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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. YOUSSEF SEMAAN et al., Defendants; ELHAM CHERFAN et al., Claimants and Appellants.	E035671 (Super.Ct.No. RIF 106168) OPINION

APPEAL from the Superior Court of Riverside County. Gordon R. Burkhart, Judge. Affirmed as to Elham Cherfan; reversed as to Marie Rose Semaan.

Jerome D. Stark and Robert Klein for Claimants and Appellants.

Grover Trask, District Attorney, and Elise J. Farrell, Deputy District Attorney, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication with the exception of section 2E.

1. Introduction

After defendants Youssef Semaan and Liliane Semaan (defendants) pled guilty to grand theft and fraud, the trial court conducted restitution hearings under Penal Code section 186.11.[1] Appellants Elham Cherfan and Marie Rose Roukoz Semaan (claimants) submitted verified claims to protect their bank account funds from being distributed to defendants' crime victims as restitution. Claimants were not involved in the charged crimes. Nevertheless, the trial court denied their claims on the grounds defendants' unlawful activities involved fraudulently using claimants' identities and controlling their bank funds.

Claimants appeal from the order denying their verified claims to protect their bank funds, and from the order seizing and using claimants' bank account funds to pay defendants' crime victims restitution. Claimants contend the People did not meet their burden of proving claimants did not have a legitimate interest in the bank funds.

We conclude claimants met their initial burden of proving they had legal title to their bank account funds. In order to refute this, the People were required to prove by clear and convincing evidence that claimants did not have a legitimate interest in the funds. As to Marie, the People failed to do so. The trial court erred in ordering her bank funds used for restitution. As to Cherfan, the People succeeded in presenting clear and convincing evidence that Cherfan did not have a legitimate interest in her bank account funds. The court thus properly denied Cherfan's claim seeking to protect her bank

account funds but erred in denying Marie's claim. The judgment is affirmed as to Cherfan and reversed as to Marie.

2. Factual and Procedural Background

In October 2002, the People filed a complaint against defendants, alleging that on or about March 1, 2002, defendants committed grand theft. (§ 487, subd. (a).) The People also filed a petition and supplemental petition to preserve property subject to levy or seizure under section 186.11, known as the aggravated white collar crime enhancement. In the supplemental petition the People identified additional property they requested preserved and seized under section 186.11, including funds in Marie's and Cherfan's Wells Fargo bank accounts. Claimants are sisters-in-law of defendants.

In early November 2002, claimants, who both resided in Lebanon, filed verified claims and amended claims to protect their bank account funds from possible levy or seizure under section 186.11. Marie sought protection of $219,577.53 located in her Wells Fargo bank account and Cherfan requested protection of $325,067.08 in her Wells Fargo bank account.

Marie alleged in her claim that the funds were from the sale of her and her deceased husband's home. Marie's husband died in 1999, and she sold their home in August 2001. Marie deposited the sales proceeds, $219,577.53, in her Wells Fargo bank account. Her social security benefits were also deposited in the bank account.

[footnote continued from previous page]

1 Unless otherwise noted, all statutory references are to the Penal Code.

Cherfan alleged in her claim that her bank account funds of $325,067.08 were from the sale of defendants' residence located on Pepperwood Lane in Corona, and were from defendants' repayment of a loan.

At the end of November 2002, defendants pleaded guilty to a 99-count information charging them with credit card and check fraud resulting in damages to their victims in excess of $1,600,000. Defendants allegedly unlawfully took money and personal property from victims, delivered checks and drafts for the payment of money knowing defendants had insufficient funds or credit for payment of those instruments, and relied upon fraudulent personal information as to salary, employment, and value of homes to obtain credit. Neither claimants was charged with involvement in defendants' fraud scheme.

On October 27, 2003, the trial court held a hearing on claimants' verified claims for protection of their bank account funds. The court heard testimony from claimants' expert witness, Certified Public Accountant Susan Carroll and the People's witness, Detective Brad Kloepfer. After hearing testimony and argument, the court took the matter under submission. On February 10, 2004, the court denied both claims and ordered claimants' bank funds seized and distributed to defendants' crime victims as restitution.

