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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN J. DACEY, Plaintiff and Appellant, v. WILLIAM TARADAY et al., Defendants and Respondents,	A125080 (San Francisco City and County Super. Ct. No. CGC-06-448535)
JOHN J. DACEY, Plaintiff and Appellant, v. WILLIAM TARADAY, as Administrator, etc., Defendant and Appellant.	A125670

John J. Dacey and Burton J. Goldstein (Goldstein), who is now deceased, were partners at the law firm of Goldstein, Barceloux & Goldstein (GB&G). GB&G and the law firm of Desmond, Nolan, Livaich & Cunningham (Desmond) had been handling a number of inverse condemnation cases against the State of California (the flood cases) since 1986. Desmond and GB&G agreed to share equally in any fee recovery after payment of other attorneys. In 1990, the partners of GB&G signed an agreement for the dissolution and windup of GB&G (the dissolution agreement), and this agreement provided that the flood cases were "assign[ed]" to Goldstein and specified the percentages each former partner of GB&G would receive from the attorney fees recovered in the flood cases.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part I.

Goldstein died in 2001 and the flood cases finally settled in 2004, resulting in a substantial total fee recovery (the fee recovery). William Taraday, the administrator of the estate of Burton J. Goldstein (Taraday, the administrator, or the estate), settled with numerous attorneys participating on behalf of the plaintiffs in the litigation of the flood cases. Taraday agreed to reduce the estate's share in the fee recovery and to increase Desmond's share.

Dacey did not file a creditor's claim in the probate court and Taraday paid him nothing from the fee recovery. Dacey sued Taraday, as the administrator of the estate, for breach of the dissolution agreement and rescission of the dissolution agreement. He also sued Taraday, as an individual, Janet Cross Goldstein (Janet),[1] Barrie Taraday (Barrie), and Gail Hart (Hart) for, among other torts, replevin and conversion.[2] He also set forth claims against Desmond for conversion and "Distribution in Violation of a Lien[.]" All of the parties filed summary judgment and/or summary adjudication motions, and the lower court ruled, among other things, that the statute of limitations under Code of Civil Procedure section 366.2, subdivision (a)[3] did not apply to Dacey's claims against the estate because the administrator, not Goldstein, breached the dissolution agreement.

The matter proceeded to a bifurcated bench trial and the court found against Dacey on all of his claims against the individual defendants. It found in favor of Dacey in his breach of contract claim against the estate. Dacey appealed and Taraday, in his capacity as the administrator, filed a cross-appeal from that portion of the judgment finding in favor of Dacey on his breach of contract claim. At the estate's request, we consolidated the appeals.

The pivotal issue in Dacey's appeal is the interpretation of the dissolution agreement. The lower court ruled that the agreement expressly transferred the legal

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[1] Janet, the wife of Goldstein, died while this case was pending on appeal. Taraday was appointed a special administrator of her estate for the limited purpose of representing her interest in this appeal.

[2] Barrie and Hart are Goldstein's daughters.

[3] All further unspecified code sections refer to the Code of Civil Procedure.

interest in the flood cases to Goldstein, and that the parties' course of conduct supported this interpretation of the agreement. The court therefore concluded that the administrator had the authority to renegotiate the fee agreement between Desmond and GB&G in the flood cases. Dacey objects to the lower court's interpretation of the dissolution agreement and maintains that the flood cases remained an asset of the partnership and therefore the administrator did not have the authority to modify the original 1986 fee agreement. He also makes various other challenges to the court's rulings on his claim of rescission, his tort claims against various defendants, and his request for punitive damages against Taraday, individually. We are not persuaded by any of Dacey's arguments.

The estate appeals from that portion of the judgment finding in favor of Dacey on his breach of contract claim. The estate maintains, among other things, that Dacey's claim was barred because he failed to file a creditor's claim as required by the Probate Code and his claim was untimely under the statute of limitations under Code of Civil Procedure section 366.2, subdivision (a). We conclude that the estate waived raising the creditor's claim issue on appeal and that section 366.2 does not apply to Dacey's breach of contract claim because Taraday, not the decedent, breached the contract. Accordingly, we affirm the judgment.

BACKGROUND

The Formation of GB&G

In 1985, Goldstein, Dacey and Joseph Ehrlich formed the law firm GB&G. About one year later, Jeffrey A. Baruh joined the law firm.

In 1986, 1,350 plaintiffs hired Goldstein and Desmond as co-lead counsel to handle their claims in flood cases, which involved actions for inverse condemnation and tort damages resulting from flooding caused by a break in the Yuba River Levee. A letter agreement in 1986 provided for Desmond and GB&G to share equally in any fee recovery after payment of other attorneys (the 1986 fee agreement). Desmond and GB&G also agreed, among other things, to split equally the costs of prosecuting the actions.

Dissolving GB&G

Ehrlich withdrew from the partnership on September 30, 1989. Primarily because of financial pressures being experienced by the law firm, the partners agreed to dissolve GB&G.

The partners of GB&G agreed that Goldstein, through his new firm Goldstein & Goldstein, would assume all responsibility for the representation and cost of the flood cases. At that time, according to Dacey, the parties estimated the flood cases to be worth "hundreds of millions of dollars." These estimates were based on client damage information, calculations prepared by GB&G, and the opinions of the partners and others. The parties also recognized that the flood cases would require significant resources, monetarily and in labor. Since Goldstein was to assume these costs, Baruh and Dacey agreed, among other things, to reduce their individual shares of the fee recovery in the flood cases.

Goldstein, Dacey, and primarily Baruh drafted the agreement for the dissolution and windup of GB&G. The partners signed the dissolution agreement on April 30, 1990, although they did not execute the agreement until August 19, 1992. The integrated agreement announced, "As a result of various changes in circumstances among the Partners, the Partners desire to dissolve and windup the affairs of the Partnership and liquidate the assets of the Partnership on the terms and conditions set forth herein." The agreement specified that Goldstein would be permitted to use the name "Goldstein & Goldstein" for his law firm after the dissolution of GB&G.

The dissolution agreement also provided the following: "As of May 1, 1990, no further professional services shall be rendered in the name of [GB&G], no further business transacted for the Partnership except action necessary for the winding up of its affairs, . . . , the distribution or liquidation of its assets, and the distribution of the proceeds of the liquidation. . . . Prior to April 30, 1990, the Partners shall assign every uncompleted Contingent Fee Case, to one or another of the Partners on such terms and conditions as shall be agreeable to the clients involved and the Partners; and the rendition of professional services from and after May 1, 1990[,] shall be by such individuals and other law firms, if any, in which they may respectfully become partners or otherwise be associated. With respect to those cases referred to as the [flood cases], the firm of Goldstein & Goldstein shall be substituted in place of the partnership." The agreement noted that the partners expressly agreed that the unfinished business doctrine "shall not be applicable for any purpose, including, without limitation, the division of proceeds collected on matters existing at the time of dissolution."

Attached to the dissolution agreement was the "Partnership Division of Certain Fees and Costs on Dissolution of [GB&G]" (exhibit 5).[4] The dissolution agreement incorporated exhibit 5 by reference. The dissolution agreement provided that exhibit 5 "specifically provided for the allocation and division of, as between the Partnership and themselves individually, of certain contingent and other non-hourly fee matters."

Exhibit 5 specified that GB&G was to receive "75% of the net contingent recovery" in the lawsuits involving "Monterey Hills." With regard to the Monterey Hills actions, exhibit 5 pointed out that the contract with another law firm had been amended to provide GB&G with 40 percent and the other law firm with 60 percent of the net contingent recovery, since the other law firm was "carrying the main burden of the litigation." Also mentioned was Safeway litigation, and the dissolution agreement stated the following: "The contract of GB&G with Safeway Stores, in addition to hourly charges, contains a percentage contingency of any recovery." It noted that Goldstein and Baruh assigned their interest in the contingent fees to Dacey. It added, "From any contingent recovery, GB&G shall receive the sum of $42,000, representing reimbursement for its contingent fee interest, unless the total contingent fee interest due to [Dacey] is equal to or less than $84,000, in which case, GB&G shall be entitled to fifty (50%) percent of any such recovery."

With regard to the flood cases, the dissolution agreement stated that GB&G was entitled to approximately 35 percent of the net contingent recovery as its portion of fees. It declared that Goldstein would "assume responsibility for continuing legal services in

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[4] The dissolution agreement erroneously referred to this document as "exhibit 4."

the cases, and the advancing of costs, disbursements and expenses, as necessary." It further specified that Dacey and Baruh would "not be required to advance further costs unless agreed in writing." Goldstein was to be repaid costs, disbursements, and expenses advanced by him after May 1, 1990.

Exhibit 5 further specified the following: Goldstein "shall receive 70.73% of the remaining total recovery (including without limitation, 70.73% of costs, disbursements and expenses advanced by GB&G). NOTE: This is intended to be a different formula than that used for Monterey Hills cases, by the allocation to [Goldstein] of 70.73% of all costs, disbursements and expenses, advanced by GB&G, in addition to his attorney's fees." With regard to Dacey and Baruh, exhibit 5 provided that they "shall receive 29.27%, divided between them in proportion to their share in GB&G."

Paragraph 7 in exhibit 5 set forth the following: "As to these fees and costs, disbursements, and expense allocation agreements, [Goldstein] and [Dacey] shall have the right to assign all or any part of their individual percentages to other attorneys who participate in the litigation."

Dacey and Baruh read the dissolution agreement, including exhibit 5, prior to executing the documents on August 19, 1992, and the agreement provided "that each is hereby bound and obligated" by the dissolution agreement's terms. The agreement also provided that it could not be amended or modified unless such amendment was in writing and approved by the partners.

Neither Dacey nor Baruh ever provided Desmond with a copy of the dissolution agreement. They also never contacted Desmond regarding the terms of the dissolution agreement and never indicated to Desmond that they retained any financial interest in the fee recovery from the flood cases.

The Flood Cases

After GB&G dissolved, Goldstein continued prosecuting the flood cases as co-counsel with Desmond. Goldstein hired David Collins as an associate of Goldstein & Goldstein to work on the flood cases, and Goldstein agreed to pay Collins 20 percent of his 70.73 percent share of the attorney fees for the flood cases.

The litigation in the flood cases "was protracted and bitterly fought." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 76.) The matter proceeded to a trial and the plaintiffs lost on some theories, but won on an inverse condemnation (takings) theory. (*Id.* at p. 75.) In 1999, the Court of Appeal affirmed the defense jury verdict finding no dangerous condition of public property, reversed the inverse condemnation liability verdict in favor of the plaintiffs, and remanded for another trial on inverse liability. (*Id.* at pp. 75-76.)

Goldstein requested that his former partners Dacey and Baruh agree to reduce their share of the fee recovery. Dacey and Baruh rejected Goldstein's request.

In the fall of 2000, Goldstein became physically and financially unable to participate personally in the prosecution of the flood cases. With Desmond's consent, he retained the services of attorney Frederick Jacobsen to represent his interest in the cases.

Dacey was aware of Goldstein's inability to participate in the litigation of the flood cases, and knew that the cases were scheduled for retrial in early 2001. Goldstein died on January 2, 2001. Dacey did not contact any attorney to offer assistance. Neither Dacey nor Baruh ever contacted Desmond or any of the 1,350 clients in the flood cases at any time during the litigation.

The retrial in the flood cases occurred in 2001. A four-month court trial resulted in a judgment for the defendants. The plaintiffs appealed.

In January 2002, the probate court appointed Taraday, Goldstein's son-in-law, as administrator of the estate with will annexed. Taraday retained probate attorney Theodore Kolb. Kolb told Taraday to send Dacey and Baruh a notice of administration of the estate. Taraday mailed the notices on February 8, 2002. He mailed the notice to Dacey's former address and did not include the suite number in the address for Baruh; both Dacey and Baruh denied ever receiving the notices.

The Court of Appeal in *Paterno v. State of California* (2003) 113 Cal.App.4th 998 reversed the judgment in the flood cases as to the State of California and remanded with directions to the lower court to enter judgment for the plaintiffs and conduct any further necessary proceedings. A settlement followed in the spring of 2004, resulting in a substantial fee recovery. Taraday contacted Desmond and represented to Desmond that the estate was authorized to receive payment of Goldberg's share of the fee recovery.

