IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

SCOT VORSE, Executor, etc.,
Plaintiff and Respondent,

v.

LEWIS SARASY, et al.,
Defendant and Appellant.
_____/

Case No. A070505

Marin Superior Court
Case No. 148681

Honorable Beverly
Bloch Savitt

APPELLANT'S OPENING BRIEF

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I.

PRELIMINARY STATEMENT

This appeal involves a court's extraordinary intervention in a jury trial over a disputed partnership agreement. The court transformed a key defense witness into a powerful witness for plaintiff. It aborted his testimony for the defendant; told the jury it "was not to be believed" and must be "stricken from your minds" (10 RT 1737); barred all further *oral* testimony by him; but allowed plaintiff to rely on a declaration that plaintiff's attorneys drafted for the witness for a discovery motion three years earlier. The jury was not even allowed to hear his testimony disputing the accuracy of that document. In short, the court decided for itself and proclaimed to the jury that the only truth emanating from this key witness was plaintiff's version of the truth. The outcome was predictable.

The witness was Donald F. Schmidt. (His direct testimony begins at 10 RT [Volume 10 of Reporter's Transcript] 1692.) He was, quite literally, the pivotal witness as between the two main adversaries at the trial. Indeed, in pretrial declarations both attorneys for plaintiff stated under penalty of perjury that Mr. Schmidt was a "key witness" given his unique position in the disputed events. (AA [Appellant's Rule 5.1 Appendix] 103 & 119])

The central claim in this case is that three men impliedly agreed to share any equity they acquired in a business known as Dynatex, regardless of who paid for it. The first alleged partner was David J. Vorse ("Vorse"), the original plaintiff herein. Although Vorse died prior to trial, he testified dramatically through videotapes of his deposition. He maintained that defendant and appellant Lewis Sarasy ("Sarasy") wrongfully refused to share Dynatex when he bought it in 1990, entirely with his own money and credit.

Sarasy, the second alleged partner, testified that his only obligation to Vorse concerned their efforts as *brokers* for an acquisition of Dynatex. Acknowledging they were to share any commission that resulted, Sarasy denied he had any agreement with Vorse to share Dynatex itself if either of them purchased it outright. (*E.g.*, 5 RT 958) Indeed, Dynatex's then owner testified that, just days before Sarasy contracted to buy the business without Vorse, Vorse attempted to buy it without Sarasy and without Sarasy's knowledge. (3 RT 652-653) That incident well illustrates the sharp conflict in the evidence and contentions below.

At the pivot of that conflict stood Donald F. Schmidt — the third alleged partner according to Vorse's theory of the case. And he was the only alleged partner not also a party to the litigation. Vorse's attorneys cited that factor in separate declarations under penalty of perjury characterizing Schmidt as a critical witness:

> This case involves a partnership dispute relating to a business partnership . . . . [¶] Donald Schmidt was the third party in the partnership, Mr. Schmidt is a key witness in this case, is not a party to this action . . . . (AA 103 [Decl. of Bruce Blakely, Esq.])

> Plaintiff seeks to take the deposition of Donald Schmidt and to obtain documents from Mr. Schmidt because Mr. Schmidt is a key witness in this case, the only non-party who was a partner in the business partnership which is the subject matter of this litigation. (AA 119 [Decl. of Patrick Macias, Esq.])

Such was the witness whom the trial court, the Honorable Beverly Bloch Savitt, ejected from the trial and condemned to the jury as a liar — but only insofar as he supported *Sarasy's* position. The court credited this same man's veracity insofar as he supported Vorse's position in a disputed declaration.

Contentions on Appeal

Sarasy's principal contention on this appeal is that the court's actions regarding Schmidt were not merely "extreme" — as the court acknowledged itself (10 RT 1736) — but unprecedented, erroneous, and reversible per se. The court fundamentally violated Sarasy's right to trial by jury by arrogating a central credibility issue to itself. Under Article I, section 16, of the California Constitution, "Trial by jury is an inviolate right and shall be secured to all . . . ." Moreover, under California Supreme Court precedent a violation of that right is a

fundamental or "structural" error that is reversible per se, even without weighing the traditional prejudice factors. However, in this case those factors require a reversal as well, as this brief will demonstrate in the alternative.

While no other issue need be reached if the Court finds the Schmidt rulings reversible, two other matters should be addressed in either event because they could come up in further proceedings below.

The court supplemented the $1.3 million damages award against Sarasy with an attorneys fee award of $295,000. This was based largely on the so-called "tort of another" doctrine, but the fees were for pursuing alleged joint tortfeasors in the same action. The "tort of another" doctrine has never been extended that far.

Finally, the court refused to reduce the judgment against Sarasy in the full amount ($500,000) paid by a co-defendant, the law firm of Miller, Starr & Regalia, in a mid-trial settlement. Although Vorse's death had eliminated any potential liability for noneconomic damages in this action, the court allocated the lion's share of the settlement payment to that category, resulting in a substantial reduction of Sarasy's setoff under Code Civ. Proc. § 877. Sarasy seeks his rightful setoff here. (On a cross-appeal Vorse[1] claims there should be *no* setoff.)

[1] In this brief "Vorse" will refer both to the decedent and his son and executor, Scot Vorse. The latter had no involvement in the underlying facts, however, so "Vorse" will always refer to the decedent except in connection with legal contentions.

II.

STATEMENT OF THE CASE

A.

Introduction

Sarasy's only contentions are those just stated. He concedes there was substantial evidence (in the appellate sense of that term) supporting Vorse's theory of the case. Sarasy's whole point is that the court's intervention prevented the jury from making its own neutral appraisal of the credibility of the competing contentions. Accordingly, this brief will focus on that issue in summarizing the record "concisely, but as fully as necessary for a proper consideration of the case. . . ." (Rule 13, California Rules of Court)

B.

The Undisputed Background Facts

As Vorse's counsel stated to the jury, "Much of the evidence is undisputed." (12 RT *1928) That certainly applies to the basic background facts. Sarasy, a real estate broker and investor, learned in April 1989 that a Redwood City manufacturing business (hereafter, "Dynatex") was for sale. He called on Vorse and Schmidt, both long time friends and periodic business associates, to help facilitate a sale and thereby earn a commission.

Vorse agreed that initially, at least, the three men were acting solely as brokers. (12 RT *1928, ln. 25-28) That is, they were working as a team to help a prospective buyer other than themselves, a corporation named Winfield Polytek

Associates, Inc. It was also undisputed that the three men used the name "LDD & Associates" (standing for their three first names) for that purpose, and that they were going to share equally any cash or stock commission that resulted.

But Vorse contended there was an implied agreement going much farther than that. It was undisputed that Sarasy purchased Dynatex entirely with his own money and credit, making a $3.5 personal investment in that business. (*See, e.g.*, Exhibit 72.) Nonetheless, Vorse claimed there was an agreement to share the *equity* Sarasy had bought, not merely a commission or its equivalent. (*See, e.g.*, Vorse's first videotape, admitted at trial as Exhibit 158A.) Although the equity far exceeded any commission anticipated, Vorse claimed he was entitled to a share of the equity just as if it were a commission resulting from the purchase of Dynatex by someone else. Vorse believed that was entirely fair compensation for all the time and effort he had spent pursuing a Dynatex acquisition.[2]

Sarasy flatly disputed any such agreement or understanding. What follows is a brief sampling of the adversaries' competing interpretations of the evidence. That will suffice before turning in greater detail to the main subject of this appeal: the trial court's rulings on witness Donald F. Schmidt.

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[2] Vorse also claimed an agreement to be hired as chief executive officer of Dynatex for a certain period of time, and sought additional damages from Sarasy on that basis. But the jury rejected that claim (see AA 497) and Vorse has not cross-appealed from that aspect of the judgment. This brief will therefore make no further mention of the alleged employment agreement.

C.

The Competing Interpretations of the Evidence

Vorse relied heavily on the Schmidt declaration and other documents that referred to himself, Schmidt and Sarasy as partners or joint participants in various acquisition efforts or proposals. Indeed, anticipating at the time that Schmidt would testify at trial, Vorse's attorney argued on opening statement that "Documents don't lie. Documents are the record of what really happened." (2 RT 265-266)

Aside from the Schmidt declaration, to be discussed separately, Vorse relied on two main categories of documents. First were documents referring to LDD & Associates, the business name adopted for the three men's brokerage efforts. For example, Exhibit 122 was an April 22, 1989 agreement signed by Sarasy, on behalf of LDD, with Winfield Polytek Associates, Inc., the earliest known suitor for Dynatex. LDD promised to "endeavor to raise funds" to enable Winfield Polytek to acquire Dynatex in return for a commission ranging from 6% to 12% of the resulting stock.

