Filed 9/30/03

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

GARY THOMPSON et al., Plaintiffs and Appellants, v. ALLEN B. MILLER, JR. et al., Defendants and Appellants.	C037787 (Super. Ct. No. 98AS04739)
GARY THOMPSON et al., Plaintiffs and Respondents, v. ALLEN B. MILLER, JR., Defendant and Appellant.	C038013 (Super. Ct. No. 98AS04739)

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part I.

APPEAL from a judgment of the Superior Court of Sacramento County, Steven H. Rodda, J. Affirmed in part and reversed in part.

Freidberg Law Corporation, Edward Freidberg and Stephanie J. Finelli for Plaintiffs, Appellants and Respondents.

Orrick, Herrington & Sutcliffe, Norman C. Hile, James E. Houpt, and Margaret Carew Toledo for Defendants and Appellants.

The plaintiffs, who were minority shareholders in a closely-held corporation, sued the majority shareholder and another shareholder. They alleged the defendants, in convincing the plaintiffs to sell their shares, committed a breach of fiduciary duty, fraud, and elder abuse. A jury, however, rejected their claims and returned verdicts in favor of the defendants. Thereafter, the trial court denied the defendants' claim for expert witness fees pursuant to Code of Civil Procedure section 998, which the defendants requested because they made a pretrial offer of settlement more favorable to the plaintiffs than was the eventual judgment. The trial court also denied the motion of one of the defendants (the majority shareholder) for attorney fees, entitlement to which he claimed under the agreements executed by the plaintiffs when they sold their shares. The plaintiffs appeal, contending the evidence does not support the judgment in the defendants' favor. The defendants also appeal. They assert they are entitled to expert

witness fees, and the majority shareholder contends the trial court erred by denying his motion for attorney fees.[1]

In the unpublished portion of our opinion, we conclude the plaintiffs waived their assertions that the evidence does not support the judgment, or, in other words, that the trial court should have entered judgment in the plaintiffs' favor as a matter of law, because the plaintiffs presented an unacceptable statement of facts in their opening brief. While they give lip service to the proper standard on appeal, they do not, in fact, construe the record in its light most favorable to the judgment. Consequently, their arguments are based on an improper view of the facts.

The argument of the majority shareholder that he was entitled to attorney fees has merit. His agreements with the plaintiffs at the time of his purchase of their shares provided for an award of attorney fees to the prevailing party in "any dispute under [the agreements]." Also in the agreement, the plaintiffs stated they were not relying on the majority shareholder's representations. At trial, the majority shareholder asserted this provision of the contract as a defense, thus creating a dispute under the agreements. The

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[1] In C037787, the plaintiffs appeal the judgment on the verdicts against them, and the defendants cross-appeal the denial of their request for expert witness fees as costs. In C038013, the majority shareholder appeals the trial court's denial of his motion for attorney fees. The two cases were consolidated for consideration in this court.

trial court therefore erred in determining that the agreements did not provide for an award of attorney fees in this action.

The defendants' assertion the trial court erred in denying expert witness fees pursuant to Code of Civil Procedure section 998 also has merit. The defendants made a pretrial offer of settlement, proposing to pay the plaintiffs an amount within the approximate range the defendants would have been required to pay if they had not prevailed. We find the trial court's refusal to award expert witness fees was an abuse of discretion.

FACTS

The plaintiffs appeal after a jury verdict in favor of the defendants. Accordingly, our summary of the significant facts will cast the evidence in its light most favorable to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the defendants. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) In their opening brief, the plaintiffs state: "Because this appeal is from a jury verdict in favor of defendants, the facts set forth herein are based upon the testimony of the defendants and defense witnesses." This statement and, as will be seen, the plaintiffs' statement of facts in their opening brief do not properly reflect the standard of review. We do not limit our review to the evidence presented by the defense; instead, we consider the entire record and construe it, as noted above, in its light most favorable to the verdict. (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 259.)

The Parties and Deltam

In 1984, defendant Allen B. Miller, Jr., created Deltam Systems, Inc. (Deltam), as a closely-held corporation engaged in the Silicon Valley business of placing information technology workers in temporary positions. Defendant Stephen R. Haessler assisted in forming the company but later left to work in Portland, Oregon. Miller and Haessler each received founders' stock in Deltam for their efforts. At the times relevant to this litigation, Miller owned more than 50 percent of the outstanding shares.

Miller solicited friends, neighbors, and business associates to buy stock and supply funding for the new company. The plaintiffs were among those early shareholders. Plaintiffs Carroll and Priscilla Bravo purchased 20,000 shares at $.25 per share, for a total investment of $5,000. Plaintiffs Joseph and Patricia George invested $10,000, purchasing 40,000 shares at $.25 per share. Plaintiffs Douglas and Helen Mahr bought 20,000 shares at $.25 per share, totaling $5,000. Plaintiffs Gary and Millie Thompson invested at two different prices, buying 60,000 shares at $.25 per share and 16,666 shares at $.30 per share, for a total investment of $20,000. Sidney and Mara Diamond invested $20,000, purchasing 80,000 shares at $.25 per share. While Mara Diamond is a plaintiff in this action, Sidney was not a plaintiff and passed away about two months after the complaint was filed. Before the plaintiffs purchased their shares, they certified that they had sufficient knowledge and experience in

financial and business matters to evaluate the risk in purchasing stock.