After the court denied claimants' claims for protection of their bank funds, the court conducted a restitution hearing for the purpose of determining the amount of restitution defendants were required to pay. The court ordered defendants to repay the

victims $1,632,418.61 in restitution. In a separate appeal (case No. E035630), defendants challenged the amount of the restitution order, claiming it should be reduced. This court affirmed the lower court's restitution order.

3. Third Party Claims of Interest in Bank Account Funds

Claimants contend the trial court erred in denying their claims for protection of their bank funds from being used to pay restitution to defendants' crime victims. Specifically, claimants argue the People failed to meet their burden of establishing by clear and convincing evidence that claimants did not have a legitimate interest in the bank funds.

A. Law Applicable to Claims for Protection of Assets

When a defendant is charged with having committed two or more related felonies involving fraud or embezzlement, a pattern of related felony conduct, and the taking of more than $100,000, the defendant may also be charged with the "aggravated white collar crime enhancement." (§ 186.11, subd. (a)(1).) If found true or admitted, the enhancement subjects the defendant to an additional prison term of one to five years, paying restitution to the defendant's victims, and fines. (*Id.* at subds. (a)-(d); § 12022.6, subds. (a)-(b).)

After the specified felonies and enhancement are charged, the superior court is authorized under section 186.11 to "preserve" or freeze "any asset or property that is in the control of th[e defendant]," pending the outcome of the criminal proceeding, in order to pay restitution and fines. (§ 186.11, subd. (e).) Section 186.11 is thus sometimes

referred to as the "Freeze and Seize Law." (*People v. Green* (2004) 125 Cal.App.4th 360, 363.)

A section 186.11 proceeding is "pendent" to the defendant's criminal proceeding and is solely for the purpose of imposing the section 186.11 criminal remedies of restitution and fines. (§ 186.11, subd. (e)(2).) The prosecuting agency initiates a section 186.11 proceeding by petitioning the superior court for a temporary restraining order, preliminary injunctive relief, the appointment of a receiver, or for any other relief necessary to preserve the defendant's assets and properties, pending the outcome of the criminal proceeding. (*Id.* at subd. (e)(2).) Anyone claiming an interest in the property may file a verified claim stating the nature and amount of his or her interest in the property. (§ 186.11, subd. (e)(6).)

Following the defendant's conviction or admission of the specified felonies and aggravated white collar crime enhancement, the assets and properties may be levied upon and liquidated to pay the restitution and fines. (§ 186.11, subds. (i)-(j).)

B. Burden of Proof

The parties disagree as to the applicable burden of proof and who bears it. The People argue claimants bear the burden of proving by a preponderance of the evidence that they have a legitimate interest in the bank funds. A preponderance of the evidence standard "requires that the existence of a fact be more probable than not." (*Tannehill v. Finch* (1986) 188 Cal.App.3d 224, 228.)

Claimants, on the other hand, argue the People have the burden of showing by clear and convincing evidence that claimants' property interest was not legitimately acquired. The clear and convincing burden of proof "requires that the evidence be so clear as to leave no substantial doubt in the mind of the trier of fact; it must be '"'sufficiently strong to command the unhesitating assent of every reasonable mind.'" [Citation.]' [Citation.]" (*Tannehill v. Finch, supra,* 188 Cal.App.3d at p. 228.)

The trial court did not indicate which burden of proof it applied or the grounds for denying the claimants' claims, other than that there was insufficient evidence. The court stated as to Cherfan's claim that the court did not find the opinion evidence supporting the claim credible. As to Marie's claim, the court stated she failed to provide evidence she owned any money in her bank account. The court did not provide any explanation as to how it arrived at this conclusion or why it did not believe claimants' expert's testimony.

Section 186.11 does not specify the applicable burden of proof. The usual burden of proof applicable in criminal proceedings does not apply here since the restitution proceeding is a collateral matter in which the restitution order is enforceable as a civil money judgment. (*People v. Guardado* (1995) 40 Cal.App.4th 757, 762; Evid. Code, § 186.11, subd. (e)(2).) When the Legislature does not specify a burden of proof, the preponderance of evidence standard applies. (Evid. Code, § 115; *Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1193.) Under Evidence Code section 500, as the parties filing claims for protection of funds, the claimants bear this initial burden of

proof: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.)