Vorse cited Exhibit 122 as evidence of an implied agreement to share Sarasy's subsequently acquired equity in Dynatex, not merely a commission resulting from an acquisition by Winfield Polytek. (*E.g.*, 2 RT 267) Sarasy, on the other hand, denied any such agreement and disputed the notion that documents like Exhibit 122 evidenced one. For example, Sarasy testified that Vorse had drafted Exhibit 122 by himself. (6 RT 1082)

The second main category of disputed documents referred to DAC Acquisition Company or "DAC." In the period after the Winfield Polytek deal was abandoned, Vorse, at least, envisioned DAC as the owner of the Dynatex assets upon their acquisition by the three alleged partners in that enterprise. Under Vorse's plan DAC stock would be distributed in appropriate percentages to the participants in the deal. It was undisputed that Vorse spent considerable time drafting proposals along those lines and discussing them with the then Dynatex owner and attorneys at Miller, Starr & Regalia.

Thus, Vorse's opening statement cited Exhibits 48, 92 and 105, which were Vorse letters to Miller, Starr attorneys or the latter's notes. Vorse stressed that these documents referred to the three men as prospective shareholders in DAC. (2 RT 269-271) Sarasy responded that the letter was Vorse's own and the attorneys' notes reflected what Vorse was telling them. It was undisputed that Vorse had much greater contact with the attorneys during this period than either Sarasy or Schmidt.

For a final example before turning to the Schmidt issue, Vorse relied heavily on Exhibit 29, which was a loan application drafted by Vorse. (*See, e.g.*, 5 RT 972-973) It presented Sarasy and his wife as borrowers for a Dynatex acquisition by DAC, and stated that the couple would receive 20 per cent of DAC's stock to reflect their financing of the acquisition. The application stated that the remaining 80% was to be shared equally by Sarasy, Vorse and Schmidt. Vorse's counsel argued to the jury that the application "proves the existence of the partnership, and it establishes that David Vorse was entitled to 26.67 percent of the company."

(12 RT 1931) Sarasy, however, testified that Exhibit 29 was a proposal by Vorse (5 RT 966-967) which Sarasy only presented to his personal financial advisors, not any banks (5 RT 978-979), because his advisors thought the proposal was "ridiculous." (7 RT 1363)

In summary, it seems fair to say there was no smoking gun unequivocally corroborating or refuting either side's position on the alleged implied agreement to share Dynatex equity as well as any commission. Rather, the trial was a classic conflict between different understandings of a working relationship. And the alleged third party to Vorse's understanding of that relationship was Donald F. Schmidt.

D.

Vorse Recognizes Donald Schmidt As a Pivotal Witness

From the outset Vorse recognized Schmidt's unique position as a potential witness in this case. Vorse's complaint, filed on February 13, 1991 (AA 1), alleged that "Plaintiff, Sarasy and Donald F. Schmidt ("Schmidt"), orally and by course of conduct formed a general partnership among themselves, known as the LDD Partnership. . . " (AA 2, ¶ 8), whose purpose, among other things, was "acquiring the assets and business of Dynatex" through the corporate vehicle of DAC. (AA 3, ¶ 9(a)) Thus, Vorse placed Schmidt at the heart of the case.

At first Schmidt appeared helpful to Vorse in that role. Late in 1991, Vorse's request for discovery was met with a claim of privilege by Sarasy and Miller, Starr & Regalia. Vorse filed a motion to compel production on January 3, 1992 (AA 39)

and in support filed a declaration apparently signed by Schmidt in Florida on December 31, 1991, via facsimile. (AA 50; Trial Exhibit 143) A week later Vorse's attorneys filed what appeared to be the original of Schmidt's verification. (AA 73; Trial Exhibit 144)

The Schmidt declaration bore the caption of Vorse's attorneys and was undisputedly drafted by them. It stated as follows in pertinent part:

> David Vorse, Lewis Sarasy and I formed an oral partnership by the name of LDD in 1989 to engage in certain business ventures. One of these ventures was the acquisition of a high-tech company by the name of Dynatex Corporation ("Dynatex") by the partnership. The partnership planned to form a corporation named DAC Acquisition Corporation ("DAC") in order to acquire the assets of Dynatex. Pursuant to our oral agreement, the partners were to be the shareholders in DAC. (AA 50-51)

That language was repeated verbatim in Vorse's own declaration filed simultaneously in support of the same motion:

> Essentially, defendant Lewis Sarasy, Donald Schmidt and I formed an oral partnership by the name of LDD ("LDD") in 1989 to engage in certain business ventures. [Footnote omitted] One of these ventures was the acquisition of a high-tech company by the name of Dynatex Corporation ("Dynatex") by the partnership. The partnership planned to form a corporation named DAC Acquisition Corporation ("DAC") in order to acquire the assets of Dynatex. Pursuant to our oral agreement, the partners were to be the shareholders in DAC. (AA 55-56)

E.

Vorse Is Surprised by Schmidt's Deposition Testimony

Although Schmidt was apparently willing to sign such a declaration in December 1991, he had a lot more to say when his deposition was taken nearly

three years later. Vorse appended substantial excerpts to a discovery motion he filed on or about November 22, 1994. (AA 158 *et seq.*)

Schmidt acknowledged signing a declaration faxed to him by Vorse's attorneys in December 1991 (AA 197, Depo.Tr. 135-136). But he testified that "things were very chaotic" at that time and "I don't recall reading it." (AA 197, Depo.Tr. 138) Schmidt also testified that "None of this verbiage is something I wrote or said. Its language is more akin to what David Vorse would say or write." (AA 199, Depo.Tr. 143)

More importantly, Schmidt testified that the *substance* of the declaration "is not fact" (AA 200, Depo.Tr. 149), that "the content . . . is totally contrary . . . to the facts as they really happened." (AA 200, Depo.Tr. 150) Indeed, Schmidt stated in a November 4, 1994 declaration that Vorse had suggested making false allegations about a partnership agreement: "Mr. Vorse suggested that I could prevent the transaction from closing by claiming to be a Sarasy partner excluded from the deal, although the three of us had never had any agreement about our respective ownership interest, if any, in any acquiring entity." (AA 180)

Schmidt also testified in his deposition that he only regarded himself as "partners" with Vorse and Sarasy in an informal sense of that term. He testified that, with several exceptions not including the Dynatex efforts, they never formed a partnership in the legal sense but simply "worked together . . . just as your wife might be your partner in fac[e]ts of life . . . ." (AA 188, Depo.Tr. 49-50)

Regarding Dynatex itself, Schmidt testified that "Yes, we were going to try to acquire the assets of Dynatex but it wasn't necessarily the three of us. . . . " (AA 188, Depo.Tr. 52) Asked whether he expected any compensation if Sarasy acquired Dynatex by himself, Schmidt replied: "I felt it would have been very nice had Sarasy reimbursed me at least my expenses, which at that point were substantial, and something for my time and effort during those months when I was endeavoring to raise financing and, in fact, did raise an offer, period." (AA 189, Depo.Tr. 75-76) Pressed on whether there had been "any discussions between you and Mr. Sarasy about receiving any compensation for the work you did on Dynatex," Mr. Schmidt testified: "Unfortunately not." (AA 188, Depo.Tr. 76)

Finally, Schmidt explained the change in his perception of Vorse and the alleged partnership in the intervening years. In a declaration signed on November 9, 1994, Schmidt explained that he had come to "realiz[e] that Mr. Vorse had made substantial misrepresentations with regard to his role in the Dynatex transaction, had lied to me repeatedly over the years, had been abusing my friendship and trust, and was manipulating me with respect to whether or not Mr. Sarasy had done anything to warrant a lawsuit . . . . In addition, Mr. Vorse had candidly acknowledged that he, Mr. Sarasy and I did not have a partnership with respect to the Dynatex matter, but that this 'could be worked out' with respect to a lawsuit." (AA 136)

F.

Vorse Attacks Schmidt as a Perjurer But Clings to the 1991 Declaration

With his case now threatened by this admittedly "key witness," Vorse launched a spirited but selective attack on Schmidt's credibility. For example, in a December 1994 brief on another discovery motion, Vorse protested that "Schmidt seeks to disavow his declaration and endorse defendants' position. . . . *Schmidt has changed sides*, and is now allied with and testifying for defendants in this case." (AA 273, emphasis added) Of course, that portrayal of Schmidt cast an unflattering light on the declaration Vorse's attorneys drafted and obtained themselves in December 1991. Nonetheless, they crowned that document as the truth and condemned all of Schmidt's testimony as lies.