Deltam, with Miller as the chief executive officer, attempted to grow through its first 10 years of existence. Changes in tax laws and other challenges, however, made it difficult for Deltam to prosper. In 1992, the corporation almost collapsed with a severe cash shortage. After 1992, Deltam began placing foreign nationals in information technology jobs. By March 1994, the company posted its largest profit to date, about $200,000 for the prior year.

Plaintiffs' Sale of Shares

Some Deltam shareholders, including Sidney Diamond, were dissatisfied with the performance of the company and wanted a way to recoup their investment. At a shareholders' meeting in September 1994, Miller proposed a share repurchase plan that would be made available to all shareholders. Because of legal hurdles, Deltam was unable to offer the repurchase plan, so Miller, personally, offered to buy minority shareholders' stock. In a letter to shareholders in December 1994, Miller stated he intended to purchase shares from anyone who desired to sell. The letter included Deltam's financial statements. Miller then called each shareholder, offering to buy the shares for $.16 per share. He did not tell the shareholders, as the plaintiffs alleged, that Deltam was in poor financial condition.

In late December 1994 and early January 1995, the plaintiffs sold their shares to Miller. Other shareholders elected not to sell their stock. In a Share Purchase Agreement,

signed by each plaintiff, they stated: "Seller represents and warrants to Purchaser and the Company . . . that . . . Seller's decision to sell or otherwise convey the Shares as provided herein was not made in reliance upon any representation made by Purchaser, the Company or its officers, directors, agents or others acting with or on behalf of any of them; and . . . Seller is capable of evaluating the merits and risks of this sale and has the ability to protect Seller's own interests in this transaction."

Deltam After Plaintiffs Sold Shares

After Miller completed the purchase of the plaintiffs' shares, Haessler agreed to return to Deltam as a paid consultant. Haessler desired a larger stake in Deltam, so Miller sold or transferred some the stock he obtained from the plaintiffs to Haessler for $.24 per share. Miller also pledged additional stock he obtained from the plaintiffs to sell in the future to Haessler for $.21 per share, conditioned on Haessler meeting specified goals.

In 1996, more than one year after the plaintiffs sold their Deltam stock, an economic upturn began in Silicon Valley. After rejecting several acquisition offers, Deltam accepted an offer of acquisition three years after the plaintiffs sold their shares, in late 1997, for $7 per share from Corestaff, Inc.

PROCEDURE

The plaintiffs filed suit against Miller and Haessler, alleging fraud, concealment, and breach of fiduciary duty, and seeking rescission of their sale of stock. They also alleged

Miller and Haessler conspired to commit these torts. After trial, the jury returned special verdicts in favor of the defendants on all causes of action. The plaintiffs filed, but the trial court denied, a motion for new trial in which the plaintiffs contended the defendants breached their fiduciary duties to the plaintiffs as a matter of law. The defendants, as prevailing parties, filed a memorandum of costs. The plaintiffs responded with a motion to tax costs, asserting the defendants were not entitled to recover $55,665 in expert witness fees. The trial court granted the motion to tax costs with respect to expert witness fees. Miller moved for $1,183,778.45 in attorney fees pursuant to the Share Purchase Agreements. The trial court denied the motion.

DISCUSSION

I

Plaintiffs' Statement of Facts

The plaintiffs state many facts in their opening brief in a manner that does not conform to the proper standard on appeal. (See *Howard v. Owens Corning, supra,* 72 Cal.App.4th at pp. 630-631 [requiring consideration of evidence in light most favorable to judgment].) In other words, they seek to draw inferences and resolve conflicts in their own favor. The picture painted in the opening brief, therefore, does not reflect the facts as impliedly found by the jury in deciding this case.

Although the plaintiffs state numerous facts in the introduction of their opening brief, they do not, in that section, cite to the record on appeal. (See Cal. Rules of

Court, rule 14(a)(1)(C) [requiring citations to the record].) Accordingly, we will disregard that statement of facts. Because the plaintiffs' failure to recite properly the facts results in waiver of sufficiency of the evidence arguments, we recount here some of the more egregious misstatements and improper shading of facts. This discussion is illustrative of the problems in the plaintiffs' opening brief, but not exhaustive.

Sophistication of Plaintiffs

The plaintiffs state that Miller's background is in computer programming, management, and sales. They highlight Haessler's degrees from Dartmouth and Stanford Universities and his experience as an investment banker and venture capitalist. As for themselves, however, they state, simply, that they all are or were schoolteachers, except for Sidney Diamond. This appears to be an attempt to paint themselves as unsophisticated, at least in matters of investment.