Under Evidence Code sections 115 and 500, claimants thus bear the initial burden of proving by a preponderance of the evidence the nature and amount of their interest in the property subject to forfeiture. Once claimants have met this burden of proof, the burden of producing evidence shifts to the People under Evidence Code section 662. Evidence Code section 662 provides: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."

Because Claimants and the People view the trial court's action of ordering restitution and denying their claims as one action, they maintain that the proper standard of review is abuse of discretion. While we agree that restitution orders are reviewed under the abuse of discretion standard of review (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132) we disagree that the same standard applies to the order denying Claimants' claims. Instead, because the trial court had to weigh the evidence in making its decision, we find that the question on appeal is governed by the substantial evidence rule like any other issue of fact.

As discussed further below, in the instant case, the evidence was sufficient to meet claimants' burden of establishing by a preponderance of the evidence that they had legal title to the Wells Fargo funds. The funds were contained in bank accounts held in the

claimants' names. The burden thus shifted to the People to show by clear and convincing evidence that claimants did not have any legitimate interest in the funds.

The People argue in their respondent's brief that they were not required to establish this. Rather, the People argue they only had to show defendants had control over the funds. Then the burden was on claimants to refute this by a preponderance of the evidence. While a showing of defendants' control over an innocent third party's property may be sufficient grounds for granting pendente lite orders to preserve the property, section 186.11 does not state that a showing of control alone constitutes sufficient grounds for taking an innocent third party's property and using it for restitution.

We conclude this based on the statutory language of section 186.11 as a whole. In construing section 186.11, "'"our fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.]"' [Citations.] If possible, '"'significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citation.]"' [Citation.] Where the 'legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive; "no resort to extrinsic aids is necessary or proper." [Citation.]' [Citation.] [¶] Where the statutory language is susceptible to more than one reasonable interpretation, however, we look to extrinsic aids, including the objects of the legislation, public policy, and the statutory scheme of which the statute is a part.

[Citations.] We do not consider the particular clause or section in isolation, but instead examine it in the context of the statutory framework as a whole, keeping in mind the scope and purpose of the provision and harmonizing it with the statutory scheme. [Citations.]" (*People v. Superior Court (Plascencia)* (2002) 103 Cal.App.4th 409, 422.)

In considering section 186.11 as a whole, as well as section 186.11's legislative history, we reject the proposition that defendants' control of claimants' bank accounts was a sufficient basis for seizing and using claimants' bank funds for restitution. Subdivisions (g)(5) and (i)(3) of section 186.11 clearly state that, in ordering restitution, the court must protect the property of innocent third parties: "In making its final order, the court shall seek to protect the legitimately acquired interests of any innocent third persons, including an innocent spouse, who were not involved in the commission of any criminal activity." (§ 186.11, subd. (i)(3).) It is clear from this language that, when ordering restitution, the court cannot take and use innocent third parties' property for restitution.

Although section 186.11, subdivision (e)(1), allows the court to issue pendente lite orders to preserve property controlled by defendant until a defendant is tried, such control is not a sufficient ground for ultimately taking and using an innocent third party's property for restitution. Even if the court issues a pendente lite order based on a defendant's control of a third party's property, in doing so, the court is required to protect the third party's property interests. At this stage, a third party's property interests generally remain protected since the property is merely being preserved and the status

quo maintained until the defendant is tried for the criminal offenses. Section 186.11 is referred to as the "the 'Freeze and Seize Law' because it provides for freezing the defendant's assets before trial, and seizing them only after he or she has been found guilty." (*People v. Green* (2004) 125 Cal.App.4th 360, 372.)

Once property has been "frozen" pending a defendant's trial, the property owner has the opportunity to avoid losing the property by filing a verified claim for protection of the property. The court must then conduct a hearing to determine if the innocent third party has a legitimate interest in the property, and if so, the court must protect it from being taken from the innocent third party without just compensation. Subdivision (i) states that if a defendant is convicted, at the sentencing hearing the trial judge "shall make a finding at that time as to what portion, if any, of the property or assets subject to the preliminary injunction or temporary restraining order shall be levied upon to pay fines and restitution . . . ." (§186.11, (i)(1)(A).)