After the settlement, Desmond claimed entitlement to more than the 50 percent share it had under the 1986 agreement. Desmond asserted that GB&G, Goldstein & Goldstein, and the estate had failed to meet their obligations under the 1986 agreement.

The estate executed a settlement with the Desmond firm in late July 2005, which modified Desmond's share to 60 percent and reduced the estate's share to 40 percent. Both agreed that Desmond would hold back one $1 million in a separate account until June 30, 2006, to cover various contingencies; the money would thereafter be paid out. Taraday testified that he settled because he preferred to settle rather than litigate disputes, he recognized that Desmond had more resources, and he appreciated the amount of work Desmond did after Goldstein died. After paying other attorneys, Desmond received $64,304,960.88. Desmond gave the estate approximately $24 million.[5]

Kolb, in a letter dated September 7, 2005, advised the estate that Dacey's "failure to file a claim within the time allowed by law bars [his] right to receive any payment from the Estate."

Dacey's Complaint and Pretrial Motions and Stipulations

In letters dated November 17, 2005, Taraday notified Dacey and Baruh of the fee recovery. The letters declared that Dacey and Baruh would not receive any of the fee recovery because of their failure to file creditors' claims within the statutory period.

On January 12, 2006, Dacey and Baruh filed a civil action in the superior court against Taraday both as administrator and individually, alleging a cause of action for breach of contract. The original complaint did not identify the attorney fee recovery from the flood cases as a partnership asset. Dacey and Baruh filed an amended complaint on March 1, 2006, which also did not identify the fee recovery from the flood cases as a

[5] The calculation of the estate's 40 percent was based on a net recovery that was lower than the actual amount obtained by Desmond. Desmond negotiated with another law firm to have it reduce its share of the recovery and Taraday permitted Desmond to retain the benefit of obtaining this agreement to a fee reduction.

partnership asset. Taraday and the estate filed a demurrer to the amended complaint. They alleged that Dacey failed to file a creditor's claim and the statute of limitations under section 366.2 barred his claims. The trial court issued a tentative ruling sustaining the demurrer without leave to amend on the basis that the claims were time barred under section 366.2. The court permitted supplemental briefing after the hearing and, subsequently, overruled the demurrer.

On October 20, 2006, Dacey and Baruh filed the operative second amended complaint against Taraday, as administrator, for breach of the dissolution agreement and for rescission. They identified the fee recovery from the flood cases as a partnership asset. They also sued the Goldstein family for, among other torts, replevin and conversion. They added Desmond as a defendant under counts of conversion and "Distribution in Violation of a Lien[.]" They sought punitive damages against Taraday, as an individual. Prior to trial in the civil action, Baruh settled with the estate.

Dacey, the estate, and Desmond filed motions for summary judgment and summary adjudication. The estate argued, among other things, that the statute of limitations under the Code of Civil Procedure section 366.2 and Probate Code sections 9000, 9100, 9103, and/or 9352 barred Dacey's claims.

The trial court denied Desmond's motion for summary judgment. It also rejected Dacey's motions for summary judgment or summary adjudication against Desmond and against the estate.

Although the trial court denied the estate's motion for summary judgment, it granted in part its motion for summary adjudication. It granted the estate's motion as to Dacey's sixth cause of action for breach of fiduciary duty, fifth cause of action for fraud, and request for punitive damages. With regard to the request for punitive damages, the court found that the estate relied on counsel's advice in good faith after full disclosure of the facts and therefore exemplary damages were not recoverable against the estate.

The trial court denied the estate's motion for summary adjudication as to the remainder of Dacey's claims. The court explained that it did not agree with the estate that section 366.2 barred all of Dacey's causes of action for failing to file a creditor's claim within one year of Goldstein's death. It explained that Goldstein had not breached the dissolution agreement before he died and therefore Dacey did not have a cause of action at the time of Goldstein's death. The court found that it was Taraday, not Goldstein, who engaged in the alleged wrongdoing and therefore the statute of limitations did not begin to run when Goldstein died.

The parties stipulated to a bench trial that was bifurcated into a first phase regarding the dissolution agreement. The court was to determine whether the dissolution agreement assigned the flood cases to Goldstein with all rights, responsibilities, and liabilities or whether it provided for the flood cases to be a partnership asset following the dissolution of GB&G. The parties agreed that the material facts underlying this dispute were essentially undisputed and that the matter was an issue of contract interpretation and therefore within the sole province of the court.

The Bench Trial and Statement of Decisions

The first phase of the trial began on May 14, 2008, before Judge James McBride. The sole witnesses were Dacey and Baruh. At the end of the first phase of the trial, on May 19, 2008, the court orally ruled that the contracting parties did not intend for the flood cases to remain an ongoing partnership asset of GB&G following the firm's dissolution. On May 20, 2008, Desmond moved for judgment under section 631.8.

The bench trial continued on May 22, 2008, for the court to consider Dacey's remaining claims. Dacey and Taraday were the only witnesses during this phase of the trial.

On March 20, 2009, the trial court filed its amended and corrected statement of decision regarding Dacey's action against the estate. The court first addressed the dissolution agreement and whether it assigned the flood cases to Goldstein with all rights, responsibilities, and liabilities or whether the flood cases remained a partnership asset after GB&G dissolved. In deciding that the agreement made it clear that the parties did not intend the flood cases to be a partnership asset, the court found the language of the dissolution agreement to be "clear and unambiguous" and "not reasonably susceptible to any other interpretation." It stressed that section 6.1 of the agreement stated that the contracting parties' intended to "assign" the contingent fees cases listed in exhibit 5 to the agreement, and that included the flood cases, to one or more of the partners. The court noted that the partners expressly agreed to substitute the law firm of Goldstein & Goldstein in place of GB&G in the flood cases.

The court also found that the course of conduct of the parties was consistent with the express language of the dissolution agreement. The court pointed out that it was undisputed that after GB&G dissolved, Goldstein was solely responsible for the flood cases and it was undisputed that neither Dacey nor Baruh performed any legal services or contributed any costs to the flood cases after the dissolution of GB&G, including after the death of Goldstein. The court found that neither Dacey nor Baruh treated the flood cases like a partnership asset after dissolution, but treated these cases "in a manner consistent with the intent to maintain their contractual right to reduced percentage of the fee recovery and no attendant risk or responsibility following GB&G's dissolution. The former partners' were cognizant prior to and at the time of dissolution of the substantial potential value of the FLOOD CASES, but they also had an appreciation of the substantial labor and financial resources needed to pursue those cases to conclusion."

The court concluded that the dissolution agreement created a contractual right of recovery against Goldstein for a portion of the fees for the flood cases and that it was the intent of Dacey and Baruh, as evinced by their conduct and the clear language of the dissolution agreement, "to assign fully the rights and obligations" of the flood case to Goldstein in return for a reduction in their percentage of any recovery in the flood cases. The court ruled that the estate was liable to Dacey for breach of contract and that Dacey was entitled to damages in the amount of $4,330,708.64. The court also issued an order granting Dacey's motion for prejudgment interest.

With regard to Dacey's rescission claim, the court found that the estate's failure to pay Dacey his share of the fee recovery was not a material breach justifying the remedy of rescission.

The court also rejected Dacey's causes of action for conversion and replevin against the Goldstein family. The court found that Taraday had a good faith defense to his personal liability for conversion and replevin as set forth in Probate Code section 9651 because the evidence showed that he relied on the advice of his attorney. Attorney Kolb told Taraday that the failure of Dacey and Baruh to file timely creditors' claims prevented them from claiming any right to any of the fee recovery. With regard to the claims of Taraday and the other defendants, the court rejected the defense of unclean hands to defeat any and all of Dacey's causes of action.

On this same date, March 20, 2009, the court issued its statement of decision regarding Dacey's claims for conversion and distribution in violation of a lien against Desmond. The court rejected both of Dacey's claims, finding that Dacey failed to establish ownership or right to possession of the fee recovery at the time Desmond distributed a portion of the fee recovery to Taraday. The court also determined that GB&G's lien rights were assigned and transferred to Goldstein when GB&G dissolved and therefore Desmond properly distributed a portion of the fee recovery to Taraday. The court granted Desmond's motion for judgment under section 631.8. It entered a defense judgment in favor of Desmond and against Dacey.

In its statement of decision regarding Desmond, the court noted that Dacey argued for the first time that the flood cases were an asset allegedly held as a tenancy in common by all of the partners following GB&G's dissolution. After hearing argument on this issue, the court rejected this claim. The court found that this argument was "wholly inconsistent with the testimony, admissions, verified pleadings and exhibits offered" by Dacey. Additionally, this argument contradicted the dissolution agreement and the course of conduct of Dacey. The court also concluded that the authority cited by Dacey did not support this argument.

Appeals

Dacey appealed from the judgment involving the estate and the Goldstein family and the judgment in favor of Desmond. The estate filed a cross-appeal from the judgment entered in favor of Dacey's breach of contract claim. The estate filed an unopposed motion to consolidate the appeals and we granted that motion.[6]

DISCUSSION

I. *Dacey's Appeal*

A. *The Assignment of the Flood Cases under the Dissolution Agreement*

1. *Introduction*

Dacey challenges the lower court's finding that the dissolution agreement assigned all rights and obligations to the flood cases to Goldstein and therefore the administrator had the authority to modify the 1986 fee agreement regarding the flood cases between GB&G and Desmond. Dacey contends that the flood cases remained an asset of the partnership under the dissolution agreement and, consequently, the administrator had no authority to modify the original 1986 fee agreement between GB&G and Desmond.

In the 1986 fee agreement, GB&G and Desmond agreed to split the recovery fee equally after payment of costs and other fees, including payment of a 15 percent share to the firm Coolidge & Gisi. Taraday, as the administrator of the estate, agreed to change the split to increase Desmond's interest in the recovery to 60 percent. Additionally, Taraday agreed that the estate's 40 percent would be based on payment of 15 percent to Coolidge & Gisi even though Desmond was able to get Coolidge & Gisi to agree to a lesser amount. Taraday agreed that Desmond could retain the benefit of the reduced fees paid to Coolidge & Gisi.

The trial court found that Taraday had authority to negotiate a different fee split because the dissolution agreement resulted in a contractual assignment of the flood cases to Goldstein. The court determined that the language of the agreement clearly set forth the parties' intent to permit Dacey and Baruh to "extricate themselves from the substantial responsibility and costs associated with the further prosecution of the flood cases, in consideration for Dacey's contractual right to recover from Goldstein a portion of the fees that all the contracting parties expected to receive out of the flood cases." The

[6] Without determining the relevance of these documents, we also granted Taraday's unopposed motion for this court to take judicial notice of two documents.

parties' course of conduct, according to the trial court, supported this construction of the dissolution agreement as it was undisputed that neither Baruh nor Dacey performed any legal services or contributed to any costs to the flood cases following the dissolution of GB&G, even after Goldstein died.

2. *Standard of Review*

The parties agree that the standard of review is de novo. The parties stipulated, and the court agreed, that the material facts underlying this dispute were for the most part undisputed. Contract interpretation on undisputed facts is a question of law that we review de novo. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866.) The terms of a contract must be interpreted to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) A contract is to be construed as a whole, "so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) When two provisions conflict, the resulting "[r]epugnancy . . . must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." (Civ. Code, § 1652.) Where the terms of the contract are ambiguous or uncertain, determining the terms of the contract is a question of fact for the trier of fact, which in the present case was the trial court, based on "all credible evidence concerning the parties' intentions . . . ." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

To the extent Dacey challenges findings based on disputed evidence, we use the substantial evidence standard of review. When a judgment is attacked on the ground that there is no substantial evidence to sustain it, "[o]ur authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) The testimony of a single witness may constitute substantial evidence in support of the judgment. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment." (*Howard,* at p. 631.) We view all factual matters in the light most favorable to the prevailing party, resolving all conflicts and indulging all reasonable inferences from the evidence to support the judgment. (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465, disapproved on other grounds in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352, fn. 17.)

3. *Waiver*

The estate contends that Dacey waived any challenge to the trial court's determination that the administrator had the authority to modify the original 1986 fee agreement between Desmond and GB&G. The estate argues waiver on the grounds that Dacey ignored the court's finding regarding course-of-conduct. The court, according to the estate, ruled that the administrator had the authority to modify the original 1986 fee agreement on two independent bases: its interpretation of the dissolution agreement and the course-of-conduct evidence. Since Dacey did not discuss one of the grounds for the court's ruling, the estate maintains that we should affirm on the ground not addressed on appeal by Dacey.