The record reflects otherwise. When the plaintiffs bought their shares of Deltam stock, they filled out questionnaires concerning their investment experience. Each of the plaintiffs signed statements that they had "sufficient knowledge and experience in financial and business matters to evaluate the merits and risks" of the Deltam investment or had consulted with advisors who had such knowledge and experience.

Joseph George's questionnaire is signed by both Joseph and Patricia George. They state that Joseph is a high school teacher and chairman of the business department. He has associate, bachelor's, and master's degrees with advanced

studies in business. His net worth was at least $150,000 and his investment experience included other private placements of securities, as well as real estate, tax incentives, mutual funds, money market funds, and annuity funds.

Douglas Mahr's questionnaire, signed by both Douglas and Helen Mahr, states that Douglas is a consultant in marketing education for the state department of education. He has a master's degree in education, as does Helen. His net worth was at least $300,000, and his investment experience included prior private placements of securities, along with real estate, tax incentives, publicly traded companies, and commodities. At trial, it was revealed that Douglas Mahr exaggerated his education in the questionnaire and had not received a master's degree. He also had no prior experience in private placements of securities.

Gary Thompson's questionnaire, signed by both Gary and Mildred Thompson, indicates that Gary is a program manager for business education for the state department of education. He has an associate degree and a bachelor's degree in business administration and business education. His net worth was at least $300,000, and his prior investment experience included real estate, tax incentives, publicly traded securities, and money market funds.

Carroll Bravo's questionnaire, signed by both Carroll and Priscilla Bravo, reflects that Carroll is a consultant in business education for the state department of education. He has a bachelor's degree and a master's degree in graduate

studies, education, and educational administration. His net worth was at least $300,000. His investment experience included prior private placements of securities, along with real estate. Carroll Bravo had not, in fact, completed a master's degree when he filled out the questionnaire.

Sidney Diamond's questionnaire, signed by both Sidney and Mara Diamond, states Sidney was an account executive for KTVU-Cox Broadcasting. His education included a bachelor's degree from Stanford University and a teaching credential from the College of Notre Dame. His net worth was at least $1,000,000, and his investment experience included prior private placements of securities, as well as real estate, tax incentives, publicly traded securities, and other forms of investment. Mara Diamond testified she relied completely on her husband for decisions concerning the Deltam investment.

As this summary shows, the plaintiffs' statements of the business and investment experience of Miller and Haessler, while minimizing their own by stating, simply, that the plaintiffs were schoolteachers, was misleading. Although Douglas Mahr and Carroll Bravo inflated their educational records, they all had both business and investment experience, as did Miller and Haessler.

Disclosure of Miller's Compensation

The plaintiffs exert a considerable amount of effort detailing what they assert was "undisclosed" compensation to Miller which detracted from the ability of Deltam to show a profit. His starting salary was $60,000 per year. According to

the employment agreement, which was provided to the shareholders, his compensation could be increased by the board of directors. The plaintiffs do not acknowledge that shareholders were told the board of directors could increase Miller's compensation.

In 1989, Deltam began paying Miller commissions. In 1994, Miller made more than $243,000 in salary and commissions. The plaintiffs assert this was not disclosed to the shareholders. They did not include in this discussion of Miller's compensation that Miller had assumed more responsibility for sales and Deltam's directors approved Miller's compensation or that an expert in executive compensation testified Miller's compensation was less than other similarly situated executives.

The plaintiffs continue their discussion of Miller's compensation: "In 1990, Deltam began paying for Miller's living quarters. By 1993, Deltam was paying $2,500 per month -- $30,000 a year -- toward Miller's 4600 square-foot home in Half Moon Bay. This was a way for Miller to make more money without incurring additional income taxes. These payments were never disclosed to the shareholders." (Record citations omitted.) The plaintiffs fail to mention that the board of directors approved this arrangement as rental for space to install offsite backup computers and to give Miller an office from which to work. This arrangement was not a way for Miller to avoid paying taxes.

One of the Deltam directors testified the house was used for business purposes. At one time, Miller mortgaged his house

to keep Deltam afloat during a time in which there was insufficient income for the company. In addition, Miller risked his personal financial well-being while Deltam was struggling by cosigning on loans that Deltam could not obtain on its own.

The plaintiffs claim Miller charged to Deltam as expenses such things as rounds of golf, dinners, and luggage. Evidence was presented justifying these expenditures for the good of the company. Rather than discuss each expenditure, however, we note that Deltam's books were audited regularly and no improper expenditures were found.

Miller's Profit from Purchasing Plaintiffs' Shares

Of particular relevance to this litigation is the profit Miller made from purchasing the plaintiffs' shares of Deltam stock. In December 1994 and January 1995, Miller purchased 235,000 shares of Deltam stock from the plaintiffs for $.16 per share for a total of $37,600. The plaintiffs state: "Upon purchasing plaintiffs' stock at $.16 per share, Miller immediately sold Haessler over 150,000 shares at approximately $.24 per share."

