in denying its request to designate a new expert four weeks before trial; (2) the court should have granted Nevada Atlantic's motion for relief from the order denying designation of a new expert (pursuant to Code Civ. Proc., § 473); (3) the court erroneously sustained WREC's demurrer to the fifth amended complaint without leave to amend; and (4) there was independent evidence of damages (measured by loss of the benefit of the bargain), and therefore the court should not have granted nonsuit.

If we were to conclude some or all of the first three arguments above had merit, we would nevertheless conclude any purported errors relating to the second trial were not prejudicial because the first trial should never have ended in a mistrial. The issue of whether Judge Brenner should have granted a mistrial was briefed by both parties.² WREC argued this court could affirm the judgment for the independent reason

² Based on the briefing and comments made by counsel during oral argument, we conclude the parties agree this issue falls within the limited exception to the general rule a respondent who has not appealed from the judgment may not urge error on appeal. Code of Civil Procedure section 906 permits a respondent to assert a legal theory "for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal . . . of the judgment from which the appeal is taken." WREC has shown that review of the mistrial is necessary to determine whether any error regarding the second trial was prejudicial as to appellant, so as to bring itself within the statutory exception of Code of Civil Procedure section 906. Nevada Atlantic does not claim otherwise on appeal, and took the opportunity in its reply brief to address the issue directly. We therefore conclude the issue of whether the first trial should have ended in a mistrial can be resolved in this appeal because it directly relates to Nevada Atlantic's ability to prove it was prejudiced by the claimed errors in the second trial (upon which it seeks reversal of the judgment).

the trial court should have dismissed the case and not allowed a mistrial. Nevada Atlantic contends attorney misconduct was a proper reason for declaring a mistrial.

The general rules regarding the requirements for a mistrial are well settled: “A mistrial *terminates* the trial midproceedings for error (e.g., misconduct by counsel, by jurors, or by the court) that has prejudiced a party’s right to a fair trial and that cannot otherwise be remedied. No matter how far the trial has progressed, a mistrial means the case must be retried from the beginning. [Citation.]” (Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2011) ¶ 12:2, p. 12-1 (hereafter Wegner).) There is no statute governing the procedure for a mistrial, no formal motion is required, and most grounds for mistrial are discretionary with the trial judge. Although there are certain situations in which a mistrial is mandatory, they are not present in this case (e.g., trial judge or a juror called as a witness). (*Id.* at ¶¶ 12:5-12:9, p. 12-5.)

The most common grounds for discretionary mistrials are attorney misconduct, judicial misconduct, or juror misconduct, or when a jury is unable to reach a verdict. (Wegner, *supra*, ¶ 12:17, pp. 12-6 to 12-6.1.) Nevada Atlantic asserts the mistrial was properly based on evidence of attorney misconduct, and therefore, we will limit our discussion to what is required to obtain a mistrial on this basis.

“Attorney misconduct during trial means *purposeful disregard* for the rules of evidence or procedure in an *attempt to prejudice* the adverse party’s case. It implies a ‘dishonest act or attempt to persuade the jury by using deceptive or reprehensible methods.’ [Citation.]” (Wegner, *supra*, ¶ 12:23, p. 12-8.) In addition, “An attorney’s violation of the California Rules of Professional Conduct during trial may provide grounds for a mistrial. [Citations.]” (*Id.* at ¶ 12:24, p. 12-8.) “A motion for mistrial must be considered whenever attorney misconduct occurs . . . because grounds for mistrial must be timely challenged or are waived” (*Id.* at ¶ 12:22, p. 12-8, italics omitted.)