Dacey responds that the lower court did not find that the terms of the dissolution agreement were ambiguous and therefore the conduct evidence was not critical to its conclusion that the agreement gave Taraday authority to modify the terms of the agreement between GB&G and Desmond. He also argues that, even if the court based its decision on course-of-conduct evidence, such evidence was undisputed and his argument was that his conduct was consistent with the dissolution agreement.

In its statement of decision, the trial court expressly stated that the clear language of the dissolution agreement showed the parties' intent to assign all of the legal obligations and rights to the flood cases to Goldstein and that Goldstein had the authority to modify the agreement between GB&G and Desmond. When considering course of conduct, the court noted that extrinsic evidence is not usually considered when the terms of the agreement are clear and ambiguous. (See § 1856.) The court elaborated that such evidence is given great weight when a contract is ambiguous. The court then set forth the procedure for considering extrinsic evidence when a dispute arises over the meaning of the language in the instrument. It concluded that the express terms of the dissolution agreement assigned the flood cases to Goldstein and that the course of conduct was "totally consistent with the express language of the" dissolution agreement.

We do not agree that the trial court found that the course of conduct was an independent basis for its ruling. Rather, we conclude that it found that the former partners' course of conduct supported the court's interpretation of the contract. Accordingly, we consider the merits of Dacey's challenge to the court's ruling on Taraday's authority to modify the agreement between GB&G and Desmond.

4. *Interpreting the Dissolution Agreement*

a. *The Language of the Dissolution Agreement*

As already stressed, the salient issue is whether the language of the dissolution agreement evinced an intent of the former partners to assign the flood cases to Goldstein with all rights, responsibilities, and liabilities or whether the agreement showed an intent to have the flood cases remain a partnership asset.

The dissolution agreement sets forth the parties' intent for writing this agreement as "to dissolve and windup the affairs of the Partnership and liquidate the assets of the Partnership . . . ." Under the heading, "The Rendering of Professional Services upon Termination," is paragraph 6.1, which is entitled, "No Further Professional Services Rendered in Partnership Name." Paragraph 6.1 specifies: "As of May 1, 1990, no further professional services shall be rendered in the name of Goldstein Barceloux & Goldstein, no further business transacted for the Partnership except action necessary for the winding up of its affairs, (including legal actions which have been continued with the Agreement of the partners), the distribution or liquidation of its assets, and the distribution of the proceeds of the liquidation. Maintenance of offices to effectuate or facilitate the winding up of the Partnership affairs shall not be construed to involve the continuation of the Partnership. Prior to April 30, 1990, the Partners shall assign every uncompleted Contingent Fee Case, to one or another of the Partners on such terms and conditions as shall be agreeable to the clients involved and the Partners; and the rendition of professional services from and after May 1, 1990[,] shall be by such individuals and other law firms, if any, in which they may respectfully become partners or otherwise be associated. With respect to those cases referred to as the 'Yuba Levee Cases" (see exhibit '[5]'), the firm of Goldstein & Goldstein shall be substituted in place of the partnership."[7]

Paragraph 6.1 expressly "assigns" every uncompleted contingent fee case, which included the flood cases, to a particular partner. In the present case, it is undisputed that the flood cases were assigned to Goldstein.

The common legal definition of assign is "to transfer to another" a property or legal right. (Http://www.merriam-webster.com/dictionary/assign.) "To 'assign' ordinarily means to transfer title or ownership of property [citation], but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. [Citation.] It is the substance and not the form of a transaction[,] which determines whether an assignment was intended. [Citations.] If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place. [Citations.]" (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225.) An assignment carries with it all of the assignor's rights. (Civ. Code, § 1084; see also *Foreman Roofing Inc. v. United Union of Roofers Etc. Workers* (1983) 144 Cal.App.3d 99, 107.)

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[7] Dacey argues that this clause required a substitution of counsel. He claims that no substitution of counsel was filed in the flood cases. When making this argument, Dacey fails to cite to any evidence in the record. As already stated, we view all factual matters in the light most favorable to the prevailing party, resolving all conflicts and indulging all reasonable inferences from the evidence to support the judgment. (*Scott v. Pacific Gas & Electric Co.*, *supra*, 11 Cal.4th at p. 465.) Accordingly, we reject Dacey's argument that the facts do not show that any substitution of counsel was filed in the flood cases.

Here, attorneys drafted the agreement and the reasonable construction of the term is the common legal definition of transferring legal rights and title. Moreover, paragraph 6.1 provides that, "[w]ith respect to those cases referred to as the [flood cases], the firm of Goldstein & Goldstein shall be substituted in place of the partnership." Thus, this provision makes it clear that the legal interest in the flood cases was being transferred to Goldstein and his new firm Goldstein & Goldstein.

This interpretation is consistent with other provisions in the dissolution agreement that relate to "unfinished business." The flood cases were pending at the time GB&G dissolved and thus they fall under the category of unfinished business.

The general unfinished business rule is that a partnership does not terminate upon its dissolution but continues to exist for the limited purpose of winding up the partnership's affairs and completing all unfinished business. (*Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 Cal.App.3d 200, 216, overruled on another issue in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 521, fn. 10.) Under the Uniform Partnership Act (Corp. Code, § 15001 et seq.), a dissolved partnership continues until the winding up of unfinished partnership business. (Corp. Code, § 15030.) Other than a surviving partner, no partner is entitled to compensation in an amount that is greater than would have been received as the former partner's share of the dissolved partnership for services rendered in completing unfinished business. (*Jewel v. Boxer* (1984) 156 Cal.App.3d 171, 176.) "Thus, absent a contrary agreement, any income generated through the winding up of unfinished business is allocated to the former partners according to their respective interests in the partnership." (*Ibid.*)

Here, the dissolution agreement detailed a contrary rule in paragraph 6.2. This paragraph expressly states that the unfinished business doctrine does not apply. Specifically, it provides: "The Partners expressly agree that the unfinished business doctrine ([s]ee *Jewel v. Boxer*[, *supra*] 156 Cal.App.3d 171 . . . ; *Fox v. Abrams* [(1985) 163] Cal.App.3d 610 . . . ; *Rosenfeld Meyer & Susman v. Cohen*[*supra,*] 146 Cal.App.3d 200 . . .) shall not be applicable for any purpose, including, without limitation, the division of proceeds collected on matters existing at the time of dissolution. By separate agreement, attached hereto as exhibit [5], and incorporated herein by this reference (entitled 'Partnership Division of Certain Fees and Costs on Dissolution of Goldstein, Barceloux & Goldstein'), [Goldstein, Dacey and Baruh] have specifically designated responsibility for certain specified cases referenced therein and have specifically provided for the allocation and division of, as between the Partnership and themselves individually, of certain contingent and other non-hourly fee matters." Thus, the dissolution agreement makes it clear that the rule under the Uniform Partnership Act as set forth in *Jewel, Fox,* and *Rosenfeld,* does not apply.

Dacey objects to the foregoing interpretation of the dissolution agreement and maintains that the word "assigned" in paragraph 6.1 simply means that the case was "allocate[d]" to a particular partner. He claims that this provision, read in context, simply assigns the duty to perform professional services, and remains silent regarding the right to fees. He points out that paragraph 6.1 specifies that the "terms and conditions" must "be agreeable to the clients involved" and claims that paragraph 6.2 then identifies those "agreeable" terms when it declares, by separate agreement as provided for in exhibit 5, the partners had "specifically designated responsibility for certain specified cases referenced therein . . . ."

We disagree with Dacey's interpretation. As already discussed, the common legal definition of assign is to transfer a legal or valuable interest and it is reasonable to use the legal definition when the agreement involves the winding up and dissolution of a law firm. Dacey's citation to a portion of paragraph 6.2 does not persuade us that his definition of assign reflects the parties' intent. Dacey focuses on the beginning portion of a sentence in paragraph 6.2, and ignores the remainder of the sentence. After specifying that the partners "have specifically designated responsibility for certain specified cases[,]" the sentence provides that exhibit 5 has "specifically provided for the allocation and division of, as between the Partnership and themselves individually, of certain contingent and other non-hourly fee matters." Thus, this latter portion of the sentence makes it clear that the parties were not only designating responsibility for a case to a particular partner, but also were transferring legal interests between GB&G and individual partners.

Dacey also complains that paragraph 6.2 did not waive the protection of the Uniform Partnership Act because the paragraph does not even mention this Act. Dacey, however, ignores that the cases cited in this paragraph, e.g., *Jewel v. Boxer, supra,* 156 Cal.App.3d 171, specifically discuss the unfinished business doctrine and the Uniform Partnership Act.

The dissolution agreement expressly states that the unfinished business doctrine does not apply and the Court of Appeal decisions cited discuss the general rule of the unfinished business doctrine under the Uniform Partnership Act. Accordingly, we agree with the lower court that the dissolution agreement clearly sets forth the parties' intent for the rule regarding unfinished business under the Uniform Partnership Act not to apply to the cases still pending at the time GB&G was winding up.

Even if paragraph 6.2 waives the protection under the Uniform Partnership Act, Dacey declares that this paragraph simply sought to avoid placing a disproportionate burden on the partners for completing unfinished business and did not assign the flood cases to Goldstein. Such an interpretation, however, would require us to construct paragraph 6.2 individually and not to harmonize this paragraph with the remainder of the agreement, including paragraph 6.1. This is a clear violation of the rules of statutory construction. When considering paragraphs 6.1 and 6.2 together, it is clear that the parties intended at the time they signed the dissolution agreement to assign the flood cases to Goldstein and waive the protections of the Uniform Partnership Act.

Other provisions in the dissolution agreement, not related to the flood cases, bolster our conclusion that the lower court correctly interpreted the dissolution agreement. Paragraph 2.2 states that Goldstein "is hereby assigned and shall be entitled to use the former telephone number and telefax numbers of the Partnership." At trial, when asked whether the phone number of a law firm was a "fairly important asset[,]" Dacey responded, "I suppose so." Dacey was further questioned, "And you transferred this asset to Burt Goldstein, didn't you?" Dacey replied, "Yes." Thus, Dacey agreed that the parties intended the word “assign” as used in paragraph 2.2. to mean the transfer of a valuable asset; “assign” did not mean in this paragraph to designate a duty.

Additionally, the dissolution agreement made it clear when the parties intended to have the partnership retain an interest in a pending case that had a fee contingency agreement. Exhibit 5 expressly declared that GB&G retained an interest in a recovery in the Monterey Hills and Safeway cases. No language in the dissolution agreement indicated that any proceeds from the flood cases would be partnership property or was being collected by or on behalf of the partnership. Rather, the agreement simply provided for the percentage share each partner would “receive” out of any fee recovery in the flood cases.

In urging this court to accept his interpretation of the dissolution agreement, Dacey relies heavily on paragraphs 2.b. and 7 in exhibit 5. Paragraph 7 , which is the final paragraph in exhibit 5, reads as follows: “As to these fees and costs, disbursements, and expense allocation agreements, [Goldstein] and [Dacey] shall have the right to assign all or any part of their individual percentages to other attorneys who participate in the litigation.” Paragraph 2.b. in exhibit 5 provides that Goldstein “shall receive 70.73% of the remaining total recovery” and Dacey and Baruh “shall receive 29.27%, divided between them in proportion to their share in GB&G.” Dacey contends that the use of the word “divided” when describing the partners’ shares in the recovery fee indicates that the former partners retained a right to recovery, and that the entire interest was not transferred to Goldstein. Paragraph 7, according to Dacey established that Goldstein had the right to assign his own percentage interest in the flood cases, but not the other former partners’ interest in the flood cases. Dacey maintains that, had the intent been for Goldstein to have the right to assign both his own and other attorneys’ percentages, paragraph 7 would have explicitly stated that.

Paragraph 7 merely states that, if another attorney works on the case, Goldstein or Dacey have a right to assign a portion of his share of a fee to another attorney. This paragraph does not restrict Goldstein’s right to modify a contingent fee contract or a fee sharing agreement with another lawyer in a case assigned to Goldstein.[8] As the trial court found, the agreement provided for a lawyer's fee to come out of Goldstein's share if Goldstein hired a lawyer to work directly on the case for him after dissolution. The Desmond firm, however, had been co-counsel on the flood cases with GB&G for four years prior to GB&G's dissolution. Accordingly, as the lower court explained: "If the GB&G partners had wanted to tie Goldstein's hands about changing the fee allocation with Desmond, they could have. They did not." We agree with the lower court's conclusion that "Dacey and Baruh agreed to take a fixed percentage of Goldstein's fees, but did not include any term that tied this measure to the original Desmond and GB&G fee split."