After Miller purchased the stock from the plaintiffs, Haessler reached an agreement with Deltam to function as a consultant. As part of his agreement, Miller transferred to Haessler stock he obtained from Diamond (3,333 shares) and a third party (100,000 shares) for $.24 per share. Haessler also obtained the right to purchase, over a four-year period, 124,664 shares of stock for $.21 per share, conditioned on his continued employment at Deltam and meeting certain goals. Thus, Miller's

immediate gross profit from the plaintiffs' shares was less than $300, which he earned from the transfer of Diamond's stock for Haessler's immediate purchase.

Value of Deltam Stock at Time of Miller's Purchase

Also significant to the plaintiffs' assertion that the defendants are liable to them is the contention that the plaintiffs' stock was worth more than $.16 per share when Miller purchased it from them. The plaintiffs write in their opening brief that there was no "substantial evidence admitted showing that Deltam stock was worth only $.16 a share when Miller bought it. Even according to defendants' own experts, it was worth more than that." This forms the basis of the plaintiffs' main claim against Miller. They assert that "Miller, a fiduciary, knowingly purchased plaintiffs' stock for far less than it was worth, then sold it to Haessler, another fiduciary, at a 50% profit. . . . The undisputed evidence thus demonstrates that the stock was worth at least 50% more than what Miller paid plaintiffs for it. And there is absolutely no evidence that defendants ever told them that." The assertion that the Deltam stock was worth more than $.16 per share is a necessary premise to the plaintiffs' conclusion Miller violated a fiduciary duty owed to the plaintiffs.

As the plaintiffs note, there was conflicting expert testimony concerning the value of Deltam stock at the relevant time. Instead of showing that the evidence construed in its light most favorable to the judgment establishes the plaintiffs' Deltam stock was worth more than $.16 per share when Miller

purchased it, the plaintiffs' discussion of the evidence amounts to no more than an argument concerning the value of the stock, construing the evidence in favor of the plaintiffs. While this may have been a permissible argument to the jury, it is unacceptable on appeal.

Generally, according to the *fair value* standard of assessing the stock's value, the value of a share of stock equals the value of the company divided by the number of shares. In the real world, however, not every share is of equal value, especially shares of stock in a small, closely-held corporation. Factors such as the marketability of the holder's shares and the status of the holder as a minority shareholder diminish the value of the shares. Here, the defendants' expert applied a lack of marketability discount and determined that, at the time of sale, the *fair market value* of the plaintiffs' shares was less than $.16 per share. This testimony reveals as false the plaintiffs' premise that Miller purchased their shares for less than they were worth.

The plaintiffs argue, however, that, as a matter of law, the value of their shares could not be discounted for lack of marketability. They rely for this proposition on a Court of Appeal opinion, *Brown v. Allied Corrugated Box Co.* (1979) 91 Cal.App.3d 477 (*Brown*), a case in which the court held that a minority shareholder discount should not be applied to shares surrendered in an involuntary dissolution of the company. The plaintiffs' argument is unavailing for two reasons. First, the law by which we measure the jury's verdict is found in the

jury's instructions, not the law books. And second, *Brown* is distinguishable.

"[T]he jury is required to take the law of the case solely from the court through the medium of instructions." (*Smith v. Wemmer* (1963) 217 Cal.App.2d 226, 230.) "In a jury trial it is the duty of the jury to determine the true facts from the evidence and to apply the rules of law set forth in the instructions to the true facts to arrive at a verdict. [Citations.] By claiming the verdict is wrong, and by making no challenge to the jury instructions, plaintiffs necessarily claim that the jury failed to do its duty under the instructions." (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 877.) As stated in *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, at page 1534: "Defendants acknowledge they are asking this court to measure the evidence adduced at trial against rules of law. Our disagreement concerns where the appropriate rules of law are to be found. In defendants' view, the rules are located in law books: in codes, reports of appellate cases, etc. In essence, defendants ask us to pull these books from the shelves, to determine the applicable rules of law, and to use the rules to measure the evidence. [¶] In our view, since defendants assert no claim of error in the jury instructions, the rules are properly located in the instructions given the jury." The "adequacy of the evidence must be measured against the administered jury instructions because a civil litigant is obligated to propose complete instructions and may not withhold a theory from the jury, by tendering incomplete

instructions, and then obtain appellate review of the evidence on a theory never presented to the jury." (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 476, citing *Null v. City of Los Angeles, supra,* at pp. 1534-1535.)

Here, the plaintiffs cite no jury instruction requiring the jury not to apply the lack of marketability discount in determining the value of the plaintiffs' share at the time of sale. Since there was evidence that the shares were worth less than $.16 per share, applying the lack of marketability discount, the jury was justified in concluding that Miller did not pay less than their value to the plaintiffs.

The vitality and importance of the appellate rule requiring us to measure the validity of the verdict against the law given to the jury in the instructions, when, as here, the appellant does not challenge the instructions, is illustrated nicely here. The plaintiffs withheld from the jury this theory rejecting the lack of marketability discount but now argue it to this court to invalidate the verdict. Fairness and judicial economy are served by preventing them from doing so.

