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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LEWIS JORGE CONSTRUCTION MANAGEMENT, INC., Plaintiff, Respondent and Appellant, v. POMONA UNIFIED SCHOOL DISTRICT et al., Defendants, Appellants and Respondents.	B143162 (Super. Ct. No. KC 023186)

APPEAL from a judgment of the Superior Court of Los Angeles County. Harold Cherness, Judge. Affirmed in part, reversed in part, and remanded.

Case, Ibrahim & Clauss, Brian S. Case, F. Albert Ibrahim, and Michael A. Peters for Plaintiff, Respondent and Appellant.

Best, Best & Krieger, Howard B. Golds, Piero C. Dallarda; Horvitz & Levy, Mitchell C. Tilner, and John A. Taylor, Jr. for Defendants, Appellants and Respondents.

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Pomona Unified School District (the "District") appeals the judgment entered in favor of Lewis Jorge Construction Management, Inc. ("Lewis Jorge") in the latter's lawsuit for breach of a construction contract, claiming the trial court committed instructional error and other errors of law. Lewis Jorge filed a cross-appeal, claiming that the trial court wrongly precluded its recovery of certain categories of damages. We find merit in several of the arguments proffered on appeal, and so affirm in part and reverse in part.

FACTS

In 1994, the District solicited bids for construction of the Vejar Elementary School (the "Project"). Lewis Jorge, a private building contractor owned and operated by Robert Lewis, was the lowest bidder. On or about August 18, 1994, the District awarded the construction contract (the "Contract") to Lewis Jorge. The total contract amount was $6,029,000.

The Contract required Lewis Jorge to finish the School within 425 days after the District issued a "Notice to Proceed." The District issued the Notice to Proceed on September 30, 1994, which fixed the initial construction deadline at December 2, 1995. After factoring in 51 days of delay due to rain, the parties agreed to a new completion date of January 22, 1996. The Contract also included a liquidated damages clause, requiring Lewis Jorge to pay the District $500 for each day of delay.

On June 5, 1996, the District terminated the Contract with Lewis Jorge.

Lewis Jorge sued, claiming that the District's termination of the Contract after the Project was essentially complete breached the Contract. After a bifurcated trial, and pursuant to two special verdicts, the jury awarded Lewis Jorge $362,671 for sums due under the Contract, and $3,148,197 in lost profits due to Lewis Jorge's loss of bonding capacity following the termination. The jury awarded an additional $399,669 for claims CNA, Lewis Jorge's surety, asserted against Lewis Jorge. The jury found in favor of

Lewis Jorge on the District's cross-complaint for breach of contract and breach of the covenant of good faith and fair dealing.

Lewis Jorge also sued Christopher Butler, a District employee, who was the District's project manager on the Project. The jury rejected Lewis Jorge's theory of liability based on Butler's fraud and/or malice, but found that Butler was negligent, and held him jointly and severally liable for $3,510,868, consisting of the $362,671 in benefits Lewis Jorge would have received under the Contract but for the District's breach, and $3,148,197 in Lewis Jorge's lost profits.

In post-trial motions, the trial court awarded Lewis Jorge $696,778 in attorney fees and costs and $167,186 in pre-judgment interest, and denied Lewis Jorge's motion for penalties and interest under Public Contract Code section 7107. All parties appealed.

DEFENDANTS' APPEAL

1. *Butler's liability*

Butler contends that the judgment against him must be reversed, because he owed no duty to Lewis Jorge to protect it from economic injury. Lewis Jorge argues that, under the authority of *Biakanja v. Irving* (1958) 49 Cal.2d 647 and its progeny, Butler is liable for his negligent performance of professional services which were intended to benefit Lewis Jorge. Butler's contention is well taken.

Under California law, "[t]he threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. . . . Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law." (*Adelman v. Associated International Insurance Co*. (2001) 90 Cal.App.4th 352, 360.) In *Biakanja v. Irving*, *supra*, 49 Cal.2d 647, our Supreme Court undertook to create a checklist of factors to consider in assessing the existence of a legal duty of one party to another in the absence of privity of contract between them. In *Biakanja*, the defendant notary public had prepared the will of the plaintiff's brother which left the entire estate to

the plaintiff. Due to the defendant's negligence, the will was improperly attested and could not be admitted to probate. As a result, the plaintiff received only her in testate share of the estate. The Court concluded that the defendant owed a duty of reasonable care to the plaintiff which he had clearly breached. In reaching this conclusion, the Court was careful not to declare an unlimited scope of liability in favor of any person who might have received a benefit under a contract but for its negligent performance. The Court emphasized that the "end and aim" of the will transaction was to benefit the plaintiff, and the injury to her from the defendant's negligence was clearly foreseeable. (*Id.* at p. 650.)