Furthermore, Dacey's interpretation of paragraph 7 conflicts with those other provisions in the dissolution agreement that stated the legal interest in the flood cases was being transferred to Goldstein. Generally, "[c]ontradictory or inconsistent provisions of a contract are to be reconciled by interpreting the language in such a manner that will give effect to the entire contract." (*Estate of Petersen* (1994) 28 Cal.App.4th 1742, 1754, fn. 4.) We must reject an interpretation that creates conflicts between various provisions "when another interpretation serves to harmonize all the provisions . . . ." (*Southern Pacific Land Co. v. Westlake Farms, Inc.* (1987) 188 Cal.App.3d 807, 822.) Dacey complains that the conflict in interpretation does not justify ignoring or nullifying paragraph 7. However, the trial court's interpretation does not nullify or rewrite any provision in the dissolution agreement, but simply interprets the plain language of paragraph 7 in a manner that is consistent with the other provisions.

We also do not agree with Dacey's argument regarding the use of the word "divided" in paragraph 2.b. This paragraph simply means that Baruh and Dacey were to divide any amount of the fee recovery they were to receive according to their respective interest in GB&G. When arguing that "divided" indicates that the partners were to retain a right to the recovery, Dacey professes that this interpretation "flows from" *McCafferty*

[8] Indeed, that happened. Attorneys worked on the flood cases under Goldstein and their payment of fees came out of Goldstein's share of the fee recovery.

v. Gilbank (1967) 249 Cal.App.2d 569 (*McCafferty*). *McCafferty*, however, is completely inapposite.

In *McCafferty, supra* 249 Cal.App.2d 569, an ex-wife traded a lump-sum judgment she obtained for past due child support against her ex-husband in exchange for a percentage of litigation proceeds in the ex-husband's personal injury action against a third party. (*Id.* at p. 571.) On the strength of this promise, the ex-wife failed to file a judgment lien in the personal injury action. After the personal injury lawsuit was settled and the attorney for the ex-husband received the proceeds, he cashed the checks with his client and personally kept the amount he considered his fees even though he was intimately involved in preparing the agreement between his client and the ex-wife. (*Ibid.*) The appellate court reversed the trial court's granting the attorney's motion for a nonsuit in the wife's action for conversion, determining that the equities of the case favored imposition of an equitable lien. (*Id.* at pp. 576-577.) The court examined the conduct of the parties, the letter from the ex-wife's lawyers referring to the transaction as an " 'assignment[,]' " and the lawyer's proposed " 'dividing' the net proceeds of the recovery." (*Id.* at p. 576.) The court concluded that a reasonable interpretation of the use of the word " 'dividing' " was the "draftsman's intention that plaintiff be given a property interest in such proceeds and not just his client's promise to pay the agreed sum when due." (*Ibid.*)

Dacey claims that the court's definition of " 'dividing' " in *McCafferty, supra,* 249 Cal.App.2d 569, is relevant to the present case. This argument, however, lacks merit. The court in *McCafferty* was not interpreting a contract, but was examining language in a letter in combination with the parties' conduct to determine whether the promise created a triable issue of fact that there was an equitable lien. The court concluded: " ' "[W]here a third party has paramount title to the money in the hands of the agent, and notifies the latter of his claim, if the agent nevertheless pays the principal, he is liable to the true owner." ' " (*Id.* at p. 577.) The facts and issues considered in *McCafferty* have no relevance to the present case or to the interpretation of the word "divided" as used in the present dissolution agreement.

Paragraph 5, according to Dacey, also supports his argument that the parties intended to keep the flood cases as a partnership asset. This paragraph relates to liquidation of assets and reads in relevant part: "As of May 1, 1990, the Partners shall be the agents of the terminated Partnership in liquidation, and of the individual Partners, for winding up all of its affairs and all business transactions of the Partnership, other than the performance of incomplete professional services referred to in Section 6 herein." Dacey observes that renegotiating the agreement between GB&G and Desmond does not constitute the performance of professional services and therefore does not fall under this exception. He concludes that, consequently, the partnership continued to exist for purposes of the agreement between GB&G and Desmond.

We disagree with Dacey's interpretation. Paragraph 5 is simply irrelevant to the question of whether the parties intended to assign the flood cases entirely to Goldstein or to keep them as an asset of the partnership. The agency referred to in paragraph 5 refers to the winding up of the partnership's affairs and business transactions. Since other provisions in the dissolution agreement make it clear that the partnership's interest in the flood cases was transferred to Goldstein, paragraph 5 does not apply to the flood cases.

Dacey also refers to the language in the dissolution agreement that provides, "[u]nder existing contracts with other counsel, GB&G is entitled to approximately 35% of the net contingent recovery as its portion of fees . . . . (Note: The 35% may vary by reason of referral fees payable to other lawyers)." Dacey argues that only referral fees could trigger a change in GB&G's share of the recovery. We disagree. This language does not suggest that existing contracts could not be changed; nor does it specify that the percentage may vary *only* because of referral fees. Rather, under this provision, one reason a percentage of the recovery may vary was that a referral fee was payable to another attorney.

Finally, Dacey cites *Dunne & Gaston v. Keltner* (1975) 50 Cal.App.3d 560 (*Dunne*) in support of his argument that the dissolution agreement prevented the estate from modifying the original 1986 fee sharing agreement between GB&G and Desmond. In *Dunne*, a partner withdrew from a continuing law partnership and left a number of contingent fee cases that he had brought into the firm with the firm. (*Id.* at pp. 561-562 & fn. 2.) The agreement between the departing partner and the law firm specified that the firm would pay him an identified " 'percentage of the attorneys' fees recovered on said cases as set forth on exhibit "B," and said percentage of attorneys' fees will become a lien upon the fees paid in that particular case.' " (*Id.* at p. 562, fn. 2.) After the attorney departed from the law firm, the law firm entered into a written agreement with another law firm regarding one of the cases the departing attorney had brought to the firm. The new firm handling the case was to receive 60 percent of the recovery. (*Id.* at p. 562.) Once the case settled, the law firm sent the attorney who had departed one-sixth of the fee it received, but the attorney claimed that he was entitled to one-sixth of the entire attorney's recovery under the terms of the agreement. (*Id.* at pp. 562-563.) The court held that, at the time the agreement was executed, there was nothing in the record to show that "the parties intended, or even contemplated, that [the case at issue on appeal] subsequently was to be referred to another legal firm which would also share in the total attorneys' fee (the trial court expressly found that there was no such intention) . . . ." (*Id.* at p. 563, fn. omitted.) The court reasoned that the use of the word "recovered" in the agreement had "the common connotation of representing the *entirety* of a sum obtained by process and course of law which includes settlement. (*Id.* at p. 564.) The court therefore concluded that the law firm owed the attorney who had left one-sixth of the entire sum of attorney fees.

Although Dacey relies on *Dunne,* this case does not benefit him. Firstly, the agreement interpreted in that case did not have language similar to the language in the present dissolution agreement. In *Dunne,* the court interpreted the language of the agreement as stating that the one-sixth interest was based on the entire recovery. Dacey maintains that, similarly here, the dissolution agreement states that he is entitled to a portion of the "total recovery[.]" Dacey's argument is somewhat incomprehensible because he never argues that he is entitled to a portion of the total recovery. As already stressed, provisions in the dissolution agreement make it clear that Dacey was entitled to a portion of Goldstein's net recovery, not a portion of the total fee recovery.

Secondly, at the time the partner was leaving the law firm in *Dunne,* the parties did not intend to share the recovery with another law firm. In the present case, at the time of the dissolution agreement, GB&G had already entered into an agreement with Desmond to co-litigate the flood cases. Thus, a fee sharing arrangement was already contemplated at the time of the agreement and, if the parties had wished, they could have written a provision limiting Goldstein's authority to alter the terms of that fee sharing arrangement. No such provision was in the dissolution agreement and the agreement assigned the flood cases to Goldstein. Moreover, as the trial court observed, Dacey and Baruh agreed to take a fixed percentage of Goldstein's fees, and included no term that tied this measure to the original fee split between GB&G and Desmond. Dacey asserts that the agreement is silent with regard to any renegotiation of the agreement between GB&G and Desmond. However, no such provision was necessary since the dissolution agreement assigned the flood cases to Goldstein, giving him the authority to renegotiate any fee agreements related to the flood cases.

Dacey grasps onto language in a footnote in *Dunne*, *supra*, 50 Cal.App.3d 560, to argue that *Dunne's* reasoning requires us to reject the lower court's interpretation of the dissolution agreement in the present case. In this footnote, the *Dunne* court observed: "By a logical, although admittedly unrealistic, extension of plaintiff's position, if it had agreed to give the new firm the *entire* fee, defendant would thereafter have been entitled to nothing by way of his '1/6' share." (*Id.* at pp. 564-565, fn. 6.) Dacey argues that "[p]recisely the same untenable logic led to the erroneous result here."

In the present case, the possibility that Dacey could receive nothing from the flood cases does not reflect "untenable logic." In *Dunne,* the partner who had left the firm was the person contacted to take the case (*Dunne, supra,* 50 Cal.App.3d at p. 562), and it would therefore be presumably unfair for him to receive nothing. Here, the plaintiffs in the flood cases hired Goldstein and Desmond as co-counsel, and Dacey did no work on the cases. Moreover, the flood cases involved the investment of significant resources with a risk that there would be no attorney fee recovery. Finally, Goldstein died while the flood cases were still pending and, consequently, it would be reasonable to conclude that Desmond, who now had to carry a more significant load, would receive a greater share. Thus, not only are the terms of the agreement at issue in *Dunne* completely different, but the facts are not the same and the equities in the two cases are completely distinguishable.

We agree with the lower court that the dissolution agreement, by its express terms, waived the protection of the Uniform Partnership Act and assigned, that is, transferred the obligations and costs related to the flood cases to Goldstein and his new firm Goldstein & Goldstein. We now consider the lower court's determination that the evidence of course of conduct provided further support that the parties did not intend for the flood cases to remain an asset of GB&G. (See *McCown v. Spencer, supra,* 8 Cal.App.3d at p. 225.)

b. *Course of Conduct*

The undisputed evidence established Dacey and Baruh did not perform any legal services on the flood cases or contribute any costs toward the prosecution of the flood cases after the dissolution of GB&G. This remained true even after Goldstein's death on January 2, 2001. Dacey never contacted any of the clients of the flood cases after GB&G's dissolution and never disclosed to any insurer any ongoing responsibility for the litigation in the flood cases. Dacey also never contacted Desmond to offer any type of legal or financial assistance. Dacey and Baruh did not provide Desmond with a copy of the dissolution agreement or contact Desmond regarding the terms of the dissolution agreement. They also never advised Desmond that they had any financial interest in the fee recovery.

In Dacey's initial pleading in this action, he asserted a cause of action for breach of contract but did not identify the fee recovery as a partnership asset. It was after a demurrer to an amended pleading based upon a statute of limitations defense under section 366.2 that Dacey filed his second amended complaint and identified the fee recovery as a partnership asset.

Dacey argues that evidence in the record shows that Baruh and he met with Goldstein after Goldstein asked them to reduce their percentage share in the fee recovery and Goldstein denied their offers to help. The record establishes that Dacey was asked the following at trial: "Between GB&G's dissolution at the end of April of 1990 and the phone call . . . letting you know that Mr. Goldstein had passed away, during that frame, did you ever make an offer to Burt Goldstein to assist in the ongoing prosecution of the [flood] cases?" Dacey responded, "No, I did not." Subsequently, Dacey was asked about this meeting when Goldstein requested the former partners to reduce their percentages, and Dacey testified that, as he recalled, Baruh and he "offered to assist in the case with him in order to help him with whatever problems he was having."

The trial court found that Dacey did not offer to assist in the flood cases and Dacey's initial testimony supports that finding. Furthermore, even if Dacey made a vague offer to assist, this does not establish that Dacey considered the flood cases a partnership asset.