Vorse received help in that effort from an unlikely source. On December 27, 1994, a week before the scheduled trial date, a discovery referee mailed out a lengthy report on several privilege and related disputes entrusted to him concerning the Schmidt deposition. (AA 278) The referee, Robert V. Vallandigham, Jr., included a "finding" in his report that "Mr. Schmidt has intentionally decided to contradict and attempt to eviscerate his 1991 declaration testimony . . . ." (AA 286) Denouncing Schmidt as a perjurer, the referee went so far as to advise Schmidt's attorney to stop representing him (AA 285) and warned the law firm defendants to stop relying on "cleverly drafted declaration testimony . . . ." (AA 287, n. 2) The referee did not comment on the authorship of the 1991 declaration.

Vorse moved quickly to exploit the referee's report. On December 30, 1994, only three days after its service by mail, Vorse filed a motion featuring extensive

quotations and excerpts from the report. (AA 379) Vorse sought Schmidt's complete exclusion as a trial witness, but at the same time sought permission to rely on the disputed declaration. Vorse argued that "the discovery referee has determined that Mr. Schmidt committed perjury in contradicting his December 31, 1991 declaration" (AA 379) and that the latter "is vastly more trustworthy than his recent fabrications . . . [because it] was made at a time much closer to the disputed events, while all the participants were still alive." (AA 383)

Vorse's motion came on for hearing on Friday, January 13, 1995. (1 RT 209) Sarasy's trial counsel, William Arnone, Jr., Esq., summarized his position as follows:

> Mr. Schmidt is a critical witness in this case, [and] whether or not, as the plaintiff alleges, he's a credible witness or not is for the jury to determine. That's really it.
>
> Mr. Schmidt has a critical role in this. He's allegedly one of the partners in the partnership that the plaintiff is trying to convince the jury existed. His testimony about whether or not a partnership existed, about the relationship of Mr. Vorse, Mr. Schmidt and Mr. Sarasy to each other is critical to the defendants' ability to present their case in this matter. And that's — in a nutshell that's the defendants' position. (1 RT 209-210)

G.

The Court First *Permits* Schmidt To Testify and Both Sides Proceed on that Assumption

At the close of the hearing the court denied the motion to exclude Schmidt as a trial witness. The court stated its ruling unequivocally and unconditionally: "Mr. Schmidt will be permitted to testify." (1 RT 214)

Both sides proceeded on that assumption. Vorse's counsel mentioned Schmidt twice during opening statement. The first document he mentioned was Exhibit 15 (2 RT 266), an April 1989 agreement with Solar Electric Engineering, Inc., which Schmidt signed representing himself as a partner in "LD&D" with Vorse and Sarasy. (Schmidt later testified that the document had nothing to do with Dynatex (10 RT 1699).)

But the opening statement soon returned to the subject of Donald Schmidt, and particularly the disputed declaration:

> Now, Mr. Schmidt, who is not a party to this litigation, but is a witness to this litigation stated that he was a partner with Mr. Vorse and with Mr. Sarasy. . . . In fact Exhibit 143 which I neglected to put up on the blackboard you should write down. Exhibit 143 is another remarkable document. It's a declaration of Mr. Schmidt that was signed on December 31st, 1991, was filed with this court in January of 1992. Not only was it signed by Mr. Schmidt. It was signed under penalty of perjury. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
>
> Mr. Schmidt testified under oath in 1991 that David Vorse, Lewis Sarasy and Schmidt formed a partnership in the name of LD&D. One of its deals was to acquire the assets of Dynatex . . . . This declaration was signed three years ago by Mr. Schmidt when the matters were still fresh in his mind. (2 RT 272-272; emphasis added)

The following week Vorse's attorneys "put on" Donald Schmidt as a witness via his disputed declaration:

> We would like to put on Donald Schmidt by way of his sworn declaration under oath. What I would like to do is read it into the record. I also have a copy for the jurors. (4 RT 862)

Indeed, Vorse's attorneys also had a blow-up copy of that declaration, labeled as Exhibit 143A (4 RT 863, ln. 20-21). One Vorse attorney held the blow-up aloft near

the witness box (4 RT 862, ln. 21-22) while the other read the entire declaration aloud (4 RT 864-866) as the jurors followed along on their copy.

Sarasy's counsel made no objection to the admission or reading of the declaration. After all, the court had ruled that he could call Schmidt to the stand to describe the circumstances of the declaration and give his testimony about the underlying events.

Schmidt's testimony became even more important to Sarasy as the trial progressed. Vorse rested his case on February 28, 1995. (7 RT 1249) After a brief direct examination of Mr. Sarasy (7 RT 1249-1342) Vorse's cross-examination quickly returned to the subject of Donald Schmidt:

> Q. . . .[Y]ou've been friends with Mr. Schmidt for some 40 years; is that true?
> A. Correct.
> Q. And he was the best man at your wedding?
> A. Correct.
> Q. You intend to call Mr. Schmidt to testify?
> A. Correct.
> Q. And in 1991 Mr. Schmidt testified he was a partner of yours and of Mr. Vorse; isn't that correct?
> * * * [Objection sustained.]
> Q. It's your understanding, is it not, that Mr. Schmidt's testimony changed after David Vorse died, and that now his testimony is that there was no partnership; isn't that correct?
> * * * [Objection sustained.]
> Q. Isn't it true, Mr. Sarasy, that you have prevailed upon Mr. Schmidt to change his testimony in order to support your position because David Vorse is dead and can't support his own position and can't defend himself in this court?
> A. I did not prevail upon Donald Schmidt. (7 RT 1350-1351)

The questioning continued in that vein for several more pages.

Schmidt's long anticipated testimony was set to begin on Wednesday, March 8, 1995, as one of Sarasy's last three witnesses. (9 RT 1647) But Vorse's first order of business that day was to "once again move to exclude his [Schmidt's] testimony . . . ." (10 RT 1649) The basis this time was Schmidt's failure to bring certain documents with him. Sarasy's attorney responded that his direct examination would not be relying on those documents, but rather would focus on the disputed declaration. And the court again ruled that Schmidt would be permitted to testify. (10 RT 1662)

H.

Schmidt Testifies on Direct, Supporting Sarasy's Understanding of the Disputed Events

The direct examination of Schmidt began after the lunch recess. (10 RT 1692) He testified that in April 1989 the three men orally agreed to share equally any fee they earned if Winfield Polytek acquired Dynatex. (10 RT 1697) He testified that, after Winfield Polytek dropped out as a suitor, Vorse was still "interested in getting a right to acquire [Dynatex] for himself or somebody . . . ." (10 RT 1702) Schmidt testified that he, Vorse and Sarasy hoped "to find an investor who would fund the total acquisition of Dynatex. And that we would participate to some extent in the ownership of the company if we were so successful." (10 RT 1703)

Schmidt testified that one group of potential investors presented an offer to acquire Dynatex but conditioned it on an indemnification agreement guaranteed by Sarasy. (10 RT 1705) Schmidt testified that Vorse has assured Schmidt, and Schmidt in turn assured the investors, that Sarasy was willing to provide such an

agreement. (10 RT 1705-1706) However, Schmidt went on to testify that Vorse later told him it was not true (10 RT 1706-1707) and, as a result, the investors withdrew their offer (10 RT 1705) in October or November of 1989. (10 RT 1708)

Schmidt testified that this precipitated discussions in November and December among Vorse, Schmidt and Sarasy about using Sarasy's own assets for an acquisition of Dynatex. (10 RT 1710) Schmidt testified that they discussed their respective roles in such an acquisition but never reached an agreement:

> There was always a division of thinking on it on Mr. Vorse's part. An agreement was not reached, but a definition of it was discussed. (10 RT 1710)

Sarasy's attorney asked Schmidt to clarify:

> Q. Did you ever agree upon the terms under which the three of you would participate if Mr. Sarasy acquired the company, used his assets in acquiring the assets of Dynatex?
> A. Did we ever agree?
> Q. Yes.
> A. No. (10 RT 1711)

Schmidt testified that he understood he would "participate in a commission" if someone else purchased Dynatex. (10 RT 1711) But his understanding was that he "would have no role" if Sarasy used his own assets to acquire Dynatex assets. (*Id.*)

Schmidt next testified that Vorse called him around March 1, 1990, to report that "Sarasy had gone into contract for the acquisition of Dynatex . . . and that we needed to do something about it." (10 RT 1712) But the court sustained an objection to any further questions on direct about Vorse-Schmidt discussions about possibly suing Sarasy (10 RT 1713-1714). The court ruled that the direct

examination should turn instead to "the declaration that was signed . . . [and] how he happened to have signed this declaration." (10 RT 1714) Sarasy's counsel did just that, beginning at the bottom of page 1714 of the transcript.