Biakanja has no direct application to the facts of this case. Here, Lewis Jorge asserts that Butler negligently performed the *prime construction contract* entered into by and between Lewis Jorge and the District. However, Butler was not a party to that contract, and had no contractual obligations to anyone by reason of that contract. Rather, the District promised to perform certain duties, as specified in the contract, by and through its "Construction Manager." While *Biakanja* disposes of the impediment of lack of privity of contract in certain third party beneficiary situations, it does not hold that one can be liable for negligent performance of a contract to which one is not a party.

In order to fit the *Biakanja* rubric, Lewis Jorge must seek to hold Butler liable for negligent performance of his employment contract with the District. Lewis Jorge has never framed its negligence allegations in this manner. Moreover, there is no authority for holding an employee liable to a third party for economic injury based on negligent performance of his job.

The District goes to great lengths to explain how *Ratcliff Architects v. Vanir Construction Management, Inc*. (2001) 88 Cal.App.4th 595 is dispositive of this issue, while Lewis Jorge goes to equal lengths to distinguish that case. Both parties are well off the mark. Aside from the fact that both *Ratcliff* and the instant case concerned the construction of a school project, the two cases have nothing in common. The issue in *Ratcliff* was the architect's rights under a contract between the school district and the

defendant construction manager. The Court of Appeal acknowledged that "Courts sometimes impose a duty to prevent pure economic loss when there is no privity of contract when the injured party is an intended beneficiary of a contract between the defendant and another party. (E.g., *J'Aire Corp. v. Gregory* [(1979)] 24 Cal.3d [799,] 804-805.)" (*Ratcliff Architects v. Vanir Construction Management, Inc., supra,* at p. 605.) Here, however, Lewis Jorge does not claim rights under a contract between the District and Butler. Rather, it claims rights vis-à-vis Butler under the contract between itself and the District. As noted above, there is neither authority nor any public policy rationale for extending tort liability to one who not only was not in privity of contract with the injured plaintiff, but was not a party to the contract under which the plaintiff seeks relief.

Accordingly, the judgment against Butler must be reversed.

2. *The District's contractual liability*

The Contract provided that the District could terminate the Contract if either the District or its architect determined that Lewis Jorge was not supplying sufficient labor to complete the Project.[1] The District argues that, "Under these provisions and in light of

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[1]We set forth the pertinent provisions of the Contract. Paragraph 17.1 of the General Conditions, entitled "INSUFFICIENT PERFORMANCE BY CONTRACTOR," provides as follows: "If, in the opinion of the District and/or the District's Architect, the Contractor at any time during the progress of the work refuses or neglects to supply a sufficiency of material and labor, . . . the District may, in its discretion and without prejudice to, or waiver of, any other remedy do any or all of the following: . . . (2) initiate default procedures; . . . ."

Paragraph 3.2 of the Contract's General Conditions states: "During the prosecution and execution of the work defined in the Work Scope . . . , should the District's representative or the District's Architect, in their opinion, consider that the Contractor's plant, quality or quantity thereof and also materials and labor in general could cause the likelihood that the work will not be constructed satisfactorily, or if progress be not maintained to the extent guaranteed in the general construction schedule and/or monthly progress schedule, then the District's Representative or the District's Architect may in written modification and order, command the Contractor so to alter and

the circumstances shown by the evidence, the District, as a matter of law, could not be liable for breach of contract based on its termination of plaintiff. . . . [¶] Because the District and the architect honestly believed that plaintiff's progress was inadequate and that plaintiff was not supplying sufficient labor, the District was contractually entitled to terminate plaintiff and cannot be liable for doing so." The District is mistaken.

In *California Real Estate*, Miller & Starr discuss the perils of terminating construction contracts. "The construction contract obligates the contractor to build the described improvements in accordance with the contract documents, drawings, and plans and specifications. When he has completed his performance, he is entitled to be paid the contract price according to the payment terms of the contract. Although buildings and other improvements often contain minor defects and imperfections, the owner receives the use and benefit of the structures. Since the owner can be compensated for the deficiencies, it would be unfair to deny the contractor collection of the contract price because he failed to follow the plans and specifications exactly. [¶] The contractor

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improve accordingly to increase and improve the plant, to employ additional or more skilled workmen, or otherwise to conform with the Contract as the District's Representative or the District's Architect may deem fit and the Contractor shall, within twenty-four (24) hours comply or take steps to comply with these requirements. In the event that the contractor fails to respond appropriately and sufficiently within the specified time, the Contractor shall be deemed in breach of Contract and the District shall take the remedy as deemed convenient."