We agree with the lower court that the former partners' course of conduct indicated that they did not intend the flood cases to be a partnership asset, and such behavior was consistent with the express terms of the dissolution agreement. Accordingly, we conclude that the lower court correctly interpreted the dissolution agreement as assigning all of the legal obligations of the flood cases to Goldstein.

c. *The Authority of the Administrator to Modify the Agreement with Desmond*

Dacey contends that even if Goldstein could renegotiate the agreement between GB&G and Desmond, Taraday, as the administrator of the estate, had no such authority.[9]

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[9] Dacey also argues that GB&G's share of the flood cases had been assigned, if at all, to the three former partners as tenants in common and therefore Goldstein had no right to adjust the fee recovery with Desmond without the other partners' agreement. Dacey supports this argument with no citation to the record and does not show that he raised this issue in the trial court.

As the estate points out, Dacey did not raise this issue in his complaint and raised it for the first time on the tenth day of trial. On May 20, 2008, the court asked counsel for Dacey: "Should they, at this late date, be required to defend a tenancy in common theory that was never pled and not in any version of the complaint, either." Counsel for Dacey acknowledged: "That is correct. It was not in any version . . . ."

He argues that Probate Code section 9762 bars a representative of a deceased partner from acting for the partnership without an express court order. As already discussed, we have concluded that the flood cases were not an asset of the partnership and therefore Taraday was not acting on behalf of the partnership.

Dacey also asserts, with no analysis or discussion, that Taraday lacked the power absent court order to act on behalf of Goldstein and cites Probate Code section 9760, subdivision (b). Dacey has not shown that this issue was raised in the trial court and has provided no support for this assertion. Accordingly, we reject this unsupported argument and presume that Taraday had the authority as the administrator to enter into an agreement with Desmond regarding the fee recovery in the flood cases.

We conclude that the lower court correctly found that Taraday, as the administrator of the estate, had the authority to modify the 1986 fee agreement between GB&G and Desmond that had been signed prior to the dissolution agreement.

Dacey also neglects to mention that, on June 18, 2008, he requested leave to file an amendment to his second amended verified complaint and asked to add a cause of action against Taraday for violating his rights as a tenant in common. The court's order filed on September 3, 2008, denied this motion because Dacey filed "to demonstrate a prima facie showing necessary for such motion for the following reasons: (1) the factual allegations in the proposed ninth cause of action are inconsistent with the facts set forth in Dacey's prior verified pleadings and inconsistent with the prior rulings of this court; (2) Dacey did not demonstrate diligence in bringing the motion, nor explain any excuse for delay, and (3) the proposed amendment would result in undue prejudice against the Estate defendants in the form of a legal theory not set forth in the Second Amended Verified Complaint, creating unfair surprise."

We will not consider the merits of Dacey's argument, as he did not raise this issue in a timely fashion in the lower court and has completely failed to show that the lower court abused its discretion in denying his motion to amend. (See, e.g., *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746 [unwarranted delay in presenting the amendment of a pleading " ' "may—of itself—be a valid reason for denial" ' "].) Furthermore, Dacey failed to support his appellate argument with appropriate citations to the record and therefore waives the issue on appeal. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) If a party fails to support an argument with the *necessary* citations to the record, we may deem that argument waived. (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 391.)

B. *Partial Rescission*

1. *Background*

As an alternative to his breach of contract claim, Dacey alleged in his pleading rescission of the dissolution agreement. At trial, he told the court that Taraday had a duty to pay him his share from the fee recovery and Taraday's failure to pay him was a material breach of the dissolution agreement. The court rejected this claim on the basis that the breach was not material. It also found that damages were sufficient to make Dacey whole.

When rejecting Dacey's claim, the trial court explained that the flood cases could not be considered separate from the remainder of the dissolution agreement because the expected outcome from this litigation was "tied up with at least all of the other contingent fee cases." The court stated that there was "a give and a take, back and forth among the partners" with regard to the contingent fee cases. The court elaborated that it believed the "principal purpose of the dissolution agreement, when it happened, was the winding up of the firm to get out from under a bad financial situation." The partners at GB&G, in the court's view, were concerned with an "insufficient hourly-rate case income to pay the overhead and not enough contingent-fee income to close the gap." The court noted that the division of the workload was of equal importance, "but not of equal concern . . ."

The trial court did not ignore the significance of the flood cases. It agreed that all of the partners knew that the lawsuit involving the flood cases was "the biggest," but the court emphasized that this litigation was "the most difficult, and chancy as well . . . ." Dacey argued that the former partners did not sign the dissolution agreement until 1992, which was after the 1992 judgment in the first trial involving the flood cases and therefore they knew the fee recovery was a significant asset. The court disagreed. It found that the undisputed evidence was that the agreement was made in April 1990, not in 1992, and the litigation involving the flood cases was an important, but not pivotal, concern when drafting the dissolution agreement in 1990.

The trial court orally denied Dacey's claim for rescission, and stated the following: "The short-term obligations, the immediate business obligations, of the firm combined with the need to make more money was a major component of the decision to enter into a partnership dissolution agreement. It was the triggering component. [¶] The triggering component was not the existence and ongoing burden of the [flood] cases or the other contingent fee cases." The court elaborated: "The decision about how the [flood cases] would be allocated, the fee would be allocated among the former partners, was part of a package of accommodations and negotiations that include not only how they would split the business, the ongoing business, but other obligations. [¶] It cannot be looked at in isolation. That is not a record that is before me. The record before me was that the whole thing was a winding up of the business and an essential component of winding up the business . . . . [¶] The [litigation of the flood cases] was an important aspect of the deal. [These cases were] not by [themselves] the single most important aspect of the deal. . . ." The court concluded that Taraday's breach was "not so material as to justify the remedy of rescission."

The trial court reiterated its oral ruling in its statement of decision, and repeated that the failure to pay Dacey his share of the fees derived from the flood cases was not a material breach justifying the remedy of rescission. The court noted Dacey's argument that the fee recovery was the single most important asset of the dissolution agreement, but it disagreed and stressed that Dacey offered "neither legal authority nor evidence to support his theory that the materiality of a breach of the Dissolution Agreement is properly analyzed by looking to a single point during the long period between the break of GB&G and the signing of the Dissolution Agreement. . . ."

2. *The Standard of Review*

Dacey contends that the lower court erred as a matter of law when it denied his cause of action for rescission. However, "[w]hether a breach is so material . . . is a question of fact for the trier of fact." (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051-1052.) As already discussed, "When reviewing a claim of insufficiency of evidence, [a court] must view the evidence in the light most favorable to the verdict and presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from that evidence. The test is whether substantial evidence supports the conclusion of the trier of fact . . . . Substantial evidence must be of ponderable legal significance, reasonable in nature, credible and of solid value." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 584-585.)[10]

3. *Applying the Standard of Review to the Facts*

Dacey contends that the evidence was undisputed that the litigation involving the flood cases was the largest lawsuit ever undertaken by GB&G. Dacey testified, "[W]hen we took on [the flood] cases, that was probably by far the largest case that the firm had ever undertaken." He asserts that when the dissolution agreement was executed in 1992, the first trial had resulted in a judgment in favor of the plaintiffs and the costs had been modest. He claims that the lower court erred because it examined the entire dissolution agreement and disregarded the magnitude of the flood cases as well as the fact that the clause regarding the flood cases could have been separately rescinded.

Here, the evidence amply supports the lower court's finding that Taraday's refusal to pay was not a material breach. Rescission allows a party to a contract to be "relieved of the burdens and [to] procure restitutionary redress respecting a contract which was defective at its inception because consent was not freely or knowingly given." (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 317-318, fn. 16.) A party may rescind a contract "[i]f the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause." (Civ. Code, § 1689, subd. (b)(4).) A failure of consideration by one party is material only if it goes "to the 'essence' of the contract." (*Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 404.) "[A] person

[10] The standard of review, according to the estate, is an abuse of discretion. If the court had found the breach was material, we would review the remedy under an abuse of discretion standard. When a party seeks to rescind or partially rescind a contract in court, the remedy is equitable. (*Gill v. Rich* (2005) 128 Cal.App.4th 1254, 1264.) In the rescission context, " ' "the court should do complete equity between the parties" and to that end "may grant any monetary relief necessary" to do so.' " (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1144.) "[C]ase law recognizes the trial court's broad power to fashion an appropriate remedy in cases of rescission . . . in accordance with established principles of law and equity." (*Id.* at p. 1147.) We, however, review a ruling regarding materiality under the standard of substantial evidence.

is not entitled to rescind or abandon a contract for an alleged breach of that contract when the breach does not go to the root of the consideration. [Citation.]" (*Karz v. Department of P. & V. Standards* (1936) 11 Cal.App.2d 554, 557.)

The dissolution agreement stated that the dissolution and windup of GB&G was being "made with reference" to the following facts. The following facts mentioned the withdrawal from the partnership by Ehrlich in 1989, the withdrawal of Baruh in March 1990, an office lease with promissory notes, and bank loans exceeding $300,000. The agreement announced, "As a result of various changes in circumstances among the Partners, the Partners desire to dissolve and windup the affairs of the Partnership and liquidate the assets of the Partnership on the terms and conditions set forth herein." Thus, the dissolution agreement declared that the firm's financial situation was a principal reason for dissolving and winding up the partnership. Nothing in the agreement indicated that the flood cases were more important than other contingency cases still pending at the time GB&G was winding up or that the expected fee recovery in the flood cases was central to or the essence of the dissolution agreement.

We conclude that the record contains ample evidence to support the lower court's finding that the flood cases were not central to or an essential part of the dissolution agreement. Accordingly, we affirm the lower court's rejection of Dacey's cause of action for rescission or partial rescission.

C. *The Conversion and Lien Claims*

1. *The Elements of Conversion*

Conversion is generally described as the wrongful exercise of dominion over the personal property of another. (*Gruber v. Pacific States Sav. & Loan Co.* (1939) 13 Cal.2d 144, 148.) The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.) Money can be the subject of an action for conversion if a specific sum capable of identification is involved. (*Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599.)

Neither legal title nor absolute ownership of the property is necessary, but the plaintiff must show entitlement "to immediate possession at the time of conversion." (*Bastanchury v. Times-Mirror Co.* (1945) 68 Cal.App.2d 217, 236, italics omitted.) However, "a mere contractual right of payment, without more, will not suffice." (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 452 (*Zerin*).) "One who holds property by virtue of a lien upon it may maintain an action for conversion if the property was *wrongfully* disposed of by the owner and without authority . . . ." (*Bastanchury, supra,* at p. 236.)

2. *Claims Against Desmond*

a. *Background*

Dacey claimed conversion and distribution in violation of a lien against Desmond. Dacey contends he had a sufficient property interest in the fee recovery under the agreement between the flood clients and GB&G and Desmond. He argues that this agreement created an actual or equitable lien on the fee recovery. " 'One who wrongfully withholds personal property from another who is entitled to it under a security agreement may be liable for conversion.' " (*Zerin, supra*, 53 Cal.App.4th at p. 452.) Dacey maintains that Desmond wrongfully distributed the portion of the fee recovery owed to GB&G to Taraday, as the administrator of Goldstein's estate.

With regard to Dacey's claim of conversion, the trial court found that Dacey could not establish "ownership or right to possession" of the fee recovery at the time of distribution by Desmond. The court found that Dacey's claim of a violation of lien also failed because Desmond distributed the fee recovery to the proper recipient.

b. *Standard of Review*

The trial court granted Desmond's motion for judgment under section 631.8. Section 631.8, subdivision (a) provides: "After a party has completed his presentation of evidence in a trial by the court, the other party . . . may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party . . . ." The purpose of the section is to enable the trial court to weigh evidence and make factual findings when it finds that plaintiff's case does not require the defendant to produce evidence. (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 424.) Our review is limited to whether substantial evidence in the record supports the judgment, which we presume to be correct. (See, e.g., *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1254-1255.)

c. *Express Lien*

Dacey claims that he had an express lien based on the original retainer agreement between GB&G and Desmond and the plaintiffs in the flood cases. As already discussed, however, GB&G assigned its legal interest in the flood cases to Goldstein prior to the alleged wrongful distribution of the fee recovery by Desmond to the estate.

"An assignor may not maintain an action upon a claim after making an absolute assignment of it to another; his right to demand performance is extinguished, the assignee acquiring such right." (*McCown v. Spencer, supra*, 8 Cal.App.3d at p. 225.) At the time Desmond distributed the fee recovery in the flood cases, GB&G and Dacey had no ownership or right to possession of the fee recovery. As already stressed, the flood cases had already been assigned to Goldstein. Thus, the trial court correctly found that Desmond properly distributed the fee recovery owed to Goldstein to the estate.