Schmidt testified that Vorse's attorney called him in Florida "just a day or so prior to that December 31st date" and said "he would be sending me something I needed to sign it and send it back, and I said okay." (10 RT 1717) At that time, Schmidt testified, he had "close to zero" interest in Vorse's lawsuit against Sarasy. (*Id.*)

The questions then turned to "the actual signing of the document." (*Id.*) Schmidt was first asked to examine the signature appearing on Exhibit 143, the full declaration (AA 55). He testified that the signature appeared to be his (10 RT 1719), and also pointed out that it included his middle initial because it was his "practice" to use it on "any kind of a[n] important or legal document. . . ." (*Id.*) (The signature appearing on Exhibit 144 (AA 74), the subsequently filed verification, did not include Schmidt's middle initial.)

Schmidt was next asked whether the body of his declaration was "consistent with your recollection of the transactions in which you were involved with the Dynatex Corporation?" (10 RT 1721) However, the court sustained Vorse's objection to that question on the grounds that the "document speaks for itself. He's trying to impeach his own witness. It's a sworn statement by Mr. Schmidt." (*Id.*)

After several questions about facsimile machine notations on the declaration, Sarasy's attorney prepared to question Schmidt about the signature appearing on Exhibit 144. (10 RT 1723) Sarasy's attorney asked to have it marked for identification and prepared to hand copies to the jury. The court asked if there was any objection to its admission. Vorse's attorney replied "Yes, Your Honor," without stating any reason (10 RT 1723). But he then stated "I don't object to the document. I object to the upcoming line of questioning. I request a 402 hearing." (*Id.*) The court excused the jury from the courtroom.

I.

The Court Terminates and Strikes All of Schmidt's Testimony, Tells the Jury It "was not to be believed," But Lets Vorse Continue To Rely on the Declaration

The court stated it was "offensive" to imply that the declaration filed by Vorse's attorneys may have differed from the version they faxed to Schmidt for his signature. (10 RT 1724) Of course, Schmidt had a lot more to say about the declaration than that — chiefly, his belief that the *substance* of the declaration was inaccurate. Nevertheless, Sarasy's counsel made an offer of proof that Schmidt would testify that the signature on Exhibit 144, the verification page, was not his signature. (10 RT 1726) That testimony raised a question, at least, about the authenticity of the declaration itself.

The court first seemed inclined to issue a narrow ruling, excluding any testimony about Exhibit 144. It stated that "I find that this is getting very close to inadmissible evidence, that it's going to force [plaintiff's] counsel to testify and could mean a mistrial at the end of this case, and you're virtually at the end of it."

(10 RT 1726) (Similarly, the court stated later that "I'm not going to allow him to testify to *that*." (10 RT 1727; emphasis added)

However, the court was irate for two other reasons. First, it found Schmidt to be an untruthful witness. "[W]ithout hearing more, I can only tell you so far that I don't believe Mr. Schmidt." (10 RT 1726) Second, the court voiced strong displeasure with defense counsel for "accusing these two people [plaintiff's counsel] who could be disbarred, could be disbarred for filing false documents, for forging the documents." (10 RT 1726)

The court's reaction to Schmidt and the suggestion of attorney misconduct eventually produced the broad rulings described at the outset of this brief. But it was not clear even at this point. Sarasy's counsel, thinking the court was only concerned about testimony questioning Schmidt's signature, stated he would "move to another line of questioning that doesn't involve Exhibit 144." (10 RT 1730) Similarly, a narrower ruling was suggested by the court's statement threatening an adverse comment on Schmidt's veracity "[i]f I allow any further testimony from Mr. Schmidt." (10 RT 1733) Accordingly, Sarasy's counsel offered to ask no further questions at that point in order to avoid the adverse comment. (10 RT 1733) (He later clarified that he was only offering to stop the direct examination on that condition, assuming there would still be cross and redirect examination. (10 RT 1734-1735)

But the court soon withdrew any such option, immediately after Vorse's attorney reminded the court that it "has already found Mr. Schmidt in the Court's

words is a liar." (10 RT 1735) He went on to propose a prohibition of all further Schmidt testimony; a striking of all his prior testimony, too; *and* an adverse comment on his veracity "to explain why Mr. Schmidt has been dismissed." (*Id.*, emphasis added) The court agreed:

> I've never done this before ever. It's extreme. Now, I've had people I didn't believe on the stand, but I never had a situation in which the credibility and the ethics of lawyers, not the parties [were attacked] . . . . [¶][¶]
>
> . . . [E]ven though I respect Referee Vallandigham, I didn't want to take his word for the fact that Mr. Schmidt didn't tell the truth. I wanted to hear this myself. . . .
>
> . . . [I]t is damaging to plaintiff's case, let alone — let alone to counsel's reputation. That's not before the jury, but I think that I have to make some comment to the jury . . . . (10 RT 1736-1737)

Called back to the courtroom, the jury was greeted with the following announcement from the bench:

> Ladies and gentlemen, I have discharged the witness. I found that Mr. Schmidt's testimony was not to be believed, and therefore I have stricken it. And I am going to instruct you not to consider *anything* to which he testified. Just a minute. Exhibit 143 is already in evidence. That remains in evidence. But as to what he testified to orally, *all* of it is to be stricken from your minds. (RT 1737-1738; emphasis added)

While the court's attention may have been focused on the insinuation of attorney misconduct,[3] the court in actuality condemned and struck all of Schmidt's testimony and permitted no further testimony from this witness.

J.

Vorse and the Court Repeatedly Remind the Jury of the Schmidt Rulings

The damage to Sarasy's case did not stop there. Schmidt's wife, June Schmidt, was called to the stand only a few minutes after the court's rulings concerning her husband. After a brief direct examination the cross-examination of June Schmidt began as follows:

> Q. You are the wife of Donald Schmidt?
> A. Yes, I am.
> Q. That's Donald Schmidt, who testified a few moments ago?
> A. Yes.
> Q. Donald Schmidt, who the Judge dismissed --
> THE COURT: No.
> Q. I'll proceed, Your Honor. (10 RT 1766)

That he did. He immediately called Mrs. Schmidt's attention to the easel standing near by, which held "a copy of Exhibit 143 blown up for ease of reference for the jury. I believe the jury also has a copy in their packets." (*Id.*) The question for Mrs. Schmidt, repeated a number of times in different forms, was this:

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[3] That is further evidenced by the court's additional remarks after those quoted: "Further, anything that was said that might prejudice you against the plaintiff, I want to caution you to set that aside. Further, because I'm doing this, I don't want the defendant to be prejudiced because in no way do I believe that the defendant put a witness on to not tell the truth. I think it just happened. So, I want your assurance that you can set aside Mr. Schmidt's testimony entirely and not consider it and not hold anything he said or implied against the plaintiff or the defendant." (10 RT 1738)

> Prior to the day before yesterday, were you ever aware that your husband had signed a declaration under penalty of perjury stating that he was a partner with Mr. Vorse and Mr. Sarasy with respect to Dynatex acquisition? (10 RT 1767)

Perched on the easel, a potent reminder of the recent condemnation and ejection of Mr. Schmidt, the blow-up of Exhibit 143 fared much better than the witness on the stand.

Two days later Vorse's closing arguments to the jury exploited the Schmidt rulings again. After referring to Mrs. Schmidt unflatteringly, counsel summarized Mr. Schmidt's declaration and stated that, "In fact, Mr. Schmidt's declaration is the only evidence which you have been presented regarding Mr. Schmidt's position in this case. Mr. Schmidt testified that there was a partnership, and that he was a partner with Mr. Vorse and Mr. Sarasy." (12 RT 1915)

A few minutes later, counsel returned to his theme in the Sarasy cross-examination, that the latter had somehow "prevailed upon" Mr. Schmidt to change his story. (See *ante*, p. 16.) Counsel now stated that, "After David Vorse died, truth went out the window. Mr. Sarasy and Mr. Fusco [a co-defendant] thought that Mr. Vorse was no longer alive to contradict the story that they would make up, so they covered up the truth. Mrs. Schmidt could be bought. I would encourage you to draw the inference that Mrs. Schmidt's testimony was orchestrated by Mr. Sarasy and Mr. Fusco." (12 RT 1924) The same inference was being encouraged regarding Mr. Schmidt, too, as the court's rulings on that witness had pointedly suggested.