Finally, paragraph 49.1 of the Contract's General Conditions, which specified default procedures, reads as follows: "DISTRICT'S RIGHT TO TERMINATE CONTRACT: If the Contractor refuses or fails to prosecute the work or any separable part thereof with such diligence as will insure that its completion within the time specified or any extension thereof, or fails to complete said work within such time, . . . then the District may, without prejudice to any other right or remedy, serve written notice upon him and his surety of its intention to terminate this contract, such notice to contain the reasons for such intention to terminate, and unless within ten (10) days after the service of such notice such condition shall cease or such violation shall cease and satisfactory arrangements for the correction thereof be made, this contract shall upon the expiration of said ten (10) days, cease and terminate."

satisfies his obligation if he builds the improvements substantially in accordance with the contract documents without any willful or material deviations or omissions. The contractor will have 'substantially performed' his contract obligations if the defects are minor or trivial and not material. The owner can be compensated in damages for the deviations, defects, and omissions if they were not done by the contractor willfully or fraudulently, and they do not materially affect the usefulness of the improvements for the intended purpose. . . . [¶] If the contractor's defaults are substantial and material, the owner has the election to rescind the contract, or to take possession of the project and complete the construction. However, whether the contractor is in default and, if in default, whether the default is material are questions of fact to be decided subsequently by the court. *If the owner is in error and his termination of the contract is not with just legal cause, he has breached his contract.*" (8 Miller & Starr, Cal. Real Estate (2d ed. 1990) § 24:59, footnotes omitted, emphasis added.)

Here, the jury determined that Lewis Jorge was not in breach: In a special verdict, the jury found that Lewis Jorge did not breach the Contract "by failing to complete the Vejar Elementary School project in the time allowed by contract" or "by failing to complete all contract work required by contract." Thus, the jury had no cause to decide whether Lewis Jorge's alleged breaches in failing to complete the project on schedule and/or in failing to satisfy the District's demands to supply additional labor to the job site were material. Even if the jury had determined that Lewis Jorge was in breach of contract, due to the substantial performance doctrine, a finding that the breach was trivial or insubstantial would have rendered the District's termination of the Contract under the cited contract provisions without just legal cause, and itself a breach of the Contract.

The District argues, without citation to legal authority, that the doctrine of substantial performance did not apply to the Contract because the parties agreed that the District could terminate the Contract under certain circumstances. The District misapprehends the doctrine. Presumably, there are always circumstances under which

parties to a construction contract may terminate the agreement. An owner's decision to terminate such a contract is usually precipitated by a perceived default on the part of the contractor, as was alleged here. The doctrine of substantial performance holds that, notwithstanding the contractor's technical breach of the terms of the contract, the owner's right to terminate is restricted if the contractor has substantially performed the contract, and the owner has received the benefit of its bargain. Witkin explains the doctrine thus: "'At common law, recovery under a contract for work done was dependent upon complete performance, although hardship might be avoided by permitting recovery in quantum meruit. The prevailing doctrine today, which finds its application chiefly in building contracts, is that substantial performance is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no willful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for." (1 Witkin, *Summary of Cal. Law*, *supra*, Contracts, § 762, p. 690; see also *Denver D. Darling, Inc. v. Controlled Environments Construction, Inc*. (2001) 89 Cal.App.4th 1221, 1238-1239, fn. 8.) Thus, in his closing arguments to the jury, Lewis Jorge's counsel's refrain of "the law trumps the contract" aptly described the interaction of the contract's termination provisions and the law of substantial performance.

Finally, we note that we do not disagree with the District's argument that parties to a construction contract may agree to insist on strict performance of the contract, and thereby forgo the doctrine of substantial performance. Indeed, this very issue was considered some years ago in a law review note, which concluded, "It should be possible to contract against substantial performance." (Notes and Recent Decisions, *California Law Review* (1949) vol. 37, p. 498 et seq.) The note cautioned, however, that "A properly drafted contract must leave no question of the agreement and intention of the parties. It should indicate that the parties knew the relevant points in the law relating to

the performance and breach of contracts and contemplated the risks of impossibility, inability and inadvertence but nevertheless contract for an exact performance." (*Id*. at pp. 504-505.) The note further suggested that, in order to unequivocally manifest the intention of the parties to dispense with the substantial performance doctrine, the following clause be included: "The legal doctrine that a contractor may recover for a substantial performance of a building contract is to have no application to this contract." Here, of course, nothing approaching the foregoing language appeared in the Contract.[2] In sum, we reject the District's contention that the jury's determination that the District breached the Contract must be reversed as a matter of law because the District's termination of Lewis Jorge was authorized by the Contract.

The District also contends that the jury's finding against it on Lewis Jorge's breach of contract claim was tainted by the trial court's error in allowing Lewis Jorge to try a negligence claim against Butler. However, as the District cites no authority in support of this argument, we consider the claim waived on appeal. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283.) We note as well that the District's appellate brief fails to direct our attention to the place in the record where the trial court erred with respect to this issue by, for example, overruling a timely objection or failing, at the District's request, to admonish the jury that certain evidence was admissible only against Butler. Consequently, there is no basis to reverse the judgment as urged by the District.