“[T]he first step in challenging misconduct during trial is a timely objection and assignment of misconduct.” (Wegner, *supra*, ¶ 12:135, p. 12-28.) If the misconduct occurs in the courtroom, the attorney must immediately bring to the court’s attention the particular acts or statements claimed to be misconduct to avoid the waiver rule. (*Id.* at ¶ 12:136, p. 12-28.) “A more formal objection may be required for misconduct that occurred outside the courtroom (e.g., improper communications with jurors). Counsel should request a hearing on such matters outside the jury’s presence as soon as they are discovered. Counsel will have to lay a foundation showing such misconduct (e.g., by declarations of percipient witnesses” (*Id.* at ¶ 12:141, p. 12-30.) Some examples of the types of acts or statements that may be challenged as attorney misconduct are improper voir dire or argument in trial, bringing inadmissible evidence before the jurors, willfully concealing evidence, improper communication with jurors, and eavesdropping on confidential attorney-client communications. (*Id.* at ¶¶ 12:25–12:40.1, pp. 12-8 to 12-10.)

Ordinarily, “Where the alleged misconduct did not occur in the judge’s presence (e.g., improper juror communications), affidavits or declarations are required to establish an evidentiary record for the mistrial motion. As with affidavits and declarations generally, *nonhearsay* statements by *percipient witnesses* are required (e.g., witness who overheard the improper juror communications).” (Wegner, *supra*, ¶ 12:156, pp. 12-32 to 12-33.) “The moving party must prove both (1) misconduct and (2) irreparable prejudice resulting therefrom: [¶] ‘To justify a mistrial . . . an affirmative showing of prejudice which would alter the outcome of the pending litigation is required.’ [Citation.]” (*Id.* at ¶ 12:183, p. 12-38, italics omitted.)

“A motion for mistrial is addressed to the trial court’s sound discretion and may properly be denied where the court is satisfied no substantial prejudice has resulted or will result from the misconduct involved; or that any such prejudice may be remedied by curative instructions to the jury. [Citation.] [¶] . . . In ruling on motions for mistrial,

the trial judge normally considers such factors as: [¶] [1] How far the trial has progressed (extent of judicial resources invested in case); [¶] [2] Whether the misconduct was an isolated act or repeated; [¶] [3] Whether the misconduct appears to have been purposeful; [¶] [4] The extent of prejudice likely to have been caused thereby; [¶] [5] Whether appropriate admonitions to the jury and/or reprimand to counsel will remedy the misconduct (or whether it is impossible to ‘unring the bell’).” (Wegner, *supra*, ¶¶ 12:186-12:187, pp. 12-38 to 12-39, italics omitted.) An order granting a motion for mistrial is not appealable, but may be reviewed on appeal from the subsequent judgment. (See *Estate of Bartholomae* (1968) 261 Cal.App.2d 839.)

“Instead of ordering a mistrial for attorney misconduct, the judge may do any or all of the following: [¶] Sustain objection. [¶] Admonish jury to disregard improper statement or question or other objectionable matter. [¶] Reprimand counsel as appropriate. [¶] Cite counsel for contempt of court (for repeated misconduct or violation of court order). [¶] Impose [Code of Civil Procedure section] 128.7 sanctions (for ‘presenting’ papers without factual or legal merit). [¶] Grant postverdict motion for new trial.” (Wegner, *supra*, ¶ 12:190, p. 12-40, italics omitted.)

In the case before us, Danny arrived the second day of trial and requested a continuance to hire a new legal representative for himself and Nevada Atlantic. Danny alleged there had been attorney misconduct and he had fired the attorneys. He believed WREC bribed his attorneys to provide ineffective representation and it amounted to “big time fraud.” Danny asserted there existed solid grounds for a criminal case and the attorneys were “killing [the] case intentionally. That’s why I fired them.”

Danny did not submit any evidence, affidavits, or declarations to establish an evidentiary record of attorney misconduct (to support a motion to continue or a mistrial). When Danny boasted he could “prove [it] in court” in the criminal case, the trial court replied a criminal action would be “completely independent of this case.”