Dacey also argues that, even if the flood cases were assigned to Goldstein, he had a right to the fee based on a tenancy in common theory. As already discussed (*ante*, fn. 9), Dacey did not raise this issue in a timely fashion in the trial court and has waived raising this issue on appeal.[11]

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[11] In its statement of decision regarding Desmond, the trial court addressed Dacey's newly raised argument and stated the following: "The court notes that following its May 19, 2008 findings in favor of defendants, Dacey represented, for the first time, that the flood cases were an asset allegedly held as a tenancy in common by all of the partners following GB&G's dissolution, as opposed to a partnership asset as previously alleged and argued . . . . After entertaining argument, the court rejected this claim. First, the court finds that it is wholly inconsistent with the testimony, admissions, verified pleadings and exhibits offered by plaintiff. Assuming *arguendo* that plaintiff could somehow plead around his verified pleadings and admissions, which the court finds he cannot, there is no excusable neglect by plaintiff that can be shown in failing to plead this

d. ***Equitable Lien***

Alternatively, Dacey maintains that Desmond is liable for conversion under an equitable lien theory.[12] For the reasons discussed below, we conclude this assertion lacks merit.

A lien may arise either by contract or by operation of law. (Civ. Code, § 2881.) "An equitable lien is a right to subject property not in the possession of the lienor to the payment of a debt as a charge against that property. [Citation.] It may arise from a contract[,] which reveals an intent to charge particular property with a debt or 'out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings.' [Citation.] 'The basis of equitable liens is variously placed on the doctrines of estoppel, or unjust enrichment, or on the principle that a person having obtained an estate of another ought not in conscience to keep it as between them; and frequently it is based on the equitable maxim that equity will deem as done that which ought to be done, or that he who seeks the aid of equity must himself do equity.' " (*Zerin, supra,* 53 Cal.App.4th at p. 453.)

"It has been judicially observed that equitable liens arising by contract are as various as the contracts parties may make, and the question whether a lien has been created under particular circumstances depends upon the facts of the case. [Citation.] For example, where a lessor contracted to purchase insurance on behalf of both the lessor and the lessee but purchased protection for itself only, and a loss ensued for which the

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inconsistent fact at an earlier time. (See e.g., *Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31.) Second, the court finds that this alleged new fact contradicts the integrated [dissolution agreement] and the course of conduct of plaintiff. Finally, the court finds that the authority cited to by the parties negates this newly contrived fact. There was no unity of control or possession of the flood cases following dissolution of GB&G, nor was there an interest in common owned by several persons after dissolution, or one that was not acquired by them in partnership. [Citation.]"

[12] Desmond argues that Dacey fails to show in his opening appellate brief that he raised this issue in the trial court. In his reply brief, Dacey cites to places in the record that could be interpreted as a claim based on an equitable lien theory. Even though it is clear that the court never addressed this issue in its statement of decision, we will decide this issue on its merits.

lessor was reimbursed, the lessee is entitled to an equitable lien on the insurance proceeds." (*Zerin, supra,* 53 Cal.App.4th at p. 454.)

Here, the equities do not support Dacey's argument that he had an equitable lien. As the trial court pointed out, Desmond properly distributed the portion of the fee recovery formerly owed to GB&G to the estate. Desmond knew GB&G had dissolved and also knew that the only partner working on the case after the firm's dissolution was Goldstein. It was undisputed that after execution of the dissolution agreement, neither Dacey nor Baruh ever contacted Desmond to advise the firm that they believed they retained an interest in the fee recovery. Neither of them furnished Desmond a copy of the dissolution agreement.

Furthermore, Dacey did not pay any of the costs for litigating the flood cases or assist in the litigation after the windup of GB&G. Indeed, he never provided assistance or contacted any of the plaintiffs in the flood cases even after he learned about Goldstein's death. Since, unlike Dacey, Desmond participated in the litigation of the flood cases from its inception until the final settlement almost 10 years later and paid for some of the costs of the litigation, the record does not support a finding that Desmond would be unjustly enriched absent a lien or that it would be "inequitable and unjust" (*Zerin, supra,* 53 Cal.App.4th at p. 455) to withhold the fee recovery from Dacey.

Dacey argues that the equities support his claim because Desmond knew Dacey when the law firm first agreed to be co-counsel with GB&G on the flood cases. Dacey relies on *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302, overruled on another point in *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775-776. Not only are the facts in *Kaiser* distinguishable, the *Kaiser* court took the pre-existence of an equitable lien for granted, and never really considered whether such a lien should be imposed in the first place. (*Kaiser, supra,* at p. 307.) In *Kaiser*, an attorney was aware of his client's contractual obligation to indemnify his health care provider from the proceeds of a settlement or judgment. The court held the attorney was liable to the health care provider because the attorney settled the action and disbursed the proceeds to his client in disregard of the health care provider's lien. (*Id.* at pp. 303-304.)

Kaiser has no relevance to the present case because, here, as already discussed, Desmond correctly distributed the money to Taraday.

Dacey also again claims, without any citation to the record, that no substitution of counsel had been filed to replace GB&G. As already discussed, we will not consider this assertion that is not supported by any citation to evidence in the record. Dacey also argues that Desmond took an additional 10 percent of the fee recovery for itself in exchange for forwarding the remainder to Taraday and this was unjust because the firm never provided this information to Dacey. Dacey maintains that Desmond never asked Taraday whether he had authority to receive the portion of the fee recovery that Dacey claims was owed to GB&G.

Most of the evidence cited by Dacey is irrelevant. It is immaterial whether Desmond asked Taraday whether he had authority to receive the percentage of the fee recovery owed to Goldstein because, as the trial court found and we are affirming, Taraday did have that authority. Furthermore, since Dacey had no legal interest in the fee recovery, Desmond had no obligation to inform him about the renegotiated fee between Taraday and Desmond.

Since we conclude that the lower court correctly rejected Dacey's conversion and lien claims, we need not consider Desmond's arguments that the judgment should also be affirmed on the grounds that Dacey abandoned any right to enforce any alleged GB&G interest and Desmond's payment to the estate was not wrongful.

3. *Claims Against the Goldstein Family*

Dacey also alleged conversion and replevin against the Goldstein family. He claimed that the inheritance of members of the Goldstein family from Goldstein or Janet (Goldstein's' wife) constituted a conversion in light of Dacey's alleged right to receive a share of the fee recovery. The court rejected Dacey's claim that an equitable lien arose from the dissolution agreement.

Dacey again focuses on the language of paragraph 7 in exhibit 5 of the dissolution agreement and asserts that this provision created an equitable lien. As already noted, paragraph 7 reads as follows: "As to these fees and costs, disbursements, and expense allocation agreements, [Goldstein] and [Dacey] shall have the right to assign all or any part of their individual percentages to other attorneys who participate in the litigation." As already discussed, the fact that Goldstein could not assign any part of Dacey's percentage in what the estate was to receive does not mean that Goldstein or the estate could not negotiate the total amount the estate was to receive. "At most, [the dissolution agreement] was a mere agreement to pay [Dacey a share of the fee recovery], when received, but such an agreement [did] not create a lien even upon [the receipt of the fee recovery]." (*Morrison v. Havens* (1938) 24 Cal.App.2d 504, 506 [no equitable lien when plaintiff's assignor performed construction work on property owned by the defendant's father even though the father promised to pay for the work out of the sale of property]; see also *Imperial Valley L. Co. v. Globe G. & M. Co.* (1921) 187 Cal. 352, 354 [landlord had a viable claim for breach of contract when tenant breached his agreement to pay a percentage of his crop to the landlord but then sold the entire crop to pay his personal debts but could not assert a claim for conversion because he did not have legal title to the proceeds from the crop sales or a lien on those proceeds].) Here, as already extensively discussed, the dissolution agreement did not confer on Dacey the right to legal title to the fee recovery; nor does the dissolution agreement provide him with an express lien for the payment of his contractual right to a share of the fee recovery.

Dacey does not have a claim for an equitable lien because the equities do not support his claim. The trial court noted that the record did not show that Dacey suffered any detriment as a result of the reduction of GB&G's share in the fee recovery or that others were unjustly enriched because Dacey did not have use of the money to which he claimed entitlement under the dissolution agreement. The court explained: "When Dacey agreed to give up half of what he would have been entitled to as a partner in GB&G, he gave up a percentage of an uncertain fee contingent on the successful outcome of the case. While it was reasonable at the time of the dissolution to anticipate a large fee, it was equally reasonable to recognize some possibility that the flood cases would pay little or nothing. No matter what the outcome, it was only reasonable to anticipate that whatever fee would be earned would come only after months and years of lawyering that would not be compensated in the interim. Although Dacey agreed to cut his partnership share in that uncertain future fee by half, he also obtained immediate benefit from that bargain. He was no longer obliged to pay his share of the costs of the litigation and no longer obliged to provide legal representation on a contingent fee basis. In short, his investment of money and labor and his risk of loss were both fixed at the time of dissolution. Dacey's reliance on Goldstein's promise to pay him out of the recovery in the Flood Case is not detrimental reliance. In exchange for his agreement to take less, he contributed nothing to the prosecution of the case and obtained relief from substantial ongoing obligations."

We agree with the trial court that the equities do not support Dacey's claim. Dacey knew that the flood cases would take time to litigate so there was no detrimental reliance based on his now having to wait to receive any portion of the fee recovery. Dacey complains that there was no evidence that the partners anticipated that the flood cases would be unusually protracted. However, it was Dacey's burden to establish that he expected to recover his portion of the fee recovery within a relatively short period of time. He had to establish detrimental reliance. Additionally, as already discussed, he did not suffer as a result of the reduction in Goldstein's portion of the fee from 50 percent to 40 percent, as he did no work on the case and expended no money after GB&G dissolved.

We conclude that the lower court correctly rejected Dacey's claims of conversion and replevin and we need not consider Taraday's additional argument that Dacey's claim was barred against him as he reasonably relied on legal advice from his counsel that Dacey's claim was time-barred.

D. *Request for Punitive Damages against Taraday*

Dacey sought punitive damages against Taraday, individually, based on his claims against him for replevin, conversion, fraud and deceit, and breach of fiduciary duty. The trial court had granted summary adjudication against Dacey's claims against Taraday for breach of a fiduciary duty, finding that Taraday had no fiduciary duty to Dacey. It also granted the defendants' motion for summary adjudication against Dacey's claim for fraud. Finally, the court granted summary adjudication against his claim for punitive damages against Taraday. The court found that the punitive damages claim against Taraday was barred under Probate Code section 9651 because Taraday acted in good faith and under the advice of his counsel. It is this latter finding that Dacey challenges on appeal.

We need not address the merits of Dacey's argument that Taraday could not rely on his advice of counsel. In the present case, the trial court found in favor of Dacey solely on his breach of contract claim and rejected his tort claims. We have affirmed the court's rejection of Dacey's tort claims. Punitive damages are permissible only in connection with "an action for the breach of an obligation not arising from [a] contract." (Civ. Code, § 3294, subd. (a).) Since the only viable theory of liability is based on a contract,[13] not on fraud or any other tort, punitive damages are unavailable.

II. *The Estate's Appeal*

A. *Dacey's Failure to File a Creditor's Claim*

1. *Introduction*

The estate maintains that Dacey is not entitled to any portion of the fee recovery because, after Goldstein's death, he failed to file a creditor's claim in the probate proceedings as required by the Probate Code. Probate Code section 9100 states that a creditor must file a claim in a probate proceeding either within four months after the court appoints a personal representative, or within 60 days after notice. "The time restriction on filing creditor's claims is intended to ensure the representative of an estate is notified of all claims within a reasonable period so that the estate can be expeditiously settled and distributed to the legatees or heirs." (*Varney v. Superior Court* (1992) 10 Cal.App.4th 1092, 1101.) Failure to comply with this time requirement bars the claim. (Prob. Code, § 9002, subd. (b).) Generally, the time requirement cannot be waived either by the estate's personal representative or the probate court. (*Nathanson v. Superior Court* (1974) 12 Cal.3d 355, 361-362.)

[13] The estate is appealing the lower court's ruling on the breach of contract claim.

Dacey responds that the estate waived raising this issue on appeal. The estate points to the places where it raised this issue in the trial court, but the question remains whether the issue was sufficiently raised in the lower court to preserve it for appeal.