Vorse's closing argument returned to Mr. Schmidt twice more. Counsel mentioned the 1989 confidentiality agreement with Solar Electric Engineering, Inc., reminding the jury that Schmidt had signed it as a partner in LDD. (12 RT 1929) Then he mentioned the Schmidt declaration again, "which we already had on the easel, [which] states under oath that there was a partnership." (12 RT 1930)

Finally, Vorse's attorney returned to Schmidt in his rebuttal argument. At that time he either read from or paraphrased the 1991 declaration: "Mr. Schmidt testified in 1991 in his declaration, which I read to the jury, David Vorse, Lewis Sarasy [and I] formed an oral partnership by the name of LDD in 1989 to engage in certain business [ventures] for the acquisition of [a] high tech company by the name of Dynatex Corporation by the partnership. . . . Mr. Schmidt testified there was a partnership." (12 RT 1998)

While Vorse could say no more about the Schmidt rulings, the court itself chose to remind the jury about those rulings at the very end of the trial. During its instructions on the credibility of witnesses, not long after advising the jurors that "You are the sole and exclusive judges of the believability of the witnesses" (13 RT 2007), the court stated:

> In this case I did comment on the veracity of one witness, and that witness' testimony was stricken. You are not to consider that witness in considering the evidence before you. (13 RT 2008)

Sarasy's counsel repeated his previous objection (10 RT 1734) that, while a trial court may comment on a witness' veracity, if it does so it must instruct the jurors that they retain the ultimate power to determine the witness' credibility. (13 RT 2043-2045) That did not happen in this case.

K.

Verdict, Judgment, Appeal, and Statement of Appellate Jurisdiction

The court delivered instructions on Monday morning, March 13, 1995. (13 RT 2003) The jury was excused at 11:20 A.M. (13 RT 2040) and returned its special and general verdicts (AA 496-499) at 3:25 P.M. the following day, March 14, 1995. (13 RT 2049) The first and principal question before the jury was, "Did Vorse, Sarasy and Schmidt enter into a partnership to acquire the assets of Dynatex?" The answer was yes, by a 10-2 vote. (13 RT 2053)

The jury went on to find against Sarasy on all but one cause of action predicated on the alleged partnership agreement. That included breach of contract, bad faith denial of its existence, conversion of a partnership opportunity, fraud by concealment, and breach of fiduciary duty. Sarasy was also found liable for punitive damages. The only claims the jury rejected were fraud by false promise and breach of an alleged employment agreement. (See *ante*, p. 6, fn. 2.) The jury also exonerated a co-defendant, James Fusco, on Vorse's claims of interference with the Vorse-Sarasy economic relationship. (AA 488)

The jury awarded Vorse $1,310,000 in compensatory damages plus "all legal and court costs." (AA 496, 13 RT 2051) However, it reached an impasse on the punitive damages issue (13 RT 2113) and the court eventually discharged the jury without reaching a verdict on that issue. (13 RT 2117) Vorse subsequently waived punitive damages (see AA 492) and a final judgment was entered for the balance of his recovery on March 27, 1995. (AA 495) Notice of its entry was served by the clerk on the same date. (AA 494)

Vorse timely noticed his intention to move for new trial as to defendant Fusco on March 31, 1995. (AA 500) Sarasy timely noticed his own intention to move for new trial on April 17, 1995 (AA 510), as per Code of Civil Procedure section 659, subdivision 2.

All motions for new trial were denied by order signed on June 1, 1995 (AA 609). The same day the court entered a separate order (AA 611) that, among other things, modified the judgment in two respects. It reduced the judgment by $175,000 as a partial setoff for a pretrial settlement payment by Sarasy's co-defendant, Miller, Starr & Regalia. It also awarded Vorse another $295,449.86 as fees and expenses, mostly for pursuing co-defendants Miller, Starr & Regalia and Barrie Regan.

Sarasy filed his notice of appeal on June 22, 1995 (AA 610), specifying both the original judgment against him and the subsequent orders modifying that judgment as indicated. The notice of appeal was timely pursuant to both Rule 2 and Rule 3 of the California Rules of Court. The notice was filed within 30 days of the denial of the motions for new trial and also within 60 days of notice of entry of the modified judgment.

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III.

ARGUMENT

A.

THE COURT'S RULINGS ON WITNESS SCHMIDT ARE UNPRECEDENTED, ERRONEOUS AND REVERSIBLE

1.

The Court Violated Sarasy's Right To Trial By Jury, Both as to Schmidt's Credibility and the Principal Disputed Factual Issue at Trial

This appeal is controlled by basic and well settled principles. In jury trials it is the jury, not the court, which determines "the credibility of witnesses" and "[a]ll questions of fact." (Evidence Code § 312) And that right is "inviolate" pursuant to Article I, section 16, of the California Constitution.

In this case the court improperly intruded on the jury's power to determine credibility *and* questions of fact. First, it took over the credibility determination on the entire testimony of a unique and pivotal witness. Second, and perhaps even more seriously, the court's treatment of that witness destroyed the jury's ability to make an independent and neutral determination of the central disputed factual issue in the case.

The rulings on Schmidt did not merely truncate and undermine Sarasy's defense. They destroyed the integrity of the jury trial. They placed the court's own authority and credibility squarely on the side of Vorse's position on the central disputed factual issue of the case, the nature of the parties' agreement. By its

words and deeds, the court dramatically declared that Schmidt was a liar insofar as he supported Sarasy's position, but was perfectly reliable insofar as the 1991 declaration supported Vorse's position. That meant the only *truth* emanating from Schmidt was Vorse's version of the truth: that Sarasy *did* agree to share any equity he acquired in Dynatex. Such intervention in a jury trial is unprecedented and erroneous.

In *People v. Jackson* (1991) 235 Cal.App.3d 1670, Division Four of this Court held squarely that the court may not exclude testimony at a jury trial because the court believes the testimony is untruthful:

> It is the duty of the trier of fact to assess credibility. "Objection, your honor, this could be perjury!" has not yet made it into the Evidence Code. (*Id.* at 1679)

There, as here, the trial court believed the disputed testimony was fabricated because of the death of an important participant. Defendant Jackson and a friend proposed to testify that another friend, since deceased, had admitted to the crime of which defendant stood accused. The trial court excluded that testimony in part pursuant to Evidence Code § 452. But the Court of Appeal stated, "We know of no rule that excludes testimony on the ground that it could be a fabrication . . . ." (235 Cal.App.3d at 1679). That, however, was the predicate of the Schmidt rulings below.

A case even closer on its facts is *National Auto. Ins. Co. v. Fraties* (1941) 46 Cal.App.2d 431, decided by Division One of this Court. *National Auto* specifically upheld the right of a witness to give testimony explaining or disputing his prior sworn statements introduced as evidence. *National Auto* involved a third party

claim to attached property of the defendant, who was claimant's brother. At the hearing on the merits plaintiff introduced the claimant's sworn deposition testimony as adverse evidence. But before the claimant had an opportunity to testify, the court terminated the hearing and rejected the claim on the merits. The precipitating event was the court's belief that certain testimony being given by the defendant was perjurious. ("It seems to me it almost ought to be referred to the Grand Jury." (46 Cal.App.2d at 433)) In any event, the court refused to allow the claimant to testify about his deposition statements, cross-examine the defendant, or present any other evidence.

Reversing, *National Auto* held that the court improperly prejudged the credibility of claimant and his case. Among other things, the court specifically held that the claimant had a right to explain or dispute his prior deposition testimony, no matter how damaging it was. Even assuming there was "cause[]" for the court's negative reaction to claimant's case, the opinion stated that "we are nevertheless confronted with the fact that the third party claimant was not permitted to . . . [give] an explanation of any testimony given in his own deposition." (46 Cal.App.2d at 433) The opinion went on to observe that the prohibition of such testimony, along with the curtailment of the rest of claimant's case, "was a possible deprivation of property without due process." (*Id.*)

Schmidt's declaration was the functional equivalent of the deposition testimony in *National Auto,* and he was not even a party to the litigation. Thus, the holding and reasoning of that case apply a fortiori here. If a court sitting as trier of fact was required to hear out the party/witness in *National Auto,* surely the same

requirement obtained at the jury trial below. And if the party/witness in *National Auto* had the right to explain or dispute his own prior deposition testimony, surely Sarasy had the right to elicit testimony from nonparty Schmidt relating to the probative value of a conclusory declaration drafted by Vorse's attorneys. The jury could then consider all relevant evidence and decide what was believable and what was not.

A similar conclusion emerges from the law governing affidavits and declarations. They simply do not play the conclusive role at trials which Vorse and the court attributed to them. They are not even admissible at trials without an exception to the hearsay rule. (*Estate of Horman* (1968) 265 Cal.App.2d 796, 805) And even when admissible, the governing statute provides that affidavits and declarations are only "prima facie evidence of the facts stated therein." (Code of Civil Procedure § 2011) That means they are *not* conclusive. Sarasy had every right to elicit Schmidt's testimony about the accuracy and surrounding circumstances of the 1991 declaration. In one of the few cases applying § 2011, *Wise v. Williams* (1891) 88 Cal. 30 held that other evidence is admissible to contradict an affidavit, and indeed that the other evidence was more reliable under the circumstances of that case.