3. *Damages*

The jury awarded two categories of damages for the District's breach of contract. First, it awarded $362,671, representing the benefits Lewis Jorge would have received under the Contract had the District not terminated it. The District does not challenge this

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[2]We note as well that the Contract reflects the parties' agreement on the remedy to be utilized should Lewis Jorge fail to complete the Project on schedule. Paragraph 44.1 of the General Conditions of the Contract provides for liquidated damages in the event that the Project was not completed in the time specified in the Contract.

portion of the damage award. Lewis Jorge also argued that the District's termination of the contract caused Lewis Jorge's surety to revoke or reduce its bonding capacity, which disabled Lewis Jorge from obtaining other jobs unrelated to the Project. The jury fixed this category of damage at $3,148,197 in lost profits which Lewis Jorge would have earned had its bonding capacity not been impaired as a result of the District's breach of contract.

The District challenges the award of lost profits on three bases: (1) these were "special damages" of which the District had no notice at the time it entered the contract; (2) Lewis Jorge failed to prove that the District's breach *caused* the loss of bonding capacity and lost profits; and (3) the claimed lost profits were "necessarily speculative" and therefore not recoverable. We consider these contentions below.

a. *Lost profits were properly awarded as general damages*

At trial, the District argued to the jury that its termination of the Contract neither caused Lewis Jorge to lose its bonding capacity nor caused it to fail to be awarded bids, and that Lewis Jorge's loss of profits on other unrelated projects was not a foreseeable consequence of termination of the contract, all of which are matters for the trier of fact. It also maintained that, as a matter of law, the damages were too speculative to be recovered. On appeal, the District seeks to overturn the award of lost profit damages by claiming that they are "special damages," and that Lewis Jorge neither pleaded nor proved that the District knew or should have known about the special circumstances which caused Lewis Jorge to suffer these damages. However, a review of the record establishes that the District never presented this argument to the trial court nor to the jury. And we will not consider on appeal an argument not made below.[3]

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[3] In an earlier opinion in this matter filed on July 19, 2002, we declined to consider the District's special damages argument since it had not been raised below. The District filed a petition for rehearing, contending that the issue of waiver had not been briefed on appeal. We granted that petition to permit the District to present its argument concerning waiver of the special damages issue. We have fully considered the District's position,

In its Motion in Limine No. 6, the District asked the trial court to exclude all evidence "related to Lewis Jorge's prospective economic profits from future potential projects (loss profits), absent a showing of the requisite foundation that: (1) it was the District's termination of Lewis Jorge which in fact caused Lewis Jorge to be unable to successfully bid and obtain the award of future projects; and, (2) for each specific future project that Lewis Jorge was not able to successfully bid and win an award, Lewis Jorge would have earned a specific profit." The District argued that "In this case, Lewis Jorge's claims of lost profits are highly speculative and not grounded in fact and will confuse the jury and prejudice Defendants." The District did not contend that lost profits were not general damages but special damages to which special rules apply.

In counsels' in-chambers discussion of the jury instructions, Lewis Jorge anticipated that the District might argue to the jury that the loss of bonding capacity was a special circumstance of which it had no knowledge. Consequently, it requested that the jury be instructed in BAJI No. 10.92 regarding "special damages." The District, however, *objected* to this instruction, arguing: "I'm not sure what they referred to special damages. I mean I don't think they're seeking damages on this case. They're seeking consequential damages. Arising out of the breach and two consequential damages. I don't see any special damages being sought here either in the complaint or anywhere else."

Similarly, in its argument to the jury, the District reiterated its position that special damages were not a part of this case. At the end of his argument to the jury, and after discussing several of the jury instructions, the District's counsel, referring to BAJI No. 10.92, told the jury: "This one is really odd. Special damages. Mr. Ibrahim [Lewis Jorge's counsel] and I discuss the applicability of special damages in this case. That would probably only happen in your nightmares. Look at the instruction. [¶] 'The plaintiff is also seeking to recover special damages for the breach of contract. Special

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and again conclude that the argument is not properly before us on appeal, as it was not raised below.

damages are recoverable when special circumstances exist which cause some unusual injury to plaintiff.' [¶] Now what is special circumstances here? What unusual injury has occurred? If the loss of bonding capacity is unusual, if it's unusual – you see, Mr. Ibrahim isn't internally consistent. First he reads about the part about unusual injury and then he says the school district they should have known about it. But if they knew about it, how could it be unusual. That is because *this isn't meant to cover this situation*. This is meant to cover if I tell you, look I have a contract with us and I say, look, you deliver me 50 pounds of fish and I'll pay you for it. And by the way, if you don't deliver it to me, I'm going out of business."

Thus, rather than presenting to the jury the theory that Lewis Jorge's lost profits resulted from special circumstances which the contractor did not communicate to the District prior to entering the contract, the District actively sought to prevent the jury from being instructed in the concept of special damages, and argued simply that loss of bonding capacity and lost profits were not foreseeable consequences of its breach, and that the District's conduct did not cause Lewis Jorge's bonding problems.