Thereafter, the trial court did not ask Danny to present any evidence of attorney misconduct in the civil case. It could have, but did not, defer ruling on the issue to give Danny additional time to submit evidence proving his attorney was bribed. Instead, the court focused on the status of the case. It discussed Nevada Atlantic's history of firing counsel when rulings were not made in its favor, the most recent unfavorable rulings limiting the scope of damages and not giving time to find a new expert, and the problem of being allowed to permit the corporation to proceed without legal representation. The court also expressly recognized the expense of ongoing litigation for the opposing party, and that the case was in the middle of trial. We found several statements in the record indicating the court did not find the bribery allegations credible, but nevertheless, it concluded a mistrial would be the "easiest" solution to address the obvious breakdown in the attorney client relationship. Under these circumstances, we conclude the trial court abused its discretion in granting the mistrial.

First, evidence of a breakdown in the attorney client relationship is simply not grounds for a mistrial in a *civil* case. (Compare to rules in criminal cases, *People v. Marsden* (1970) 2 Cal.3d 118 [in criminal cases defendant has the right make a motion mid-trial to discharge his or her attorney and appoint new one on showing appointed attorney was not providing adequate representation or defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result].) As stated above, in the context of a civil lawsuit, a mistrial based on attorney misconduct requires evidence of a "*purposeful disregard* for the rules of evidence or procedure in an *attempt to prejudice* the adverse party's case" or an attorney's violation of the California Rules of Professional Conduct. (Wegner, *supra*, ¶¶ 12:23-12:24, p. 12-8.)

Second, there was not a shred of evidence before the trial court to support the claim of attorney misconduct based on bribery. Danny's self-serving accusations cannot be considered evidence. On appeal, Nevada Atlantic points to the e-mail

exchange between WREC's counsel and Nevada Atlantic's expert as proving misconduct. But this evidence was not before Judge Brenner. Indeed, it was not presented to the court until five months later (in Nevada Atlantic's April 2011 pretrial motions before Judge McEachen). Moreover, we note the alleged misconduct purportedly shown by the e-mails relates to ex parte communications with an expert, not bribery. Without evidence of the alleged bribery, there was no basis for the trial court to hold attorney misconduct prejudiced the parties' right to a fair trial and justified declaring a mistrial.

Because there was no legal basis to declare a mistrial, the question becomes what would have happened if the first trial proceeded after Schreiber was fired. WREC argues the matter would have been dismissed. Nevada Atlantic fails to offer any argument regarding this issue.

We begin by noting Schreiber represented both Nevada Atlantic and Danny, as an individual. Unlike Danny, Nevada Atlantic is a corporation and must be represented in court by an attorney. "A corporation has the capacity to bring a lawsuit because it has all the powers of a natural person in carrying out its business. [Citations.] However, under a long-standing common law rule of procedure, a corporation, unlike a natural person, cannot represent itself before courts of record in propria persona, nor can it represent itself through a corporate officer, director or other employee who is not an attorney. It must be represented by licensed counsel in proceedings before courts of record. [Citation.]" (*CLD Construction Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145 (*CLD Construction*)).

A corporation that attempts to appear in court without an attorney is entitled to "a reasonable time to secure counsel." (*CLD Construction, supra*, 120 Cal.App.4th at p. 1148.) It is appropriate "to treat a corporation's failure to be represented by an attorney as a defect that may be corrected, on such terms as are just in the sound discretion of the court." (*Id.* at p. 1149.) The trial court "retains authority to dismiss an

action if an unrepresented corporation does not obtain counsel within reasonable time.”
(*Id.* at p. 1150.)

Therefore, it lies within the trial court’s discretion to determine what constitutes a “reasonable time” in which a corporation must retain counsel. And the court has a duty to advise the corporation of the need for counsel; if the entity then fails to hire counsel, the court may enter a default against the corporation for nonappearance. (*Van Gundy v. Camelot Resorts, Inc.* (1983) 152 Cal.App.3d Supp. 29, 31-32.) The effect of Danny’s termination of counsel was to leave the corporation without representation. Without the ability to practice self-representation, this would have placed “extreme pressure” on the corporation to quickly bring in new counsel because it “risks forfeiture of its rights through nonrepresentation.” (*Ferruzzo v. Superior Court* (1980) 104 Cal.App.3d 501, 504.)