Furthermore, *Brown* did not involve the voluntary sale of shares by a minority shareholder to a controlling shareholder. Instead, the minority shareholders in *Brown* initiated an action for involuntary dissolution of the closely-held corporation, charging the majority shareholder with fraud and unfairness. To avoid involuntary dissolution, the majority shareholder initiated a statutory buy-out of the minority shares. (*Brown,*

supra, 91 Cal.App.3d at pp. 479-480.) In valuing the shares, the *Brown* court held that it should not devalue shares for the minority shareholder's lack of control when the sale is to the controlling shareholder because it would allow an unscrupulous controlling shareholder to "avoid the proportionate distribution which would follow from an involuntary dissolution simply by invoking the [statutory] buy-out provisions . . . ." (*Id.* at p. 486.)

In this case, the plaintiffs' sale of their shares was voluntary. Shareholders had become impatient and wanted to recoup what they could of their investments. Accordingly, the public policy reasons for not using a discount to value the stock do not apply here. Also, the *Brown* court dealt with the lack of control discount placed on shares held by minority shareholders, not the lack of marketability discount for which there was expert evidence here. Accordingly, *Brown* does not control.

Disclosure of Haessler's Intention to Work for Deltam

The plaintiffs contend Miller knew, at the time he purchased the plaintiffs' shares, that Haessler was planning to join Deltam as a consultant and to purchase stock in connection with that career move. They assert Miller had a duty to disclose these facts. They state: "These were material facts that Miller himself acknowledged should have been disclosed." This misrepresents the record. Miller testified, in deposition, that he had a duty to disclose to the minority shareholders the truth about the financial condition of the company and its

plans. Nowhere did he state he had a duty to disclose Haessler might join Deltam as a consultant or that he might purchase stock. Far short of showing a duty to disclose, the evidence, construed properly, shows that Haessler had not yet agreed to join Deltam or to purchase stock. An expert testified that it would have been inappropriate to disclose to shareholders the possibility that Haessler would join Deltam, especially at a time when there was no agreement.

Waiver of Sufficiency of Evidence Argument

The defendants assert that, as a result of the plaintiffs' failure to state the facts properly, having in mind the standard of review, the plaintiffs have waived consideration of the sufficiency of the evidence to sustain the judgment. We agree.

An appellant cannot avoid the effect of a judgment in favor of the opposing party by ignoring the findings, express or implied, of the trier of fact. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman & Clark*).) The Supreme Court explained the consequences of this appellate mistake in *Foreman & Clark*: "'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.] [Appellants'] contention herein 'requires [appellants] to demonstrate that there is *no* substantial evidence to support the challenged findings.' (Italics added.) [Citations.] A recitation of only [appellants'] evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if, as [appellants] here contend, 'some particular issue of fact is not

sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.' (Italics added.) [Citations.]" (*Ibid.*)

Here, the plaintiffs mainly contend the "undisputed evidence" shows the defendants breached fiduciary duties owed to the plaintiffs. They also claim they are entitled to a new trial on their fraud and elder abuse causes of action. Yet in their opening brief they do not properly state the facts supporting the jury's verdicts. In their reply brief, the plaintiffs remain unrepentant, even brazen, after the defendants pointed out the opening brief's many omissions and improper implications. They accuse the defendants of focusing on irrelevant evidence and avoiding the real issue. Despite the plaintiffs' burden of showing error on appeal (see *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865 [appellant bears burden of showing error]), they complain that the defendants fail to "cite to disputed material facts which, even if viewed in the light most favorable to them, would support the judgment." Whether an honest misunderstanding of appellate practice (see *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 112-114 [encouraging attorneys to familiarize themselves with and abide by appellate rules]) or a deliberate attempt to obtain reversal by disguising and omitting significant facts that do not favor them, plaintiffs' failure to state the evidence in its light most favorable to the judgment waives their contentions that the evidence does not support the

verdicts and that they are entitled to a new trial.[2] (*Foreman & Clark, supra,* 3 Cal.3d at p. 881.)

II

Attorney Fees

When the plaintiffs sold their stock to Miller, they each signed a document entitled "Share Purchase Agreement." Contained in that agreement is the following attorney fee provision: "The prevailing party in any dispute under this Agreement shall be entitled to reasonable attorneys fees incurred in such dispute."