While the purpose of section 186.11 is to facilitate reimbursement of crime victims, as well as provide enhanced punishment, the Legislature also made it clear that, in ordering restitution, the court must protect innocent third parties from losing their property. (Sen. Com. on Crim. Proc., Analysis of Sen. Bill No. 950, (1995-1996 Reg. Sess.) April 18, 1995.) Even if the defendant controlled the property, there is no language in section 186.11 which authorizes the trial court to take an innocent third party's property and use it for restitution, particularly if the third party was unaware that the defendant was in control of the property or using it for an illicit purpose.

Here, the claimants' bank funds were ordered taken from claimants and used for paying restitution to defendants' crime victims. Viewing section 186.11 as a whole, particularly the provisions mandating the court to protect innocent third party property interests, we conclude evidence of defendants' control over claimants' bank funds is not a sufficient ground for seizing and using the funds to pay restitution. In order to refute the claimants' property claims, the People must prove that the claimants did not have any legitimate interest in the funds.

C. Marie Rose Semaan's Claim

Marie filed a verified claim to $219,577.53 contained in a Wells Fargo bank account in her name. It is undisputed the funds were in a bank account in her name. This satisfied Marie's initial burden of establishing by a preponderance of the evidence that she had legal title to the funds in her account.

In addition, the People stipulated the sum of $219,577.53 in Marie's bank account was from the sale of her home, which had been in her deceased husband's name. Upon his death, Marie inherited title to the home. There is no evidence that the funds Marie and her deceased husband used to acquire their home were derived from an illegal source, such as from stolen or laundered funds. Also, claimants' expert witness, Certified Public Accountant Susan Carroll, testified that Marie was the seller of the residence and the proceeds from the sale were deposited in Marie's account in August 2001, when escrow closed. The only other money in the bank account was from Marie's social security

benefit checks, and Marie is not claiming protection of those funds. She is only seeking protection of the money from the sale of her home.

Since Marie met her initial burden of establishing legal title to the bank funds from the sale of her home, the burden of producing evidence shifted to the People to refute by clear and convincing evidence her legal title to the funds. The People argue the following evidence established defendants were in control of the funds: (1) Youssef filled out the paperwork for the P.O. box annex address used on Marie's bank account and registered the P.O. box in Marie's name; (2) Detectives found Marie's bank account checkbook at defendants' residence; (3) defendants wrote checks against Marie's account to purchase goods and services for their own benefit, including payments for purchases on credit cards defendants had fraudulently obtained using Marie's identity; (4) Youssef transacted the sale of Marie's residence using a forged power of attorney; (5) the bank account funds, including Marie's social security benefits, were used for defendants' benefit, rather than Marie's, even though Marie claimed she had no means of support other than the social security benefits and her family; and (6) Marie attempted to withdraw money from her account and was unsuccessful.

The People argue this evidence establishes that, even assuming Marie had a legitimate interest in the funds, she abandoned her interest or "gifted" the monies to defendants by allowing defendants to have unfettered control over the funds.

While there is evidence of defendants' control over Marie's bank account funds, as discussed above, control alone is not a sufficient ground for divesting Marie of her

bank account funds. As to the proposition defendant abandoned or "gifted" the funds to defendants, the People have not provided clear and convincing evidence of this. Since Marie resided in Lebanon, it is quite plausible defendants fraudulently used her bank funds and credit, just as they had done with so many other innocent victims. There is little, if any, evidence Marie consented to defendants spending her bank funds or abandoned her interest in the funds.

While it is possible defendants were using Marie's account for money laundering, the People have not established by clear and convincing evidence that Marie did not have a legitimate interest in the money deposited in her bank account. The trial court thus erred in denying Marie's property claim and ordering the funds in Marie's bank account seized and used to pay restitution to defendants' crime victims.

D. Elham Cherfan's Claim

It is undisputed that the $225,067.08 in bank funds, which are the subject of Cherfan's appeal, were in a bank account in Cherfan's name. Thus, as with Marie, Cherfan met her initial burden of proving by a preponderance of the evidence that she held legal title to the $225,067.08 in her bank account.

Cherfan also met her initial burden of proof by providing evidence tracing the origin of the bank funds. Carroll provided expert opinion testimony that in January 2002, defendants purchased a home on Royal Vista from Cherfan for $750,000. Defendants borrowed $380,000 from Cherfan for the downpayment. According to Carroll, documentation showed the $338,000 came from a Wells Fargo investment service

account in the name of Cherfan and Rala Mamoun, another of defendants' sister-in-laws. In January 2002, at the time of defendants' purchase of Royal Vista, defendants deeded to Mamoun the Pepperwood house as collateral for Royal Vista.