We recognize the court specifically denied Danny’s request for continuance, and Nevada Atlantic does not appeal Judge Brenner’s ruling denying the request for a continuance. Because the continuance ruling was not raised on appeal, we ordinarily would presume it was correct.³ However, the circumstances of this case are unique. It appears the primary reason Judge Brenner granted the mistrial was simply to give Danny additional time to hire counsel for Nevada Atlantic. Judge Brenner warned Danny it would talk to Judge McEachen and make sure Danny hired counsel who would be ready to pick a trial date. Case law clearly supports giving a corporation a “reasonable time” in which to retain counsel, which is in essence what Judge Brenner sought to accomplish by declaring a mistrial. Contrary to WREC’s contention, there is no authority

³ It is well settled, ““A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.” [Citation.]” (*Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 787.)

to support its conclusion it would be fair to dismiss Nevada Atlantic from the lawsuit due to nonrepresentation, when it was never given a “reasonable time” to retain new counsel (or otherwise indicate it was refusing to retain new counsel).

Given the history of this case and the trial court’s statements on the record indicating it was displeased with Danny’s gamesmanship at trial, we conclude a “reasonable time” for this corporation would be a very short period of time. The record clearly shows the trial court believed the corporation’s attorney was fired simply because Danny was unhappy with the recent unfavorable rulings and the way the case was proceeding. It is undisputed Nevada Atlantic (with Danny in charge) had a long history of terminating its attorneys and reporting them to the state bar anytime things were not going their way. The trial court expressed displeasure with Danny’s questionable litigation tactics and was uneasy rewarding Danny by giving him additional time.

For this reason, we conclude Nevada Atlantic and Danny should not benefit from the court’s error in granting a mistrial rather than a continuance to give them an opportunity to find a new attorney. If the case had been continued for a short period of time, and if we assume Nevada Atlantic could have quickly retained its new attorney, the trial would have proceeded with the motion in limine rulings intact and without an expert on damages. Nevada Atlantic would not have been able to file a fifth amended complaint, it would not have had standing to augment its expert witness list with a new expert on damages midtrial, or produce a different expert on lost profits. Therefore, any issues raised on appeal regarding these events will not be addressed in light of our ruling the court erred in granting a mistrial.

Moreover, we conclude the case need not be remanded for a retrial. We can presume WREC would have moved for nonsuit after the plaintiffs’ case in chief as

they did in the second trial.⁴ As we will explain, based on the evidence presented and the arguments raised on appeal, WREC's nonsuit was properly granted.

Our standard of review is well settled: We review de novo the trial court's grant of a nonsuit. (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458.) We accept as true the evidence most favorable to the plaintiff and disregard any conflicting evidence. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) We will not reverse a judgment of nonsuit if the plaintiff's evidence raises only speculation or conjecture; we reverse if we find substantial evidence supporting the plaintiff's claim upon which reasonable minds could differ. (*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1313.)

After Nevada Atlantic rested its case, WREC moved for nonsuit based on the failure to make a prima facie showing of breach of contract, the only claim remaining in the case. The court granted nonsuit as to Danny, finding there was no evidence he was a party to the lease. This portion of the nonsuit order is not challenged on appeal, and we will not discuss it.

The court granted nonsuit as to the corporation on the grounds there was insufficient evidence WREC was given the required notice about its failure to advertise and there was only speculative evidence of lost profits for damages. On appeal, Nevada Atlantic only challenges the portion of the court's ruling regarding the lack of evidence of damages. However, it does not dispute the trial court's finding there was the lack of evidence of lost profits caused by the disrepair during the six-month period in 2007, or the court's conclusion there was a lack of certainty regarding the attributable amount of lost profits. Instead, Nevada Atlantic argues the court erred in failing to appreciate "a reasonable juror could conclude to a reasonable certainty that Nevada [Atlantic] suffered

⁴ We are confident the trial would have been the same as the first trial, with the exception that Nevada Atlantic had the benefit of five more months to prepare. Nevada Atlantic theory of recovery, witnesses and evidence was the same for both trials.

a loss of [*sic*] benefit of the bargain (damages) for WREC's failure to maintain the property." It explained that "[a]t the time of the motion for nonsuit the evidence was that [it] paid first class maintenance fees (\$1,099.51) every month for maintenance of what was supposed to be a first class facility, yet the testimony and photographs showed a very deteriorated and poorly maintained building and center that would fall far below what anyone could consider a first class facility. The center was so poorly maintained that it was obvious to a juror, and expert testimony was not needed to determine that Nevada was not getting what it bargained and paid for every month."