2. *The Record in the Lower Court*

The estate first raised the issue of Dacey's failure to file a creditor's claim in a footnote in a section related to the statute of limitations under section 366.2 in its papers filed in support of its demurrer to Dacey's complaint. In the footnote, the estate wrote: "Defendants nevertheless anticipate that plaintiffs may attempt to argue that [section 366.2, subdivision,] (b)(1) somehow excepts this matter from the requirements of [section 366.2, subdivision,] (a). Any such effort, however, would be misplaced, and the law is clearly contrary to any such argument. Indeed, Part 4 (commencing with Section 9000) of Division 7 of the Probate Code (as referenced in [section 366.2, subdivision,] (b) itself) clearly imposes the one-year statute within the context of probate administration. Specifically, Probate Code section 9100[,] subdivision,] (c) provides, '[n]othing in this section shall be interpreted to extend or toll any other statute of limitations or to revive a claim[] that is barred by the statute of limitations. The reference in this subdivision to a "statute of limitations" includes Section 366.2 of the Code of Civil Procedure.' [Citation.] Reading both Section 366.2[, subdivision,] (b)(1) and Section 9100[, subdivision,] (c) together, a creditor is put on notice of the need to file within a year. In fact, 'if the one-year deadline is approaching and no probate has been opened, the wise approach for the plaintiff is to open a probate proceeding as a creditor and file a timely creditor's claim.' [Citation.]" (Bold and italics omitted.)

The trial court issued a tentative ruling sustaining the estate's demurrer without leave to amend. At the hearing, Dacey argued that he was claiming a right to specific property and therefore the statute of limitations did not apply. After the hearing on the demurrer, the court permitted supplemental briefing.

In its supplemental papers, the estate asserted that Probate Code section 9000, subdivision (a) "defines 'claim' as 'a demand for payment for any of the following, whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated: (1) Liability of the decedent, whether arising in contract, tort, or otherwise.' " The estate noted that the statutes exempted specific property from the definition of claim, and that Dacey was attempting to "avoid the implications of section 366.2 by arguing that Goldstein's liability under the dissolution agreement is not a liability at all, and that the property at issue is really 'specific property,' somehow insulated from the language of section 366.2." The estate contended that Dacey was not claiming a right to specific property and, consequently, section 366.2 applied. The estate also argued that the Probate Code statutes "can operate independently to bar a claim" and quoted the following from a Court of Appeal decision: " 'If a claim is not filed within the claims filing period of Probate Code section 9100, or within the one-year limitation period of Code of Civil Procedure section 366.2, a creditor will be forever barred from asserting a claim against the decedent.' [Citation.]" The estate concluded that Dacey's failure to file a claim within one year of Goldstein's death was "fatal to [his] present action."

The court overruled the estate's demurrer to the first amended complaint and, subsequently, Dacey filed his second amended complaint.

The estate filed a motion for summary judgment and argued that all of Dacey's claims were barred "by the statute of limitations set forth in [Code of Civil Procedure section] 366.2, . . . Probate Code sections 9000, 9100, 9103, and/or 9352." Under the heading related to Code of Civil Procedure section 366.2, the estate mentioned the following: "Plaintiffs' claims are clearly barred by section 366.2, as well as Probate Code section 9100[, subdivision,] (a), because they are all founded upon plaintiffs' respective demands as creditors for payment of Goldstein's contingent debt to them under the Dissolution Agreement."

When denying the estate's summary judgment motion, the trial court ruled that the statute of limitations under section 366.2 did not apply. The court did not make any independent ruling on Dacey's failure to file a creditor's claim. The estate never objected to this ruling on the ground it failed to address any argument regarding a creditor's claim; nor did the estate raise this issue at trial.

3. *Waiver*

The estate argues that the foregoing was sufficient to preserve on appeal the issue of Dacey's failure to file a creditor's claim. (See, e.g., *Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 650.) "The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court." (*Id.* at p. 649.)

Here, a claim based on failure to file within the claims filing period of the Probate Code was mentioned in conjunction with the statute of limitations under section 366.2, but was not presented as an independent defense. Accordingly, we conclude that this issue was not sufficiently preserved for appeal as an *independent basis* for rejecting Dacey's breach of contract claim.

The estate asserts that, even if the issue was not sufficiently preserved, it could raise this issue for the first time on appeal because Dacey's failure to file a claim represents an incurable defect in Dacey's pleading. (See *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 831, fn. 18.) The estate acknowledges that older cases have held that this particular defect cannot be raised for the first time on appeal (e.g., *Falkner v. Hendy* (1895) 107 Cal. 49, 53), but maintains that the rationale for concluding there was waiver does not apply to the present case because Dacey had the opportunity to supply "the requisite pleading or proof" (see *Burmester v. McNear* (1919) 42 Cal.App. 527, 529).

We do not agree that the failure to plead compliance with Probate Code section 9100 represents an incurable defect. Courts have held that in some limited circumstances the time requirement for filing a creditor's claim can be waived or the estate may be estopped from relying on it when the decedent's representative has induced a creditor not to file a timely claim. (See, e.g., *Varney v. Superior Court, supra,* 10 Cal.App.4th at pp. 1101-1102 [tolled the expiration of time for filing proposed creditor's claim]; see also *Satterfield v. Garmire* (1967) 65 Cal.2d 638, 645; *Katz v. A.J. Ruhlman & Co.* (1945) 69 Cal.App.2d 541, 545-546; *Estate of Sturm* (1988) 201 Cal.App.3d 14, 18.)

In the present case, the estate failed to assert that Dacey's claims were barred solely on the basis of his failure to comply with Probate Code section 9100 and the trial court never had the opportunity to consider whether the facts of the present case supported a finding that the period should be tolled or that estoppel applies. Accordingly, we conclude that the estate failed to preserve for appeal the issue that Dacey's failure to comply with the Probate Code and file a timely creditor's claim bars his breach of contract claim.

B. *The Application of Section 366.2 to Dacey's Breach of Contract Claim*

1. *Background*

The estate argued in its summary judgment motion that Dacey's claims were time-barred under section 366.2, because under this statute Dacey had to file his action within one year of Goldstein's death. Goldstein died on January 2, 2001, and Dacey did not file his complaint until more than five years later on January 12, 2006.

The trial court rejected this argument and cited *Estate of Yool* (2007) 151 Cal.App.4th 867, 877 (*Yool*), for holding that section 366.2 does not apply "if the wrongdoing does not precede the decedent's death." The lower court noted that section 366.2 may bar the claim, even if the cause of action has not accrued, if the liability was against the decedent and existed at the time of death. (See *Bradley v. Breen* (1999) 73 Cal.App.4th 798; *Battuello v. Battuello* (1998) 64 Cal.App.4th 842, superseded by § 366.3.) Since undisputed facts established that Goldstein did not breach the dissolution agreement, the court determined that Dacey had no cause of action existing at the time of Goldstein's death and section 366.2 did not apply.

The estate argues that the lower court erred in its interpretation and application of section 366.2.

2. *Standard of Review*

The estate is challenging the lower court's interpretation of the statute and the application of section 366.2 to undisputed facts. It is well established that we apply a de novo standard of review to the construction of a statute based on undisputed facts. (*Shapiro v. Board of Directors* (2005) 134 Cal.App.4th 170, 178.)

When interpreting a statute, "[o]ur fundamental task . . . is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*Day v. City of Fontana*

(2001) 25 Cal.4th 268, 272.) When determining what the Legislature meant, " '[t]he statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.' " (*Martinez v. Combs* (2010) 49 Cal.4th 35, 51.)

3. *Interpreting Section 366.2*

a. *The Statute's Language*

Section 366.2 is a "general statute of limitations for all claims against a decedent." (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 255.) Section 366.2, subdivision (a) provides: "(a) If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply."

Subdivision (b) of section 366.2 states that the limitations period "shall not be tolled or extended for any reason except as provided in any of the following, where applicable: [¶] . . . [¶] (2) Part 4 (commencing with Section 9000) of Division 7 of the Probate Code (creditor claims in administration of estates of decedents)."

Since it is undisputed that Dacey filed his lawsuit more than one year after Goldstein's death, his breach of contract claim against the estate is time barred if section 366.2, subdivision (a) applies. It is also indisputable that Goldstein's obligation to Dacey arose from the dissolution agreement and, prior to his death, he was personally liable to Dacey for a percentage of the fee recovery from the flood cases. The litigation in the flood cases was still pending at the time of Goldstein's death; therefore, the contractual obligation regarding the fee recovery was in existence at the time of Goldstein's death, but had not accrued. It is undisputed that Goldstein never repudiated or otherwise breached the dissolution agreement while alive. Rather, the administrator, acting on behalf of the estate, breached the dissolution agreement.

The estate argues that a personal liability of the person means any legal obligation, and parties to a contract become liable to perform the covenants contained in the contract at the time the contract is executed, "notwithstanding that no right of action could accrue until a breach." (*Chambers v. Farnham* (1920) 182 Cal. 191, 195.) The estate points out that the legal obligation under the dissolution agreement arose prior to Goldstein's death. It contends that this legal obligation was personal to Goldstein and therefore the statute of limitations under section 366.2, subdivision (a) applies to Dacey's breach of contract claim.

The estate reconciles the above interpretation of the statute with the language in section 366.2, subdivision (a), which states the "cause of action survives" the decedent's death, by maintaining that the use of the words "cause of action" does not mean that a *complete* cause of action must exist at the time of the decedent's death. Under the primary right theory, a cause of action is defined as " '(1) a primary right possessed by the plaintiff, (2) a corresponding duty imposed upon the defendant, and (3) a wrong done by the defendant which is a breach of such primary right and duty.' " (*Boblitt v. Boblitt* (2010) 190 Cal.App.4th 603, 794.) The estate declares that the Legislature's insertion of the words "not accrued" into the statute indicates its intent not to require the third element, wrongdoing by the defendant, to have occurred by the time of the decedent's death as long as the legal obligation under the contract with the decedent survives the decedent's death.

Dacey disagrees; he asserts that there was no cause of action that survived Goldstein's death since Goldstein did not breach the dissolution agreement. Dacey contends that postdeath misconduct can be committed only by someone other than the decedent, and section 366.2, subdivision (a) never applies to claims involving postdeath misconduct. Dacey points out there is nothing in the language indicating that only some of the elements of a cause of action have to be in existence at the time of the decedent's death.

b. ***The Meaning of the Words in the Statute***

Generally, a statute of limitations begins upon the accrual of a cause of action, but the Legislature is free for policy reasons to adopt a different rule. (§ 312; *Hamilton v. Asbestos Corp* (2000) 22 Cal.4th 1127, 1144-1145.) Section 366.2 provides that "an action may be brought on a liability of the person . . . whether accrued or not accrued" as long as the cause of action survives death. (§ 366.2, subd. (a).)

An action is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (§ 22.) At oral argument, the estate argued that, at the time of Goldstein's death, Dacey could have brought an action for declaratory relief based on Goldstein's contractual obligation to him.

We agree with the estate that Goldstein was liable under contract to Dacey and, at the time of Goldstein's death, Dacey possibly had a creditor's claim. We, however, do not agree that a contractual liability is the same as "liability of the person[.]" (§ 366.2, subd. (a).) "Liability of the person, or 'personal liability' means '[l]iability for which one is personally accountable and for which a wronged party can seek satisfaction out of the wrongdoer's personal assets.' (Black's Law Dict. (8th ed. 2004) p. 993.)" (*Yool, supra,* 151 Cal.App.4th at p. 875.) At the time of Goldstein's death, there was no wronged party, and Dacey could not have filed any cause of action against Goldstein based on contract or tort.

The estate contends that the word "liability" of the decedent is used in Probate Code section 9000, subdivision (a)(1) to mean any " '[c]laim' " that is a demand for payment, "whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated . . . ." It claims that the creditors' claim statute in the Probate Code and the statute of limitations under Code of Civil Procedure section 366.2, subdivision (a) are to be considered together and therefore the definition of "liability" in

Probate Code section 9000 applies to section 366.2. The word "liability" in section 366.2, according to the estate, refers solely to the underlying obligation.