Notwithstanding the fact that the District did not rely on this argument below, we conclude that the lost profit damages sought by Lewis Jorge were in the nature of general damages, and not special damages as claimed by the District on appeal.

Section 347 of the Restatement Second of Contracts (the "Restatement") explains the measure of damages for breach of contract as follows: "Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by (a) the loss in value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform."

The Restatement identifies four limitations to the foregoing measure of damages: avoidability (§ 350), unforeseeability (§ 351), uncertainty (§ 352), and emotional disturbance (§ 353). The District's "special damages" argument is concerned with the

second of these limitations, unforeseeability. Section 351 of the Restatement provides in pertinent part:

"(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

"(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

"(a) in the ordinary course of events, or

"(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know."

In Comment b to section 351, the Restatement discusses "general" and "special" damages: "Loss that results from a breach in the ordinary course of events is foreseeable as the probable result of the breach. See Uniform Commercial Code § 2-714(1). Such loss is sometimes said to be the 'natural' result of the breach, in the sense that its occurrence accords with the common experience of ordinary persons. . . . The damages recoverable for such loss that results in the ordinary course of events are sometimes called 'general' damages. [¶] If loss results other than in the ordinary course of events, there can be no recovery for it unless it was foreseeable by the party in breach because of special circumstances that he had reason to know when he made the contract. . . . The damages recoverable from loss that results other than in the ordinary course of events are sometimes called 'special' or 'consequential' damages. These terms are often misleading, however, and it is not necessary to distinguish between 'general' and 'special' or 'consequential' damages for the purpose of the rule stated in this Section."

The foregoing measure of damages has long been applied in California. "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code § 3300.) "Under general contract principles, when one party breaches a contract the other party ordinarily

is entitled to damages sufficient to make that party 'whole,' that is, enough to place the nonbreaching party in the same position as if the breach had not occurred. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 515; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 813; Rest.2d Contracts, ¶ 347.) This includes future profits the breach prevented the nonbreaching party from earning at least to the extent those future profits can be estimated with reasonable certainty. (See, e.g., *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907-908; *Coughlin v. Blair* (1953) 41 Cal.2d 587; Summary of Cal. Law, *supra*, Contracts, § 823.)" (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1708-1709.)

BAJI No. 10.90, entitled "General Damages/Breach of Contract," expresses the foregoing measure of damages as follows: "The measure of [general] damages for the breach of a contract is that amount which will compensate the injured party for all the [detriment] [or] [loss] caused by the breach, or which in the ordinary course of things, would be likely to result therefrom. The injured party should receive those damages naturally arising from the breach, or those damages which might have been reasonably contemplated or foreseen by both parties, at the time they made the contract, as the probable result of the breach. As nearly as possible, the injured party should receive the equivalent of the benefits of performance. [¶] Damages must be reasonable. Plaintiff cannot recover a greater amount as damages than [he] [or] [she] could have gained by the full performance of the contract." Those damages which "naturally arise from the breach" or are the "natural and probable consequence of the breach" are those which follow a breach "in the ordinary course of events."

Like the Restatement, California incorporates the holding of *Hadley v. Baxendale* (1854) 156 Eng. Rep. R. 145 which limits the damages recoverable for breach of contract based on their foreseeability: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as would fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of

contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated." (*Hadley v. Baxendale, supra,* 156 Eng.Rep. 145, 151.)

Cases which have disallowed recovery of special damages under the foregoing principle include *Mitchell v. Clark*. (1886) 71 Cal. 163 and *Automatic Poultry Feeder Co. v. Wedel* (1963) 213 Cal.App.2d 509. In the former case, the defendant breached a contract by failing to deliver $1,500 to plaintiff's creditor. Plaintiff was sued by his creditor and his good were sold at a sacrifice, to plaintiff's injury. While the $1,500 owed by defendant was recoverable as general damages, the special injury suffered by plaintiff by reason of the forced sale was not, since there was no evidence that defendant was aware of plaintiff's insolvency and the probability of suit. Similarly, in *Wedel*, plaintiff turkey farmer had an agreement with a third party to raise turkeys. He purchased a feeding machine from defendant manufacturer, the use of which caused the death of several thousand turkeys. Plaintiff sued for damages for breach of warranty, and also sought recovery of the bonus which the third party would have paid if the mortality of his flocks had been less than ten percent. Although the defendant was aware of the third-party contract, there was no showing that it had notice or knowledge of the bonus provisions of that agreement. Consequently, the bonus was not recoverable. (*Automatic Poultry Feeder Co. v. Wedel*, *supra*, 213 Cal.App.2d at p. 514.)