Given that the entire trial was based on a theory of lost profit damages, Nevada Atlantic fails to mention how the loss of the benefit of the bargain theory was introduced below, when the court ruled on the matter, or for that matter, why the court rejected it. Nevada Atlantic simply asserts the court erred by granting the nonsuit and not permitting the jury to consider this theory of recovery.

We have carefully reviewed the record, and as WREC asserted in the respondent's brief, Nevada Atlantic raised this new theory of damages for the first time in response to WREC's motion for nonsuit. The court considered and rejected the argument. It determined lost profits based on a simple comparison of the restaurant's tax returns was the only theory of recovery offered during discovery, depositions, and the testimony at trial. The court stated it would usually allow a party to pursue a theory that could be reasonably contemplated by the evidence presented during the lawsuit, but it was problematic to have prepped the whole case based on lost profits and then suggest the case should be reopened because there might be another way to show damages.

Nevada Atlantic's counsel argued the benefit of the bargain was just a different way to calculate loss profits. The court disagreed, stating it recognized there could be an economic or accounting theory to convert the diminution in the value of what you bargained for into a recitation of lost profits. However, the evidence presented at trial related to how much money the business made and how much Danny believed the

breach caused him to lose in profits. It concluded, “To the extent there’s been a motion to reopen, it would be denied.”

The trial court also discussed it believed the new theory would fail, for the same reason the evidence on lost profits was too speculative. It explained a rational juror could conclude Nevada Atlantic was not getting the benefit of its \$1,099 in maintenance fees, but how would they conclude to a reasonable certainty the amount of loss. We find it very telling Nevada Atlantic did not offer any methodology for calculating the loss of the benefit of the bargain in the trial court or on appeal. The court properly recognized the jury should not be asked to speculate about what portion of the \$1,099 fee was not being used to maintain the property.

In light of the record, it appears Nevada Atlantic is not challenging the court’s decision to grant nonsuit based on the speculative nature of the evidence concerning lost profits. In essence, Nevada Atlantic is challenging the court’s decision to not let Nevada Atlantic reopen its case in chief and let the jury consider its new theory of damages measured by the loss of the benefit of the bargain.

However, to review this issue this court would have to first determine whether Nevada Atlantic intended to make a request to reopen and remedy the defects raised in the nonsuit motion. (*John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 162 [failure to request an opportunity to reopen waives the right to do so].) In addition, we would need to determine if Nevada Atlantic made an adequate offer of proof describing the evidence and explaining how it would cure the deficiencies. (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1337 [waiver absent adequate offer of proof].) And finally, if we decided Nevada Atlantic should have been given an opportunity to reopen, we would have to also decide whether the trial court’s refusal would have been prejudicial to warrant reversal on appeal. The burden of establishing prejudice is on Nevada Atlantic. (*Charles C. Chapman Building Co. v. California Mart* (1969) 2 Cal.App.3d 846, 858-859.)

In view of Nevada Atlantic’s complete failure to include any relevant authority or meaningful analysis of its right to reopen to remedy defects brought to light by a nonsuit, or the issue of prejudice, it has failed its appellate burden to show error. “‘The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. . . . [E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.’ [Citation.]” (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.) We find no grounds to disturb the nonsuit ruling.

III

The judgment is affirmed. Respondent’s request for judicial notice of documents contained in the trial court record is affirmed. (Evid. Code, § 452, subd. (d).) Respondent shall recover its costs on appeal.

O’LEARY, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.