The estate's argument ignores that the Legislature provided a special definition for "liability" in Probate Code section 9000, but the Legislature did not indicate that this special definition has any application to statutes outside the Probate Code. Probate Code section 9000 is concerned with claims by creditors, and a creditor is any "person who *may* have a claim against estate property." (Prob. Code, § 9000, subd. (c), italics added.) Under a claims statute, such as Probate Code section 9100, the party has an obligation to file a claim if there is any liability or legal obligation. Section 366.2, a statute of limitations under the Code of Civil Procedure, is not concerned with possible claims against estate property. Rather, this statute, when considered within the context of contracts, applies to claims against the estate on all *causes of action* on a decedent's debts when the causes of action survive the decedent's death. Thus, under the statute of limitations, a party has an obligation to file an action when the party fails to perform as promised.

The estate focuses on the language in section 366.2, subdivision (a), which states that the cause of action against the decedent does not have to have accrued by the time of the decedent's death. This language, according to the estate, shows that the Legislature intended section 366.2, subdivision (a) to apply when a cause of action is incomplete at the time of the decedent's death, such as when the wrongdoing or failure to perform occurs after the decedent's death. The estate emphasizes that the present case, which involves a contract, differs from other cases that have held that the misconduct must be committed by the decedent because in those cases there was no contractual obligation or liability personal to the decedent before the decedent's death. (See, e.g., *Shewry v. Begil* (2005) 128 Cal.App.4th 639, 644 [the Medi-Cal reimbursement claim existed "only by right of statute, and only against the deceased person's estate" and therefore statutory liability arose "only upon the decedent's death" and "could not have been brought against the decedent"].)

We are not persuaded by the estate's argument. If the Legislature did not intend to require the entire cause of action to survive the decedent's death, it would have stated that the claim or liability, not the cause of action, had to survive the decedent's death.[14] "A cause of action for breach of contract does not accrue before the time of breach." (See e.g., *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 488; *Kroff v. Larson* (1985) 167 Cal.App.3d 857, 860-861.)

We conclude that the correct construction of the words "accrued" and "not accrued," which gives effect to each word in the statute without severely limiting the meaning of "cause of action," is the interpretation set forth in *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509. The *Ferraro* court determined that section 366.2, subdivision (a) did not apply to the claim of a breach of an agreement to make a specific testamentary disposition. The court concluded that the claim "could not come into existence until decedent died having failed to make provision in accordance with her alleged agreement . . . ." (*Ferraro,* at p. 554.) When explaining the meaning of "not accrued" in section 366.2, subdivision (a), and attempting to harmonize it with the latter part of the statute requiring the cause of action to survive the death of the decedent, the court concluded that "not accrued" referred to claims fully accrued, but not accrued until after the decedent's death under the delayed discovery rule. (*Ferraro,* at p. 554.) Under *Ferraro's* reasoning, the breach or misconduct must occur prior to the decedent's death, but the claim does not have to be discovered while the decedent is alive. (See also *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398 [discusses accrual under the discovery rule].)

Although some courts have applied section 366.2, subdivision (a) to situations where the damages were not ascertainable or suffered until after the decedent's death (see, e.g., *Bradley v. Breen, supra,* 73 Cal.App.4th 798; *Dawes v. Rich* (1997) 60

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[14] As we discuss subsequently, some cases involving torts committed by the decedent hold that the element of damages does not have to be suffered prior to the decedent's death. (See, e.g., *Bradley v. Breen, supra,* 73 Cal.App.4th 798.) We express no opinion as to whether damages have to occur prior to the decedent's death for section 366.2, subdivision (a) to apply, since that issue is not before us.

Cal.App.4th 24, 32-36; *Yool, supra,* 151 Cal.App.4th at p. 876-877;[15] *Battuello v. Battuello, supra,* 64 Cal.App.4th 842[16]), we are not aware of any case that has applied the

[15] The court in *Yool, supra,* 151 Cal.App.4th 867 provided two independent reasons for concluding that section 366.2, subdivision (a) does not apply. In *Yool,* a mother and a daughter took title to a house and, after the mother died, the daughter claimed that the mother "had provided no consideration for the property, never intended to take beneficial title, and accepted legal title as a mere accommodation to facilitate financing." (*Yool,* at p. 871.) The daughter asserted a resulting trust in her favor, and the appellate court held that section 366.2, subdivision (a) did not bar the claim. (*Yool,* at p. 875.) The court explained that the allegations did not state a cause of action " 'on a liability of the person' " as required by section 366.2, subdivision (a), because "the trustee holds title, *but does not own* the property in question [and, therefore,] there is no issue of personal liability or resort to the trustee's assets." (*Yool,* at p. 875.) The court held that the statute of limitations begins to run when the trustee repudiates the trust, and repudiation occurs when the beneficiary demands the property from the trustee and the trustee refuses to convey the property or account for it. (*Id.* at pp. 875-876.) The court explained that by definition, an action for a resulting trust seeks only to convey legal title to property that the claimant (not the decedent) already beneficially owns. (*Ibid.*)

The court in *Yool* also determined that an independent reason for rejecting the application of section 366.2, subdivision (a) was that this statute "specifically contemplates an action that may be brought against a person prior to his or her death. Under the facts of this case there was no cause of action, accrued or not yet accrued, that existed at the time of decedent's death within the sense of section 366.2 and hence no action that could have been commenced on that cause." (*Yool, supra,* 151 Cal.App.4th at pp. 876-877.) The court stressed that the mother had not repudiated the resulting trust or shown any resistance to conveying the property prior to her death. (*Id.* at p. 877.) The court observed that the facts established that the mother would have conveyed title to the daughter had the daughter asked her to do so. (*Ibid.*) The court explained that the proper interpretation of "not accrued" in section 366.2 was that the misconduct must have occurred prior to the decedent's death, but the damages do not have to occur until after the decedent's death. (*Yool,* at p. 877.) The court concluded, "Simply put, the cause of action had not accrued, nor did it exist." (*Ibid.*)

[16] The court in *Battuello v. Battuello, supra,* 64 Cal.App.4th 842 declared that section 366.2 generally would not apply to a cause of action alleging a promise to leave certain property in a will because such a cause of action "neither 'accrue[s]' prior to the promisor's death nor 'survives' his death." (*Battuello,* at p. 846.) The court concluded an exception to this general rule occurred in the case before it because the promisor had during his lifetime made a transfer of the promised property to another and therefore the cause of action did exist prior to the decedent's death. (*Ibid.*) The court then appeared to contradict its statement that the damage had to occur prior to the decedent's death when it

statute when the decedent did not commit the injury or did not already have a collectible debt at the time of death. Thus, for example, in *Bradley*, the decedent pled guilty to a criminal charge of lewd acts with a minor and the minor sued him in civil court. (*Bradley, supra,* at p. 800.) After the decedent died, the minor sued the defendants, alleging that they aided and abetted the molestation. (*Ibid.*) The defendants cross-complained against the estate for indemnity and other relief. (*Ibid.*) The appellate court rejected the argument that it was inequitable to apply section 366.2 to a cross-action for equitable indemnity simply because the defendants seeking indemnity from the estate had not paid a judgment or settlement within one year of the decedent's death and could not have filed their claims any sooner. (*Bradley, supra,* at p. 805.) In *Bradley,* the decedent committed the molestation; thus, the defendants' cause of action against the estate—unlike the present case—was based on the decedent's wrongful conduct.

The estate cites *Wagner v. Wagner, supra,* 162 Cal.App.4th 249 when urging a construction of section 366.2, subdivision (a) that does not require the decedent to have committed the actual injury. In *Wagner*, the trustee of her deceased mother's living trust requested an order permitting her to pay herself out of trust funds for past care of her mother more than one year after her mother died, and her brother objected on the basis that the request was untimely. (*Id.* at p. 252.) The court held that section 366.2, subdivision (a) barred the claim by the daughter trustee against the decedent's living trust for compensation. (*Wagner,* at p. 256.) *Wagner's* rendition of the facts did not indicate that the mother had engaged in any misconduct prior to her death, and apparently this was not an issue raised on appeal. In rejecting the trustee daughter's argument that she satisfied the statute because she had formed the claim against the trust in her own mind

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stated in a footnote that the statute of limitations applied even if a transaction prior to death "could only potentially harm" the plaintiff, because section 366.2 "governs causes of action that exist at the time of a person's death 'whether accrued or not accrued.' " (*Battuello, supra,* at p. 847, fn. 1.) Although the court was not clear whether the damage had to occur prior to the decedent's death for section 366.2 to apply, it did plainly hold that the misconduct or breach had to be committed by the decedent before his or her death.

and knew about it as the trustee within the statutory period, the court announced, " 'This uniform one-year statute of limitations applies to actions on all claims against the decedent which survive the decedent's death.' " (*Ibid.*)

Wagner v. Wagner, supra, 162 Cal.App.4th 249 did not address the question posed here, which is whether the decedent has to commit the breach of contract for section 366.2, subdivision (a) to apply. It is axiomatic that opinions are not authority for issues not considered. (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1268.) Furthermore, *Wagner* differs significantly from the present case because the mother in *Wagner* actually owed the daughter a debt at the time of her death and therefore, at the time of the mother's death, the daughter did have a cause of action on her mother's debt.

In contrast to the situation in *Wagner v. Wagner, supra,* 162 Cal.App.4th 249, Dacey did not have a cause of action on a debt when Goldstein died, because Goldstein's obligation to Dacey was contingent upon the flood cases resulting in a settlement or a victory for the plaintiffs. Neither event had occurred at the time of Goldstein's death. At the time of Goldstein's death, Dacey had a claim of a potential debt based on the dissolution agreement. Since Dacey had no cause of action against Goldstein at the time of his death, section 366.2, subdivision (a) does not apply.[17]

Our interpretation of section 366.2 does not violate the public policy of protecting the decedent's estate from creditors' stale claims. When a party has a claim based on a contract with the decedent—no matter whether the obligation has come due or the breach has occurred—Probate Code section 9000 et seq. will operate to ensure that stale creditors' claims will not be presented years later. When the decedent actually owes money at the time of his or her death and does not pay it or acts in some manner to repudiate a contractual obligation, section 366.2, subdivision (a) will apply. We do not believe that the Legislature intended section 366.2 to apply to mere claims, but intended

[17] We need not consider the application of section 366.2, subdivision (a) where the debt is enforceable against the decedent before his or her death, but a different party commits the actual breach or refuses to pay the debt. In the present case, Dacey had no cause of action for an unpaid debt at the time of Goldstein's death *and* Goldstein did not breach or repudiate his contract with Dacey.

the statute to apply " '*in any action on a debt of the decedent* . . . .' " (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 308, citing the Dec. 1989 Cal. Law Revision Com.)

At the time of his death, Goldstein had a liability, but did not actually owe Dacey any money. It would be unfair to bar Dacey's claim for breach of contract when he never had any cause of action for debt against Goldstein and never had a cause of action against Goldstein for breach of contract. As the estate argues, both section 366.2 and Probate Code section 9000 et seq. are designed to accomplish the Legislature's goal of promoting the prompt administration of estates, but they do not address the same liabilities: The statute of limitations cuts off the time for asserting a claim against the decedent's estate based on a *cause of action* that existed against the decedent before the decedent's death. The Probate Code provides a method for the timely handling of a creditor's claim based on a liability or legal obligation of the decedent.

Accordingly, we hold that section 366.2 does not apply in the present case where the debt was not enforceable against Goldstein while he was alive and the breach of the contract occurred after Goldstein's death.[18]

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[18] We need not address the arguments regarding the application of section 366.2 based on Dacey's assertion that he was not pursuing a contract claim but seeking to recover specific property from Goldstein's estate. As already discussed, we agree with the trial court's ruling that the flood cases did not belong to the partnership and therefore Dacey had no property interest in these cases; the flood cases had been legally assigned to Goldstein. We also do not need to consider the estate's arguments that, even if Dacey prevailed on his claim that he was seeking to recover specific property, section 366.2 applies. As already stressed, we reject Dacey's argument that he had a right to recover specific property and, given that holding, the sole issue remaining for our consideration was the application of section 366.2 to his breach of contract claim.

DISPOSITION

The judgment is affirmed. Dacey is to pay the costs of his appeal and the estate is to pay the costs of its cross-appeal.

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Lambden, J.

We concur:

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Kline, P.J.

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Richman, J.

Dacey v. Taraday, et al. (A125080 & A125670)

Trial Court:	San Francisco Superior Court
Trial Judges:	Hon. James J. McBride Hon. Peter J. Busch Hon. James L. Warren
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