In their original complaint, the plaintiffs asserted that venue in Sacramento was proper because the Share Purchase Agreements were entered into there. They alleged they signed the Share Purchase Agreements in reliance on Miller's representations. And they claimed the right to an award of attorney fees: "As a further direct and legal result of the

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[2] While we do not reach the plaintiffs' contentions the evidence did not support the verdicts, our discussion of the facts here debunks the factual foundation of their arguments. For example, contrary to the plaintiffs' assertion on appeal, the plaintiffs' shares were not worth more than what Miller paid; therefore, he did not breach a fiduciary duty, commit fraud, or engage in elder abuse when he purchased those shares. Furthermore, the plaintiffs' arguments concerning the sufficiency of the evidence to support the verdicts fail because they do not measure the verdicts against the jury instructions. Instead, they measure the verdicts against cases and statutes, even though they do not assert the jury was improperly instructed. (See *Null v. City of Los Angeles, supra*, 206 Cal.App.3d at p. 1534 [requiring us to measure sufficiency of evidence according to jury instructions if no instructional error asserted].)

above described conduct of DEFENDANT, PLAINTIFFS incurred attorney fees, costs and expenses to bring the instant action and prosecute DEFENDANT for his fraud, misrepresentations, deceit and breaches of fiduciary duties to PLAINTIFFS, all to their damage and in an amount to be ascertained at trial. PLAINTIFFS THOMPSONS, BRAVOS, and MAHRS are entitled to attorney fees in accordance with paragraph 6 of the Share Purchase Agreements attached hereto as Exhibits 'A', 'B' and 'C'." The plaintiffs' two amended complaints made essentially the same allegations with respect to the Share Purchase Agreements and their right to recover attorney fees on every cause of action pursuant to those contracts. The defendants' answer likewise claimed a right to attorney fees under the Share Purchase Agreements and asserted as a defense the plaintiffs' statements in those agreements that they were not relying on the representations of Miller.[3]

During trial, the plaintiffs sought to overcome Miller's assertion of the Share Purchase Agreements as a defense to the causes of action. They continued to assert their right to attorney fees under those agreements. During the opening

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[3] As noted above, the Share Purchase Agreements each stated: "Seller represents and warrants to Purchaser and the Company . . . that . . . Seller's decision to sell or otherwise convey the Shares as provided herein was not made in reliance upon any representation made by Purchaser, the Company or its officers, directors, agents or others acting with or on behalf of any of them; and . . . Seller is capable of evaluating the merits and risks of this sale and has the ability to protect Seller's own interests in this transaction."

statements, the plaintiffs conceded Miller's right to recover attorney fees should he prevail: "And in this lawsuit one of the issues that you will decide is whether this agreement was obtained by fraudulent representations or concealments of known facts because if it was it is not enforceable and that's one of the issues in this case. [¶] (Reading) ['] The agreement also provides the prevailing party in any dispute under this agreement shall be entitled to reasonable attorneys fees incurred in such dispute.['] [¶] (Finished reading.) So you don't get attorneys fees unless you have this written agreement. The clients don't get paid for their attorney's fees, they have to suffer that for themselves. So now he has a provision in here if they want to fight this and they lose they will have to pay his attorney's fees, another way of discouraging them from this litigation."

After the jury verdicts in the defendants' favor, the plaintiffs sought to have the trial court rescind the Share Purchase Agreements and set aside the judgment. The trial court refused.

Miller filed a motion for $1,183,778.45 in attorney fees. Finding that the Share Purchase Agreements did not give Miller the right to recover attorney fees and that the plaintiffs were not estopped from so asserting, the trial court denied the motion for attorney fees. The court held: "In the instant case, the causes of action on which defendant prevailed sounded in tort not contract. The fact that plaintiffs sought rescission of the share purchase agreements as one possible

remedy for the alleged fraud does not mean that the action sounds in contract. The court has already determined, in this case, that rescission is a remedy, not a separate cause of action. [¶] The question, then, for this Court, is whether the fee provision at issue is broad enough to encompass plaintiffs' tort claim. The Court finds that it is not. [*Exxess Electronixx v. Heger Realty Corporation* (1998) 64 Cal.App.4th 698 (*Exxess Electronixx*)] is on point. Its reasoning is persuasive. The fee provision covers disputes 'under the contract.' It is too narrowly drawn to encompass the tort claims asserted in this action."

Miller contends the trial court erred in determining that the Share Purchase Agreements did not provide for an award of his attorney fees in this action. He asserts he is entitled to an award because he used a provision of the agreements to defend against the plaintiffs' claims.

The parties did not present extrinsic evidence to interpret the attorney fee provision of the contract. Therefore, we must determine, de novo, whether the applicable statutes and the Share Purchase Agreements entitled Miller to the award he sought. (*Exxess Electronixx, supra,* 64 Cal.App.4th at p. 705.) "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ." (Code Civ. Proc., § 1021.) "As to tort claims, the question of whether to award attorneys' fees turns on the language of the contractual attorneys' fee provision,

i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision. [Citation.] This distinction between contract and tort claims flows from the fact that a tort claim is not 'on a contract' and is therefore outside the ambit of [Civil Code] section 1717. [Citations.]" (*Exxess Electronixx, supra,* 64 Cal.App.4th at p. 708.)

In *Exxess Electronixx*, the contract provided for an award of attorney fees for "an action or proceeding to enforce the terms [of the contract] or declare rights hereunder." (64 Cal.App.4th at pp. 702, 708-709.) Finding that the tort claims were asserted in that action neither to "enforce the terms [of the contract]" nor to "declare rights [thereunder]," the reviewing court concluded the prevailing party was not entitled to an award of attorney fees.