Escrow closed on the Royal Vista sale in February 2002. Upon purchasing Royal Vista, defendants moved into the home and sold their Pepperwood home in August 2002.

When the Pepperwood house sold in August 2002, the sales proceeds amounting to $325, 067.08 were deposited in Cherfan's account. In September 2002, Mamoun issued Cherfan a $325,067.08 check, which was deposited in Cherfan's bank account. Shortly after that, in September, 2002, Cherfan transferred $100,000 of the funds to an account in her name in Beirut, leaving $225,067.08 of the Pepperwood sales proceeds in her bank account. These are the funds in which Cherfan claims she has a legitimate interest.

Carroll further testified she reviewed a letter from Cherfan, dated July 18, 2003, in which Cherfan stated she purchased the Royal Vista home in August 2001 for $595,000, and then sold it to defendants in January 2002 for $750,000. Cherfan explained in her letter that the Pepperwood house was collateral for defendants' Royal Vista purchase until defendants sold Pepperwood and the sales proceeds could be used to pay off the $338,000 loan.

In addition, the parties stipulated that if Liliane testified, she would state that Youssef decided to purchase Royal Vista in January 2002; Pepperwood was deeded to Mamoun as collateral for the $338,000 loan to defendants; $338,000 was deposited in

escrow in connection with defendants' purchase of Royal Vista from Cherfan; and when Pepperwood sold, the sales proceeds were to be used to repay Cherfan for the loan.

This evidence was sufficient to meet Cherfan's burden of establishing by a preponderance of the evidence that she had legal title to $225,067.08 in her bank account. The burden shifted to the People to produce by clear and convincing evidence that Cherfan did not have any legitimate interest in the bank funds.

The People refute Cherfan's claim to the funds by arguing Cherfan's claim to the money lacks credibility because it is based solely on Carroll's expert opinion, which is based on Cherfan's July 18, 2003, letter. Furthermore, there is no documentation memorializing the $338,000 loan; the final settlement statement for the Pepperwood sale and grant deed indicate Mamoun bought the Pepperwood property from Youseff, with escrow closing in January 2002; according to the final settlement statement for Pepperwood, Mamoun paid Youssef $349,000 outside of escrow, prior to the close of escrow for the Royal Vista property; the August 2002 Pepperwood closing statement, which lists Mamoun as the seller, states the residence sold for $349,900; and there is a copy of a cashier's check issued by Mamoun in September 2002, to Cherfan for $325,067.08.

The documentation showing Mamoun purchased Pepperwood from defendants before defendants allegedly purchased Royal Vista contradicts Cherfan's claim that her bank funds were from defendants paying her back for a $388,000 loan. If Mamoun paid defendants $349,000 on or before escrow closed in January 2002 for the purchase of

Pepperwood, then (1) defendants already had $349,000, which could be used for the Royal Vista downpayment and (2) defendants could not use Pepperwood as collateral for the alleged $388,000 loan because they no longer owned Pepperwood when they allegedly purchased Royal Vista.

There is also no explanation for the difference between the $338,000 Cherfan allegedly loaned defendants and the $325,067.08 Mamoun paid Cherfan in September 2002. The evidence indicates that after Mamoun purchased Pepperwood from Youseff in January 2002, she sold it in August 2002 for $349,900. It is unclear as to whom she sold it or why a month later she paid Cherfan $325,067.08.

Additional evidence contradicting Cherfan's claim to the bank funds includes evidence Cherfan is listed as the buyer of Royal Vista on the escrow documents, although "Joe Cherfan," alias for Youssef, is named in the escrow papers. There is also no recording of defendants' purchase of Royal Vista and no documentation of any transfer of title to them. Nor is there any explanation why Youssef used the name, "Joe Cherfan," on the Royal Vista escrow documents.

Carroll testified that she based her opinion the money in Cherfan's account was from defendants' repayment of the $338,000 loan on the assumption Cherfan's statements in her July 18, 2003, letter were true. But Carroll admitted at least one statement in the letter was false. Cherfan stated she purchased Royal Vista in August 2001, whereas in July 2001, she attempted to buy a different home on Summit Grove. In January 2002, Cherfan purchased Royal Vista, according to the escrow papers. In

addition, the purchase and close of escrow occurred when Cherfan was in Beirut, Lebanon, and the name, "Joe Cherfan," is on the walk-through papers, indicating Youseff transacted the purchase in Cherfan's name.