Viewed from a different perspective, too, the court's selection of an isolated piece of evidence as Schmidt's only truth violated the principles of fairness and balance expressed in Evidence Code § 356.[4] *Rosenberg v. Wittenborn* (1960) 178

[4] "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party . . . ; (continued...)

Cal.App.2d 846 held that § 356 is "as broad as principles of fair play may demand" in order to prevent a jury from hearing "half-truths." (*Id.* at 851-852, quoting Wigmore) In the instant case, the trial court violated those principles by singling out a conclusory declaration as the whole truth emanating from witness Schmidt, while condemning and striking everything else the man had to say. Even a murder defendant has the right to explain and contradict a confession admitted at trial. (*People v. Cahill* (1993) 5 Cal.4th 478, 503)

In sum, both the credibility of Donald Schmidt and the factual dispute to which his testimony related were for the jury to determine, not the court. The rulings below demonstrably violated Sarasy's right to trial by jury as secured by the California Constitution and the statutes and cases discussed above.

2.

There Is No Precedent *Supporting* the Court's Rulings

The error below is further confirmed by the several theories Vorse put forward to defend the subject rulings. Those theories border on the frivolous. Indeed, Vorse could not cite a single supporting precedent.

Vorse first cited *Marathon National Bank v. Superior Court (Campbell)* (1993) 19 Cal.App.4th 1256 (review denied) for the proposition that the discovery referee's "finding" that Schmidt committed perjury was conclusive as a "special verdict." (1

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[4](...continued)
and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

RT 175, ln. 23) But *Marathon*, like the instant case, involved a discovery referee, not a referee appointed to adjudicate facts. (*Compare* subd. (a) and (e) of section 639, Code Civ. Proc.) Vorse took the following sentence from *Marathon* completely out of context: "*When the reference is to report the facts*, the decision of the referee is binding as a special verdict." (*Marathon, supra*, 19 Cal.App.4th 1256, 1259, emphasis added) Moreover, Judge Savitt stated that the Schmidt rulings reflected the court's own credibility appraisal, not the referee's. (10 RT 1736-1737) Enough said about the referee's report.

Vorse also referred several times to Evidence Code § 352 as authority for the challenged rulings. He was suggesting, in other words, that the court had power to declare Schmidt's entire "probative value" (except his declaration, of course) to be outweighed by his "prejudice" to Vorse's case or, indeed, to the reputations of Vorse's attorneys. Not surprisingly, though, Vorse could cite no precedent for such a reading of § 352. The statute authorizes the exclusion of particular evidence, not the indiscriminate exclusion of all testimony by a witness because the court doubted its credibility. Moreover, even if § 352 conceivably authorizes such action as to a peripheral witness, not so a witness of unique and undisputed importance on the central disputed issue of a case. (*See, e.g., People v. Jackson, supra*, 235 Cal.App.3d 1670, 1679, rejecting the trial court's reliance on § 352 because the claimed admission by a third party, even if not *credible* evidence, was relevant and unique evidence and "was prejudicial only in the sense that it cast doubt on the prosecution's case.")

Vorse also suggested that Sarasy was "trying to impeach his own witness" (10 RT 1721) by inviting Schmidt to explain the circumstances and challenge the accuracy of the disputed declaration. But Vorse proffered and "put on" this declaration during his own case in chief. (4 RT 862) Sarasy was attempting to elicit responsive testimony as part of his defense.

Next, Vorse cited Evidence Code § 402 when requesting the hearing that led to the challenged rulings (10 RT 1723). Thus, Vorse was suggesting that Schmidt's entire credibility as a witness could be adjudicated by the court as a "preliminary fact." But Vorse cited no precedent for such an expansive reading of that statute, either. Indeed, Evidence Code § 406 states that nothing in the article on preliminary fact determinations "limit[s] the right of a party to introduce before the trier of fact evidence relevant to weight or credibility." Moreover, Evidence Code §§ 700 and 701 make clear that the court may not disqualify a witness for a perceived lack of credibility, but only if the person is "incapable of understanding the duty of a witness to tell the truth." (Evidence Code § 701(a)(2)) No such suggestion was ever made as to Mr. Schmidt, and any such finding would have applied equally to the declaration. (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 166-167 (review denied))

Finally, Vorse cited Evidence Code § 1237 as authority for singling out the declaration as the only evidence the jury would hear from Schmidt. (AA 384) But the text of § 1237 flatly precludes such an argument. All it does is establish conditions for the admissibility of a witness' prior statement. Nothing suggests such a statement can be admitted when the witness' oral testimony is completely

excluded. On the contrary, § 1237 *requires* the witness to testify at trial before the prior statement can be admitted. Subdivision (a)(3) requires testimony "that the [prior] statement . . . was a true statement . . . ." Aside from the fact that Mr. Schmidt disputed the truth of the declaration, the statutory requirement of trial testimony makes it frivolous to cite § 1237 in support of the challenged rulings.

In sum, Vorse's attempts to defend the rulings below only confirm that they are indefensible. The applicable authorities are those cited in the previous section of this brief. They demonstrate that the rulings below unquestionably violated the right to trial by jury.

3.

The Error Is Reversible

It remains to demonstrate that these erroneous rulings are reversible on two independent grounds. First, they are reversible per se because they violated Sarasy's right to trial by jury. Independently, they are reversible for prejudice because of their powerful effect on the jury deliberations and in undercutting Sarasy's reliance throughout the trial on the court's initial ruling allowing Schmidt to testify.

a) The Error Is Reversible Per Se

In *Olivia N. v. National Broadcasting Company* (1977) 74 Cal.App.3d 383, Division Four of this Court held that a violation of the right to trial by jury was "reversible error" (74 Cal.App.3d at 389) even without consideration of the traditional prejudice factors. That case involved an action for damages claiming

that a television film depicting a sexual assault incited a similar assault on the plaintiff. Although plaintiff timely demanded a jury trial, the assigned court viewed the film before empaneling a jury; made its own factual finding that the film "did not advocate or encourage violence" as required to overcome its First Amendment protection (74 Cal.App.3d at 386); and thereupon entered a judgment of dismissal. Division Four reversed because the court's action violated plaintiff's "right, under California Constitution, article I, section 7, to have all fact issues in the case determined by a jury." (*Id.* at 389)

Without any discussion of *prejudice* from that error, *Olivia N.* simply stated that the violation of the jury right was "reversible error." (74 Cal.App.3d at 389) The opinion contains no discussion, for example, of the nature or strength of the factual basis of the trial court's decision. Nor does the opinion contain any discussion of the likelihood that the jury would have reached a different conclusion about the film. Rather, the reversibility of the error was predicated on its very nature: interference with the right to trial by jury.

National Auto. Ins. Co. v. Fraties, supra, 46 Cal.App.2d 431, reached a similar conclusion where the court at a bench trial prematurely determined the credibility of a claimant and his case. Like *Olivia N., National Auto* tersely stated that "Section 4½ of art. VI of the Constitution was not intended to abrogate constitutional guarantees." (*Id.* at 434) Section 4½, like its successor, Section 13 of the same article, ordinarily required quantitative proof of prejudice in order to establish a reversible "miscarriage of justice." What *National Auto* was saying, therefore, is that such proof is not required when the error is of the type involved in that case.

In *National Auto*, as here, the error undermined the integrity of the trial as a fact finding process and resulted in a significant truncation of the record. Thus *National Auto*, like *Olivia N.*, held that reversibility flowed from the error itself. Such a significant defect in the fact finding process undermines the usual presumption of a correct result. (*See also, Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] (defective instruction on reasonable doubt precluded the normal prejudice standard for determining reversibility).) Also, an erroneously truncated record makes it unfair and unrealistic to require a review of such traditional prejudice factors as the weight or balance of the evidence actually admitted. Thus, *National Auto* and *Olivia N.* reversed without any such review. They held that the error itself established the "miscarriage of justice" necessary for a reversal.