Here, Miller is a prevailing party. To determine whether he is entitled to an award of attorney fees, we must determine, consistent with the language of the Share Purchase Agreements, whether this action entailed "any dispute under [the Share Purchase Agreements] . . . ." "'To answer this question, we apply the ordinary rules of contract interpretation. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. . . . Such intent is to be inferred, if possible, solely from the written provisions of the contract. . . . The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,'

unless 'used by the parties in a technical sense or a special meaning is given to them by usage' . . . , controls judicial interpretation. . . . Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. . . .'" [Citation.]" (*Exxess Electronixx, supra,* 64 Cal.App.4th at p. 709.)

Because the attorney fee provision of the Share Purchase Agreements differed from the attorney fee provision of the contract in *Exxess Electronixx*, that case is not directly on point. There, the prevailing party was entitled to an award in an "*action*" to enforce the contract or declare rights under it. Here, the provision is different, providing for an award in a "*dispute*" under the agreements. A major difference between the two provisions is the term "dispute" instead of "action." Another difference is *Exxess Electronixx* dealt with an action to enforce the terms of a contract; we deal with a dispute "under" a contract.

Miller contends that, because the statement by the plaintiffs in the Share Purchase Agreements that they were not relying on representations made by Miller became his primary defense to the plaintiffs' tort claims, this action involved a "dispute under" the Share Purchase Agreements. The defendant in *Exxess Electronixx* made this same argument, that its defense was based on a provision of the contract that also contained an attorney fees provision.

In *Exxess Electronixx*, the court appeared to agree that use of a contract provision as a defense in a tort action could give

rise to recovery of attorney fees under that contract. The court went on to find, however, that the specific attorney fee provision found in that contract did not allow such use. The court's discussion is instructive:

"[The defendant] argues that it is entitled to fees because its defense to the cross-complaint was based on a provision of the lease, in particular, the 'as is' clause. According to [the defendant], all of [the plaintiff's] claims were meritless because [the plaintiff] had expressly agreed in the lease to take the property 'as is' and 'with all faults' and had further agreed to rely solely on its own investigation of the property. The 'as is' clause, so the argument goes, negated any duty on [the defendant's] part to disclose defects in the property. [Citation.]

"Leaving aside the merits of the 'as is' defense, the question remains whether it comes within the attorneys' fee provision of the lease. Assuming that [the defendant] is the prevailing party in the case, the lease authorizes attorneys' fees '[i]f any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder.' (Italics added.) While the 'as is' defense may have had the effect of 'enforc[ing] the terms' of the lease or 'declar[ing] rights [there]under,' [the defendant] did not 'bring[] an action or proceeding' to accomplish those goals. Under any reasonable interpretation of the attorneys' fee provision, we cannot equate raising a 'defense' with bringing an 'action' or 'proceeding.' By asserting a defense to the cross-complaint, [the defendant]

did not bring an action or proceeding to enforce the lease or to declare rights under it." (*Exxess Electronixx, supra,* 64 Cal.App.4th at pp. 711-712, italics and fn. omitted.)

But here, the specific language of the attorney fee provision is broader than the language of the provision in *Exxess Electronixx*. There is no limitation requiring that an action be brought to enforce the agreements or to declare rights under them. The attorney fee provision applies, simply, to "any dispute under [the agreements]." This language varies substantially from the attorney fee provision in *Exxess Electronixx*, which applied to an *action* to enforce the contract or declare rights under it, and the language of Civil Code section 1717, which applies to "any *action* on a contract." (Italics added.) "An 'action' is 'a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law[;] . . . [a]n ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' (Black's Law Dict. (6th ed. 1990) p. 28, col. 1; accord, Code Civ. Proc., § 20 - 22.) . . . In contrast, a 'defense' is '[t]hat which is offered and alleged by the party *proceeded against in an action or suit*, as a reason in law or fact why the plaintiff should not recover or establish what he seeks[; . . . [¶] it is a] *response to the claims* of the other party, setting forth reasons why the claims should not be granted.' (Black's Law Dict., *supra*, p. 419, col.

2, italics added.)" (*Exxess Electronixx, supra,* 64 Cal.App.4th at p. 712, fn. 15, ellipses and brackets in original.)

Here, however, the right to recover attorney fees hinges on whether there is a "dispute," "any dispute" at all, not an "action," under the contract. A "dispute" is a more general term that includes any conflict or controversy. (Black's Law Dict. (7th ed. 1999) p. 485, col. 1.) While "dispute" includes a conflict giving rise to an action, it is not necessarily limited to such a conflict. As a matter of plain language, whether the plaintiffs' tort claims are defeated by their statements in the agreements that they did not rely on Miller's representations is a dispute -- that is, a conflict or controversy -- under the Share Purchase Agreements upon which the result depends just as much as would have been an allegation that the defendants breached a duty imposed by the agreements. Any conflict concerning the effect of the agreements gives rise to a right to an attorney fee award by the prevailing party. The assertion of the defense, fatal to the plaintiffs' causes of action, that the Share Purchase Agreements established the plaintiffs did not rely on Miller's representations when they sold their Deltam stock, created a dispute under the agreements. Moreover, the dispute was under the Share Purchase Agreements because the dispute was based on their validity. Therefore, Miller is entitled to recover attorney fees because a dispute arose concerning the effect of the Share Purchase Agreements.