As can be seen from the foregoing examples, special damages are not recoverable absent notice because, unless the plaintiff communicates to the defendant at the time of contracting the special circumstances under which the plaintiff is operating, the defendant would have no reason to suspect that its breach of contract would result in this category

of damages. In the instant case, Lewis Jorge was not laboring under a special circumstance which, unbeknownst to the District, would cause the District's breach of contract to result in damages which do not normally flow from the breach of a construction contract. To the contrary, all public works contractors must provide various bonds to secure their performance in order to be awarded construction contracts. A contractor who cannot obtain such bonds will not be long in business. And of course, the District was well aware of this fact, since one of the District's requirements of the successful bidder was that the contractor be able to post a performance bond.

Moreover, impairment of bonding capacity has long been recognized as a direct consequence of an owner's breach of a construction contract. (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285; *S.C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529.) "[L]ost profit from impaired bonding capacity is recoverable in a proper case, and is not inherently speculative." (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464.) Other jurisdictions are in accord. For example, in *Laas v. Montana State Highway Commission* (1971) 483 P.2d 699, a jury awarded a contractor damages against the state for breach of a road construction contract, which damages included future lost profits which resulted from impairment to the plaintiff's bonding capacity as a consequence of the state's failure to timely pay amounts owing under the contract. "In essence, the plaintiff alleges he was so entangled over this particular contract, and went so far in debt as a result of the delays in this contract, that he lost his bonding capacity, and thereby lost profits in the years 1967, 1968 and 1969. He proved he had always been a successful contractor, had always made a profit on all of his jobs over some 22 years, and on that basis, he lost anticipated or future profits for the three years in question to the extent of $250,000. The jury agreed with him to the extent of $78,000." (*Id*. at p. 700.) The Supreme Court of Montana upheld the jury's verdict, finding that "[t]he loss of bonding capacity in an entanglement such as the instant case is clearly foreseeable, and in the ordinary course of things, would be likely to result therefrom. . . ." (*Id*. at p. 704.)

"It is a well-settled rule that the damages that can be recovered for any breach of contract are only such as may reasonably be supposed to have been in the contemplation of the parties at the time of entering into the agreement, as the probable result of a breach. Other damages are too remote. . . . This rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought, must be such as the parties may be reasonably supposed, in the light of all the facts known, or which should have been known to them, to have considered as likely to follow in the ordinary course of things, from a breach, and, therefore, to have in effect stipulated against. The understanding and intention of the parties in this regard must of course be ascertained from the language of the contract, in the light of such facts. (*Hunt Bros. Co. v. San Lorenzo Water Co.* [(1906)], 150 Cal. 51, 56.)" (*California Press Manufacturing Co. v. Stafford Packing Co.* (1923) 192 Cal. 479, 483-484.) Thus, the standard for the award of general damages within the contemplation of the parties is an objective one ("should have been known"), not whether, subjectively, the breaching party considered the consequence which ultimately occurred. (See, e.g., Comment a to Rest.2d Contracts, § 351 ["the party in breach need not have made a 'tacit agreement' to be liable for the loss. Nor must he have had the loss in mind when making the contract, for the test is an objective one based on what he had reason to foresee"].)

The District misapprehends the foregoing well-settled rule. It avers that it did not contemplate, and was not unreasonable in failing to contemplate, that Lewis Jorge would suffer millions of dollars in lost profits by reason of the District's termination of the Contract. However, the parties need not have contemplated "the consequence that occurred, but simply the consequence," that is, loss of bonding capacity, "for which compensation is sought." The jury found, and common sense supports the finding, that a builder of public construction projects, which must provide a bond with each and every bid it submits, will be injured if, as a consequence of an owner's wrongful termination of its contract, and wrongful resort to the contractor's bonding company to complete the

project, it can no longer secure performance and completion bonds. Even the District's project manager on the project, Mr. Butler, acknowledged that he knew that Lewis Jorge's bonding capacity could be impaired as a result of the District's termination of the contract.

Finally, we note that, after presiding over the trial of this matter, and in ruling on post-trial motions, the trial court expressed its view of the issue as follows: "On the issue of damages, I think it is foreseeable that if you are terminated from a public project, you're going to lose your bonding capacity. And that's what happened here. You lose your bonding capacity, you lose your ability to make money. You lose your ability to bid on job."

In sum, we conclude that substantial evidence supports the jury's conclusion that Lewis Jorge sustained over $3 million in lost profits as a result of the District's breach of contract.[4] Contrary to the District's characterization of Lewis Jorge's lost profits as "special damages," these sums are recoverable as general damages because they follow from the breach in the ordinary course of events and as the natural and probable consequence of the breach.

b. *Lost profits are not too speculative; adequate proof of damages*

Relying on *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, the District argues that lost profits flowing from the loss of bonding capacity are necessarily speculative, and therefore may not be recovered. The District's reliance is misplaced.

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[4] The standard of review of the sufficiency of the evidence is whether substantial evidence supports the judgment. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) On a challenge to the sufficiency of the evidence, the appellant's opening brief must set forth all the material evidence on point; the brief cannot merely state facts favorable to appellant. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The District's brief falls short of this requirement.