An en banc panel of the Ninth Circuit reached a similar conclusion in *United States v. Gaudin* (9th Cir. 1994) 28 F.3d 943, *affirmed* (1995) —U.S.— [115 S.Ct. 2310, 132 L.Ed.2d 444]) There, in a jury trial on a prosecution for making false statements to a federal agency, the district court decided for itself that the statements were material and so instructed the jury. A unanimous Supreme Court affirmed the Ninth Circuit's holding that this was unconstitutional, but the high court did not reach the reversibility issue because the Government conceded it at that level. However, the Ninth Circuit's published and still valid decision held that the error was reversible per se:

> [S]uch an error *cannot* be harmless. . . . When proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether that element existed at all. (28 F.3d at 951; emphasis added)

Cases like *Olivia N.* and *National Auto* remain good law today in California. In *People v. Cahill, supra,* 5 Cal.4th 478, and *Soule v. General Motors Corporation* (1994) 8 Cal.4th 548, the California Supreme Court expressly approved the longstanding rule that certain types of error — violating the right to trial by jury is the error most frequently cited — are reversible even without the traditional proof of prejudice. *Cahill* stated that an error is reversible per se if it represents "a 'structural defect' that affects the framework within which the trial proceeds . . . ." (5 Cal.4th 487, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312) *Cahill* further explained that 'certain fundamental rights . . . are guaranteed to the defendant upon which he can insist regardless of the state of the evidence [*i.e.,* regardless of prejudice], such as the right to a jury trial . . . .'" (5 Cal.4th at 492, quoting *People v. Watson* (1956) 46 Cal.2d 818, 835; emphasis added) *Cahill* also quoted extensively from *People v. O'Bryan* (1913) 165 Cal. 55:

> When we speak of administering "justice" in criminal cases, . . . we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected. For example, if a court should undertake to deny . . . the right of trial by jury, and after a hearing of the evidence render a judgment of conviction, it cannot be doubted that such judgment should be set aside even though there had been the clearest proof of guilt. (5 Cal.4th at 490, quoting *O'Bryan* at 165 Cal. 65-66; emphasis added)

Soule followed *Cahill* in stating that an error is reversible per se if it violates "the constitutionally required 'orderly legal procedure' (or, in other words, a fair trial) — for example, the denial of the defendant's right to a jury trial or to an impartial judge . . . ." (8 Cal.4th at 577, quoting *Cahill* at 5 Cal.4th 501-502; emphasis added) Later, when explaining why the erroneous omission of

instructions requires proof of prejudice, *Soule* pointed out that in such cases the litigant was still "permitted to introduce evidence, cross-examine witnesses, and present argument before a fairly selected jury that rendered its honest verdict on the trial record . . . ." (8 Cal.4th at 579) In the instant case, of course, the court significantly curtailed Sarasy's introduction of evidence; prohibited him, in essence, from cross-examining the Schmidt declaration that was presented as part of Vorse's case in chief; and destroyed the independence and neutrality of the jury's fact finding process. This case falls well within the *Cahill/Soule* concept of reversibility per se.

Rulings like those below are held reversible per se in part because they defy a reliable prejudice analysis. *Cahill* explained that the more typical trial error "occurs during the presentation of the case to the jury, and . . . may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was [prejudicial or harmless]." (5 Cal.4th at 501, original brackets, quoting *Fulminante* at 499 U.S. 307-308) *Sullivan v. Louisiana, supra,* 124 L.Ed.2d 182, further explains that a defective reasonable doubt instruction is reversible per se because it vitiates the predicate of the traditional prejudice analysis, a presumptively valid verdict, and requires the appellate court to engage in improper speculation.

However, *Sullivan* also announced an alternative holding that is strikingly similar to the principles stated by the California Supreme Court in *O'Bryan* and reiterated in *Cahill. Sullivan* held that a defective reasonable doubt instruction is an error —

> whose precise effects are unmeasurable, but without which a criminal trial cannot reliable serve its function. . . . The right to trial by jury reflects . . . "a profound judgment about the way in which law should be enforced and justice administered." [Cit. omitted] . . . . The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error." (113 S.Ct. at 190; emphasis added)

In the instant case, too, the court's extraordinary intervention destroyed the independence and neutrality of the jury's appraisal of the case, along with the important public function of jury trials as described in *O'Bryan*, *Sullivan*, and innumerable other cases.

b) The Error Is Reversible for Prejudice

If a traditional prejudice analysis is required and possible in this case, however, the same conclusion is inescapable. The error is reversible.

There is no need to rehash the facts and proceedings detailed at the outset of this brief. They reveal a number of factors pointing inexorably to a finding of prejudice:

(1) Schmidt was undisputedly a pivotal witness on the central issue of the case: the alleged agreement to share Dynatex equity in addition to any commission. Every cause of action against Sarasy was predicated on the existence of such an agreement.

(2) There were sharply conflicting versions of the alleged agreement.

(3) Sarasy relied to his great detriment on the court's initial ruling *allowing* Schmidt to testify over Vorse's "perjury" objections. A prime example is Sarasy's decision not to object to the admission in evidence of the Schmidt declaration. That

reliance alone makes the court's later ruling reversible for prejudice. But Sarasy's entire trial presentation was predicated on his expectation that Schmidt would be allowed to testify. In *Brautigam v. Brooks* (1964) 227 Cal.App.2d 547, for example, it was held to be a prejudicial abuse of discretion to permit the defendant to reintroduce an issue that he withdrew at the outset because of plaintiff's reliance in planning and conducting her trial strategy:

> The ruling . . . definitely prejudiced plaintiff in presenting her cause. . . . [D]uring the presenting of evidence there was no suggestion that there was such an issue [contributory negligence] in the case. . . .
>
> Who can say that plaintiff's counsel, had he known he would be confronted with the claim of contributory negligence, would not have handled his examination of witnesses and general conduct of the case differently? Certainly we cannot do so. (227 Cal.App.2d at 560)

(4) The court's later turnabout on Schmidt, resulting in his public ejection and condemnation as a liar, all came at a dramatic point near the end of Sarasy's defense case.

(5) Vorse's attorneys amplified the effect of the error, relying immediately and often on the court's rulings on Schmidt in cross-examining his wife and in the closing and rebuttal arguments to the jury.

(6) Finally, the court chose to remind the jury at the very conclusion of the trial, in the instructions, that Schmidt had been declared untruthful insofar as he supported Sarasy's position.

Suffice it to quote from *United States v. Gaudin, supra*, 28 F.3d 943. The erroneous Schmidt rulings in this case "cannot be harmless." (28 F.3d at 951) They truncated and undercut Sarasy's entire defense near the conclusion of the trial. And their powerful endorsement of Vorse's side of the case, echoed by Vorse and

reinforced by the court just before the jury began its deliberations, clearly demonstrate the probability of an adverse effect on the outcome.

B.

THE "TORT OF ANOTHER" DOCTRINE DOES NOT PERMIT AN ATTORNEYS FEE AWARD FOR PURSUING OTHER ALLEGED JOINT TORTFEASORS IN THE SAME CASE

The trial court increased Vorse's judgment by $225,434.62 under the purported authority of the "tort of another" doctrine. (AA 607) The reasoning behind this award was that Sarasy's tortious conduct required Vorse to pursue tort remedies against other alleged joint tortfeasors in this action, namely, Barrie Regan (the former owner of Dynatex) and the law firm of Miller, Starr & Regalia. Vorse relied principally on *Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618 and *Gray v. Don Miller & Associates* (1984) 35 Cal.3d 498.

Neither *Prentice, Gray* nor any other authority supports such an extension of the "tort of another" doctrine. In fact, the recent case of *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 57, expressly held that the doctrine "was not intended to apply to one of several joint tortfeasors." *Vacco*, involving a trade secret claim, reversed an attorneys fee award against one defendant for the expense plaintiff had incurred in pursuing another. Although the target defendant was said to have initiated the other defendant's trade secret violation, the theory of the case was that the two defendants were joint tortfeasors. Thus, *Vacco* observed that the fee award would result in the "total emasculation of Code of Civil Procedure section 1021 in tort cases" because "there is no reason why [such an

award] could not be applied in every multiple tortfeasor case with the plaintiff simply choosing the one with the deepest pocket as the *Prentice* target." (*Id.* at 57)

Vorse, like the plaintiff in *Vacco Industries*, plainly alleged and sought to prove that Sarasy, Regan, and Miller, Starr & Regalia ("MSR") were joint tortfeasors in the exclusion of Vorse from the fruits of the Dynatex acquisition. For example, Vorse's complaint asserted ten separate causes of action against MSR including legal malpractice, bad faith denial of contract, negligent and intentional interference with economic relations, misrepresentation and concealment. (AA 7-17) In essence, Vorse asserted that he was MSR's client in connection with the alleged partnership efforts to acquire Dynatex, yet MSR participated in and facilitated Sarasy's ultimate acquisition of the business alone. Similarly, Vorse's amended complaint (AA 38A *et seq.*) added a number of tort causes of action against Regan, who allegedly colluded with Sarasy by selling him Dynatex. The claims against Regan included fraud, intentional infliction of emotional distress, and negligent and intentional interference with economic relations.

Vacco's holding is undeniably applicable. In fact, it is difficult to imagine a closer connection between alleged joint tortfeasors than the connections alleged here. Vorse claimed that Sarasy wrongfully acquired Dynatex in conjunction with its seller, Regan, and with MSR, Sarasy's transaction counsel. Moreover, Vorse claimed that both of those other parties had a multitude of independent legal and equitable obligations not to cooperate with Sarasy the way they did. The conclusion is inescapable that these were all alleged joint tortfeasors and that, under *Vacco*, there can be no invocation of the "tort of another" doctrine.