When the People petitioned for preservation of the Royal Vista property, it was still listed in Cherfan's name, although defendants were living in the home. The parties stipulated Secret Service Agent John Waugh interviewed Liliane on October 3, 2002, and she told him defendants did not own Royal Vista. She initially claimed she did not know who owned the home but later said Cherfan owned it. Liliane at first denied having any relationship with Cherfan but later admitted Cherfan was the wife of Youssef's brother. Liliane said she did not know how Cherfan became owner of Royal Vista.

In addition, Detective Kloepfer testified that the Royal Vista salesperson told him Youssef was the buyer of the home. The salesperson indicated she only dealt with defendants during the purchase of Royal Vista but acknowledged the property was bought in another person's name. Also, none of the Royal Vista neighbors knew Cherfan and, during Kloepfer's investigation, no one mentioned a loan involving Royal Vista. In addition, according to Kloepfer, there was another bank account in Cherfan's name in which defendants were writing checks for their own benefit.

Carroll acknowledged she did not know the source of the $338,000 Cherfan allegedly loaned to defendants. She also acknowledged defendants made payments to Cherfan, other than the Pepperwood sale proceeds, that could have been repayment for the alleged loan. Finally, she admitted that laundering was another possible explanation

for the transferring of the funds Marie claimed she received as repayment for the $338,000 loan.

We conclude the totality of this evidence was sufficient to refute by clear and convincing evidence Cherfan's claim of possessing legitimate title to the bank account funds. The trial court thus appropriately denied Cherfan's property claim and ordered the funds in Marie's bank account seized and used to pay restitution to defendants' crime victims.

4. Disposition

The judgment is affirmed as to Cherfan and reversed as to Marie. The parties are to bear their own costs on appeal.

s/Gaut
J.

I concur:

s/McKinster
J.

HOLLENHORST, J.

I respectfully dissent.

Claimants Elham Cherfan (Cherfan) and Marie Rose Roukoz Semaan (Marie) (collectively Claimants) have appealed from the trial court's order denying their verified claims under Penal Code section 186.11 (Section 186.11) as to certain funds in bank accounts in their respective names. I would affirm the trial court's order in its entirety.

B. *Marie's Claim*

Regarding Marie's claim, she stated that (1) she is a resident and citizen of Lebanon; (2) she was married to Simon Semaan, (3) Simon owned a condominium in Brea, (4) Simon died in 1999, and (5) the condominium was sold on August 3, 2001. She declared that the proceeds from the sale of the condominium were deposited into the Wells Fargo account. Also, all Social Security payments for Marie and her minor child were deposited into the account.

Susan Carroll, the certified public accountant who testified on behalf of Cherfan, also testified on behalf of Marie. Carroll stated that she reviewed the bank statements from the Wells Fargo account and some escrow documents. The account had a beginning balance of $1,986.89 as of December 7, 2000, and an ending balance of $219,577.58 as of October 7, 2002. Carroll stated that in her opinion the money in the bank belonged to Marie because it came from either Social Security checks in her name or the sale of the condominium which was in her deceased husband's name. Carroll later stated that Marie was on the title to the condominium. The money from the sale of the

condominium was deposited into the account on August 14, 2001. The first Social Security payment was deposited into the account in March 2001.

Carroll acknowledged that she based her opinion on certain assumptions: (1) that Marie owned the condominium at the time of its sale; (2) that Marie was entitled to the Social Security deposits on the date they were made; and (3) that Marie had not "gifted" the money to the Semaans. Carroll believed that the Wells Fargo account belonged to Marie because her name was on the account and she saw a driver's license with Marie's name on it. She could not recall the source from which she obtained the driver's license and she has never seen Marie herself.

Carroll acknowledged that defendant Youssef Semaan was the person who actually transacted the sale of the condominium, based upon a power of attorney allegedly signed by Marie in Beirut on May 22, 2001. Carroll also acknowledged that she had no evidence that Marie has been in the country anytime between May 2001 and November 2002, the month her claim was filed.