The Supreme Court in *Kajima/Ray* granted review "to determine whether the lowest responsible bidder who is wrongfully denied a public contract has a cause of action for monetary damages against the public entity, and if so, whether those damages include lost profits." (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority, supra,* 23 Cal.4th at p. 310.) The Court concluded that such a cause of action is viable, solely under the equitable doctrine of promissory estoppel, in order "to do rough justice when a party lacking contractual protection relied on another's promise to its detriment." (*Id.* at p. 315.) The Court employed the promissory estoppel doctrine "primarily to further certain public policies by creating a damages remedy for a public entity's statutory violation." (*Ibid*.) The Court limited the monetary damages recoverable under the promissory estoppel theory to bid preparation expenses, disallowing recovery of lost profits on the rejected bid. Among the reasons proffered for this result was the fact that, under the terms of the bid solicitation, the public entity was entitled to reject all bids. Thus, while the MTA represented that, if the contract were awarded, it would go to the lowest responsible bidder, it did not represent that the lowest responsible bidder would be awarded the contract.

Lewis Jorge was not wrongfully denied a public contract. Rather, it was awarded a contract as the lowest responsible bidder. Unlike the plaintiff in *Kajima/Ray*, Lewis Jorge had no need to rely on the equitable doctrine of promissory estoppel to recover damages; the construction contract itself was the source of that remedy. Thus *Kajima/Ray* offers no assistance to our analysis of this case.

Neither does *S.C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, which the District cites in support of its argument. In *S.C. Anderson*, the plaintiff contractor was engaged to construct tenant improvements on two buildings, while the defendant bank was the lender on the project. The plaintiff claimed that, due to the defendant's fraud, it was not timely paid for its work on the project, resulting in a diminishment of its working capital. This in turn led to a reduction in its bonding capacity, from an aggregate exposure or $10,000,000 to an aggregate limit of $5,000,000.

The plaintiff bid on a public construction project for which it was the low bidder. All bids were rejected, and the project was then rebid. The plaintiff prepared its rebid in the amount of $2,980,000, including a 5 percent profit margin of $140,588. However, the surety refused to provide a bid bond because the project would cause the plaintiff to exceed its then existing $5,000,000 aggregate bonding capacity. Consequently, the plaintiff did not submit its bid on, and was not awarded, the construction contract. The successful low bid was $3,027,036.

"Based on these facts, [the plaintiff] contended that, but for its inability to obtain a bid bond, it would have been the successful low bidder for the . . . project and would have realized a profit of $140,588 had it completed the work." (*S.C. Anderson, Inc. v. Bank of America*, *supra*, 24 Cal.App.4th at p. 534.) The court acknowledged that the Supreme Court in *Warner* "has recognized this ground of recovery in construction cases." (*Ibid*.)

The defendant bank moved for nonsuit on the ground that the plaintiff failed to present facts sufficient to support an award of lost profits. "Specifically, the Bank argued that because [plaintiff] had not presented evidence of its past profitability, it failed to establish it would have earned the 5 percent profit margin projected in the rebid." (*S.C. Anderson, Inc. v. Bank of America*, *supra*, 24 Cal.App.4th at p. 534.)

The appellate court stated the rule for proof of lost profits thus: "Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.) It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. (*Kerner v. Hughes Tool Co.* (1976) 56 Cal.App.3d 924, 937; accord, *Maggio, Inc. v. United Farm Workers* (1991) 227 Cal.App.3d 847, 869-876.) The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits. (*Warner Constr. Corp. v. City of Los*

Angeles [(1970)] 2 Cal.3d [285] at p. 302; *Stott v. Johnston* (1951) 36 Cal.2d 864, 876.)" (*S.C. Anderson, Inc. v. Bank of America*, *supra*, 24 Cal.App.4th at p. 535.)

The appellate court ruled, however, that there was "no evidence which would have enabled the jury to conclude it was reasonably probable the company would in fact have earned a profit of $140,588 had it been awarded the . . . project. (See *Warner Constr. Corp. v. City of Los Angeles*, *supra*, 2 Cal.3d at p. 301.)" (*S.C.Anderson, Inc. v. Bank of America*, *supra*, 24 Cal.App.4th at pp. 535-536.) The plaintiff failed to produce evidence "relating to the accuracy of its bid, its ability to competently and efficiently perform the . . . project, or its likely net profit." (*Id*. at p. 537.) Rather, its proof of lost profits consisted of evidence that it "generally used a 5 to 8 percent profit and overhead figure in its bids." (*Id.* at p. 534.) The appellate court ruled that this proof was not sufficient. It did not rule, as the District would have us believe, that lost profits from a loss of bonding capacity are inherently speculative and thus not recoverable. To the contrary, *S.C. Anderson v. Bank of America* has been cited for the proposition that "lost profit from impaired bonding capacity is recoverable in a proper case, and is not inherently speculative." (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co*. (1996) 47 Cal.App.4th 464, 489.)