The trial court erred in denying Miller's motion for attorney fees pursuant to Code of Civil Procedure section 1021.

On remand, the trial court must determine and award reasonable fees.

Having found that the attorney fees provision of the Share Purchase Agreements gave the defendants the right to recover attorney fees, we need not consider whether the plaintiffs are estopped from denying the applicability of the attorney fees provision. Additionally, we need not consider the defendants' assertion that the plaintiffs' attempt to rescind the Share Purchase Agreements gave rise to a right to attorney fees.

III

Expert Witness Fees

Before trial, the defendants made an offer to settle the case for $300,000. The plaintiffs did not accept the offer. Thereafter, the defendants prevailed, thus obtaining a judgment more favorable to them than was their settlement offer.

The defendants filed a memorandum of costs, including approximately $55,000 in expert witness fees incurred after they made the settlement offer. The plaintiffs responded with a motion to tax costs and argued that the defendants were not entitled to expert witness fees. The trial court granted the motion to tax costs relating to the expert witness fees, stating: "As to the motion to tax costs, the Court exercises its discretion under [Code of Civil Procedure section] 998(c) to deny defendants' recovery of expert witness fees in their entirety. In exercising its discretion, the Court has considered the reasonableness of the offer in view of the potential liability, as well as the purpose of the statute, and

concludes that the interests of justice would not be served by an award of expert witness fees under the circumstances."

The defendants assert the trial court abused its discretion in denying an award of expert witness fees. We agree.

Code of Civil Procedure section 998, subdivision (b), provides in part: "Not less than 10 days prior to commencement of trial . . . , any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." Subdivision (c) of section 998 provides: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post-offer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

Whether the settlement offer was reasonable and made in good faith are left to the sound discretion of the trial court. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700.) However, when a party obtains a judgment more favorable than its pretrial offer, it is presumed to have been reasonable

and the opposing party bears the burden of showing otherwise. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134 (*Nelson*).) "Even a modest or 'token' offer may be reasonable if an action is completely lacking in merit." (*Ibid.*) On appeal, the losing party has the burden of establishing the trial court abused its discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) We will not substitute our opinion for that of the trial court unless the trial court clearly abused its discretion, resulting in a miscarriage of justice. (*Nelson, supra,* at p. 136.)

In *Nelson*, the court based the reasonableness of an offer on how well it approximates the amount the party will have to pay if found liable, discounted by an appropriate factor for receipt of money before trial.[4] If the offer is in a range of reasonably possible results and the offeree has reason to know the offer is reasonable, then the offeree must accept the offer or be liable for costs under Code of Civil Procedure section 998. (72 Cal.App.4th at p. 135.) Here, $300,000 was within the approximate range for which the defendants could have been found liable. Each plaintiff would have reaped a gain of more than five times the initial investment in Deltam. Furthermore, it exceeded the alleged underpayment by Miller based on the value, at the time of sale, that the plaintiffs' own expert placed on the stock. The plaintiffs had this information; nevertheless,

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[4] We would also add a discount for the probability of success of the claim for purposes of determining the reasonableness of the offer.

they declined the offer. This was not a token offer. It was generous.

The plaintiffs are hard-pressed to defend the trial court's ruling. They assert, simplistically, that whether to award expert witness fees was subject to the trial court's discretion and the defendants have not succeeded in showing an abuse of discretion. In making this argument, they make no mention of the amount of the defendants' offer or its relationship to what they may have gained in the event of a jury verdict favorable to them. The cases on which they rely do not support their position that $300,000 was not a reasonable offer.

The trial court based its denial of expert witness costs on perceived unreasonableness of the offer and, in the trial court's words, "the purpose of the statute." As we have discussed, the offer was reasonable. "It is well settled that the purpose of this section is to encourage the settlement of litigation without trial. Its effect is to punish the plaintiff who fails to accept a reasonable offer from a defendant. [Citations.]" (*Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 711, italics omitted.) Denial of expert witness fees, here, does not further the purpose of the statute.

The trial court's denial of expert witness fees was arbitrary, a clear abuse of discretion, given the circumstances. Accordingly, we must reverse the trial court's taxing of the defendants' costs and remand for an award of reasonable expert witness fees.

DISPOSITION

The judgment is affirmed. The orders denying attorney fees and taxing costs are reversed for proceedings to determine and award Miller's reasonable attorney fees and the defendants' reasonable expert witness fees. The defendants shall recover their costs on appeal.

NICHOLSON, Acting P.J.

We concur:

KOLKEY, J.

ROBIE, J.