As *Vacco* recognized, *Prentice v. North Amer. Title Guar. Corp., supra,* 59 Cal.2d 618, and *Gray v. Don Miller & Associates, supra,* 35 Cal.3d 498 are distinguishable on their facts and, more importantly, on their rationale for a fee award. *Gray* did not involve joint tortfeasors. The defendant, a real estate broker, falsely told plaintiff that his offer to buy land had been accepted. When the purported seller balked, naturally enough, plaintiff brought an action against him for specific performance in reliance on the broker's misrepresentation. Thus, because plaintiff incurred attorneys fees in that connection, as a direct result of the tort of the broker, the Supreme Court upheld the inclusion of those expenses in plaintiff's damages award.

Similarly, *Prentice* upheld a fee award where an escrow holder "negligently made it necessary for the vendor of land to file a quiet title action against a third person." (*Id.* at 621) Just as in *Gray,* the third party pursued by plaintiff in *Prentice* was completely innocent of any wrongdoing towards plaintiff. It was simply a matter that the actions of the true wrongdoer caused or required plaintiff to incur additional expenses in the form of attorneys fees.

As *Vacco* correctly held, the "tort of another" doctrine has never been extended to the situation where a plaintiff incurs legal expenses in seeking tort remedies against third parties for their own wrongful conduct. Such an extension of *Prentice* and *Gray* would completely swallow the American rule that parties bear their own legal expenses unless provided otherwise by statute or contract.

C.

THE COURT ERRED AS A MATTER OF LAW IN DENYING SARASY HIS FULL SETOFF FOR A SETTLEMENT BY A CO-DEFENDANT

Sarasy has only one objection to the Vorse estate's mid-trial settlement with defendant Miller, Starr & Regalia ("MSR") for $500,000. The estate succeeded in circumventing Sarasy's setoff rights under Code Civ. Proc. § 877.

Because Vorse passed away long before trial, MSR no longer faced potential liability in this action for any noneconomic damages. (Code Civ. Proc. § 377.34; *see,* former Probate Code § 573 and *Williamson v. Plant Insulation Co.* (1994) 23 Cal.App.4th 1406 (review denied)) Nevertheless, the estate sought to preclude any setoff by allocating the entirety of the $500,000 settlement to "emotional distress non-economic damages." (AA 553) (*See, Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685 (noneconomic damages no longer subject to § 877 setoff).) Later, though, the estate dropped the emotional distress rubric in favor of "non-economic damages for alleged injury to Vorse's reputation . . . ." (AA 585)

The court went along with that theory. However, it exercised its power over the good faith determination by reducing the noneconomic damages allocation from $500,000 to $325,000, granting Sarasy a setoff of $175,000. (AA 612)

Sarasy contends this was error as a matter of law. He asks this Court either to restore his right to a full $500,000 setoff or, if necessary, to remand the setoff issue for further proceedings in the trial court. To clarify, however, Sarasy does not ask the Court to review the specific figure chosen by the trial court as the

"ballpark" value of MSR's potential liability for noneconomic damages. Trial courts have considerable discretion over allocation issues in passing on the good faith of settlements, and the substantial evidence rule applies to their factual determinations in that connection.

However, Sarasy's contention does not turn on any factual determinations below. As in *Toyota Motor Sales v. Superior Court* (1990) 220 Cal.App.3d 864, the error underlying the court's ruling is apparent based on undisputed facts. Thus, this Court can and must review the issue de novo and "reach its own legal conclusion . . . ." (220 Cal.App.3d at 872, citations omitted) Sarasy's only contention is that, as a matter of law, *no* component of the MSR settlement could properly be allocated to noneconomic damages when such damages had become unavailable in this action long before the settlement.

The court adopted the settling parties' argument that Vorse's death only cut off MSR's potential liability for "emotional distress" damages, not "reputational" damages. The court stated that it "considered this settlement attributable to the damage to Vorse's reputation and for the malpractice of the defendant's attorneys." (RT May 24, 1995, p. 2169)

However, the settling parties shifted their rhetoric in vain. The applicable survival statute, Code Civ. Proc. § 377.34, can not be so easily circumvented. In language carried forward from its predecessors in the Probate Code (*see, e.g., Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1141-1142), § 337.34 provides that a decedent's estate may not pursue "damages for pain, suffering or disfigurement."

Case law has given that prohibition a broad application to general damages that were personal to the decedent, and places reputational damage within that category.

In this Court's own recent case on this subject, *Williamson v. Plant Insulation Co.* (1994) 23 Cal.App.4th 1406, then Court of Appeal Justice Werdegar summarized the thrust of the predecessor to § 337.34 as follows:

> [A]n estate should not be enriched by compensation for suffering that was personal to the decedent, not suffered by the estate or its beneficiaries. (23 Cal.App.4th at 1414)

The unanimous opinion went on to hold that the trial court had improperly "rescue[d] . . . pain and suffering damages from abatement" (*id.*) by entry of a judgment nunc pro tunc to the day before the plaintiff's death.

Here, too, the trial court improperly rescued a prohibited damages claim. Case law establishes that the survival statutes prohibit a broad class of general damage that is "personal to the decedent" (*Williamson, supra*) and that this includes reputational damage. Thus, *Urbaniak v. Newton, supra*, 226 Cal.App.3d 1128, 1142, contrasted the emotional distress damages prohibited by the survival statute with "special damages." Similarly, *Fein v. Permanente Med. Group* (1985) 38 Cal.3d 137, in upholding a legislative cap on noneconomic damages, equated its economic/noneconomic damage distinction with the general/special damage distinction in another statute, which defined general damage as "loss of reputation, shame, mortification and hurt feelings." (38 Cal.3d 158, n. 15) Indeed, reputational damage is consistently included in the general class of personal emotional damage even in other contexts. (*Lisec v. United Airlines, Inc.* (1992) 10 Cal.App.4th 1500,

1506 ("the other traditional harms associated with personal injury . . . [include] pain and suffering, emotional distress, [and] harm to reputation"); *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 70 ("relief pertaining to personal injury [includes] loss of reputation, pain and suffering, or emotional distress"); *Franklin v. Franklin* (1945) 67 Cal.App.2d 717 (the "personal injuries" that formerly abated and were nonassignable included "[w]rongs done to the person, like those to the reputation or feelings of the injured party . . . ." (67 Cal.App.2d at 726).)

In sum, the trial court erred as a matter of law in approving a circumvention of Sarasy's setoff right by means of a circumvention of the prohibition against noneconomic damages. Vorse's counsel was correct the first time. When he first reported the MSR settlement to the court, he stated that the settling parties were allocating the entirety of the settlement to "emotional distress non-economic damages." (AA 553) That was clearly prohibited, and nothing changed when the parties later came up with their new label of "reputational" damage.

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IV.

CONCLUSION

The judgment below must be reversed because of the trial court's extraordinary intrusion on the province of the jury. It not only made a sweeping determination of the credibility of a pivotal witness, but effectively instructed the jury that only Vorse's version of the disputed agreement was deserving of belief. These rulings are reversible either for their violation of the jury trial right or, independently, for their demonstrable prejudice.

Finally, even if this Court remands the cause for a new trial, it should hold that the trial court erred by granting Vorse a "tort of another" fee award and by denying Sarasy his rightful setoff in the full amount of the MSR settlement.

DATED: January 31, 1996

BIEN & SUMMERS

By _____
ELLIOT L. BIEN
Attorneys for Appellant,
LEWIS SARASY

CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. I caused to be served by mail –

APPELLANT'S OPENING BRIEF;
APPELLANT'S RULE 5.1 APPENDIX

by enclosing true copies of one or both of said documents, as indicated, in envelopes with proper postage prepaid and addressed to –

Patrick M. Macias, Esq. (brief and appendix)
874 Fourth Street
San Rafael, CA 94901

Bruce W. Blakely, Esq. (brief only)
1000 Fourth Street, Suite 875
San Rafael, CA 94901

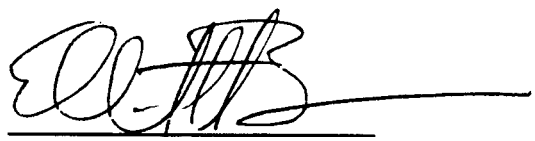
Clerk, Marin County Superior Court (brief only)
3501 Civic Center Drive, Room 151
San Rafael, CA 94903

Clerk, California Supreme Court (5 copies of brief)
303 Second Street, 8th Floor
San Francisco, CA 94107
Clerk, Marin County Superior Court

and placing same for delivery by the United States Postal Service in my usual manner on the date stated below.

The foregoing is true and correct. Executed under penalty of perjury at San Francisco, California.

DATED: January 31, 1996



Elliot L. Bien