According to Carroll, one way to determine who has control over an account is to see where monies from the account are spent. She admitted that if a person wrote checks on an account and if that person had control over the physical checkbook for the account, that person would have some control over the account. She further agreed that just because a person's name is on an account, it cannot be assumed that that person is the one in charge of the money in the account.

According to Carroll, Marie attempted to withdraw $196,000 from the account in 2001 but was unsuccessful. However, $2,482 was withdrawn from the account based upon 24 checks written against it. Several checks were written on the account from the time period of April 30, 2001, to December 9, 2001, which were for plumbing work for Defendants' residence and payment on credit card accounts.

Detective Kloepfer testified that Marie was not in this country from May 2001 to October 2002. As of September 2001, the address on the Wells Fargo account was listed as 2621 Green River Road, No. 105-165, Corona – a postal annex. Though the postal annex mailbox was registered in the name of Marie, defendant Youssef filled out the paperwork.

Detective Kloepfer further testified that he seized several documents with Marie's name on them from the kitchen pantry in the defendants' residence, including a Social Security card and a driver's license. The driver's license had the name "Marie Rose Roukoz." The signature on the driver's license was easily read, but the signature endorsing the check from the escrow company for the sale of the condominium was unreadable.

Detective Kloepfer stated that the signature card on the bank account appeared to be the same as on the driver's license. With respect to one of the checks presented to the accountant during her testimony, Detective Kloepfer stated that he found the credit card for which the payments were made in defendant Youssef's desk at his business. He also

found credit cards there in the names of both claimants. The credit card with Marie's name was obtained while she was out of the country.

A check written on the account and made out to American Express was in payment for a credit card account controlled by defendants. All other checks written on the account were for payments on credit cards controlled by defendants or for the defendants' personal expenses. There were a total of six credit cards in Marie's name found in defendant Youssef's business office. Detective Kloepfer testified that the signature on the power of attorney for the sale of the condominium was different from the signature on Marie's driver's license. The signature on the power of attorney appears to have been written by the same person who wrote the checks against the account.

Detective Kloepfer testified that the defendants lived in Corona in Pepperwood before they moved to the Royal Vista home. A check was written on the account for utilities listed to Pepperwood. In January and February of 2001, ATM withdrawals in Corona were made against the account. Also, three handwritten spreadsheets for credit card accounts were found in defendant Youssef's desk at his business. One spreadsheet was in the name of Marie. Defendant Youssef produced all three spreadsheets.

Having heard the above, the trial court stated: "Court finds although claimant may have once had some property interest in the [condominium] she has failed to show evidence that she owned any of the money in the Wells Fargo Account. Therefore it is the order of the court that [Marie's] claim be denied."

The majority rejects the trial court's finding for several reasons. To begin with, the majority argues that defendants' control over Marie's bank account is insufficient, on its own, to divest her of her property interest. Second, the majority rejects the claim that Marie gifted the funds to defendants on the grounds that the People failed to provide clear and convincing evidence of such gift. Finally, the majority speculates that defendants could have fraudulently used Marie's bank funds and credit. Absent evidence of Marie's consent or of her abandonment of interest in the funds, the majority concludes that the trial court erred in denying her property claim.

Unlike the majority, I find sufficient evidence to support the trial court's decision. Clearly, defendants controlled the funds in Marie's account. Under Section 186.11, subdivision (e)(1), "any asset or property that is in the control of [the defendant], and any asset or property that has been transferred by [the defendant] to a third party, subsequent to the commission of any criminal act alleged pursuant to subdivision (a), other than in a bona fide purchase . . . may be preserved by the superior court in order to pay restitution and fines imposed pursuant to" Section 186.11. Since 2001, defendants have controlled Marie's account. She has never complained or taken any action to change this. For me, her failure to act is sufficient evidence of defendants' control of the account via a gift, consent or abandonment. Further, her failure to initiate any legal action at any point prior to filing a claim following the seizure of the account in her name, and after defendants were charged and convicted of several criminal acts, speaks volumes. While the majority speculates that Marie was a victim of defendants' fraud, it is just as plausible that she

was, and is, a consenting participant who filed the present claim to recover the funds on behalf of defendants.

For the above reasons, I would affirm the trial court's order in its entirety.

HOLLENHORST
Acting P. J.