The black letter law on lost profits is easily understood: "Where the defendant's breach of contract prevents the plaintiff from carrying on some particular business in which profits might have been made, these profits are not necessarily too uncertain of realization for recovery as damages, even though they are dependent on the uncertain conduct of customers and competitors. If the business is one that has already been established, a reasonable prediction can often be made as to its future on the basis of its past history. Evidence as to its past expenditures and receipts and of the conditions under which the business was carried on is frequently held to afford a sufficiently certain basis for a verdict awarding damages for profits prevented." (5 Corbin on Contracts, § 1023.)

The fact that an established construction company may recover an award for lost profits resulting from reduced bonding capacity has been recognized in California for

over 30 years. (*Warner Constr. Corp. v. City of Los Angeles, supra,* 2 Cal.3d 285.) There is no question that such an award is permissible: "For an established firm . . . , an award for lost profits could not be criticized as speculative." (*Id*. at p. 301, citation omitted.) The only question arising in the case law concerns the adequacy of proof. "As to the reasonableness of the assumptions underlying the experts' lost profit analysis, criticisms of an expert's method of calculation is a matter for the jury's consideration in weighing that evidence. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp*. (1990) 226 Cal.App.3d 442, 460.) 'It is for the trier of fact to accept or reject this evidence, and this evidence not being inherently improbable provides a substantial basis for the trial court's award of lost profits . . . .' (*Id*. at pp. 469-470.)" (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co*., *supra*, 47 Cal.App.4th 464, 489-490.)

Here, Lewis Jorge presented the expert testimony of Robert Knudsen, a partner with PricewaterhouseCoopers, to establish its lost profit damages. Mr. Knudsen was qualified as an expert without objection. His expert qualifications included the following: he was awarded a master's degree in business administration with an emphasis in accounting by the University of California at Berkeley; he was a certified public accountant licensed by the State of California; he had for the prior 12 years worked in the Financial Services Practice at PricewaterhouseCoopers, where he conducted various financial analyses for businesses, including the calculation of lost profits for approximately 100 business clients, including construction companies. Mr. Knudsen had previously been qualified as an expert in damages in court proceedings.

Mr. Knudsen testified that in the four years preceding its termination, Lewis Jorge was a growing company, the working backlog of which increased from under $5 million in June of 1992 to $20 million in June of 1996. This growth occurred while the growth of the construction market in Southern California overall remained "flat." After the June 1996 termination, growth in the Southern California commercial construction market "took off." Although Knudsen could have relied on Lewis Jorge's historical growth to assume continued backlog growth, Knudsen chose to be conservative and assumed that

Lewis Jorge would have maintained its $20 million backlog for a period of no growth. Mr. Knudsen concluded that, had Lewis Jorge's bonding capacity continued uninterrupted between June 1996 and March 2000, it would have earned profits of $4.5 million during that period, which sum, discounted to present value, amounted to lost profit damages of $3,148,107.

In late 1995, when CNA's surety manager reviewed Lewis Jorge's financial records, he determined that the contractor had completed all jobs on time, that there had been no claims filed against any bonds, and that its credit record did not present any problems or issues. Additionally, Lewis Jorge's bonding agent testified that the contractor was very successful in completing projects and building up its working capital and net worth, which resulted in a doubling of its bonding capacity.

The District did not present expert testimony contradicting the conclusions of Lewis Jorge's expert. The jury awarded Lewis Jorge lost profits in nearly the precise amount calculated by Mr. Knudsen.

In sum, as the court in *Laas v. Montana State Highway Commission*, *supra*, explained: "There is no question but that the plaintiff was damaged by reason of the breach of the contract by the State. The evidence reflected the plaintiff had been averaging an annual gross volume of business in excess of $300,000 for the four year period immediately prior to the completion of the contract. The jury awarded less than 10 per cent per year for profit for the three year period following the completion of the contract. In the face of no rebutting evidence, we find nothing unreasonable in either the amount nor the way in which the amount was determined, under the facts of this case." (483 P.2d 699, 705.) Here, too, it cannot be doubted that Lewis Jorge was injured by reason of the District's breach. Lewis Jorge presented evidence that it had been in business for over ten years, that the business had consistently grown over that period of time, had generated a certain amount of revenue over the four years previous to the loss of its bonding capacity, and had consistently enjoyed net profits of a given percentage of revenue, such evidence is sufficient to support an award of lost profits. Like the *Laas*

court, we can find nothing unreasonable in either the amount of lost profits nor the method by which they were arrived at. Indeed, Lewis Jorge presented the "best evidence" of damages for lost profits, as explicated by the Supreme Court in *Warner Const. Corp. v. City of Los Angeles*, *supra*, 2 Cal.3d at p. 302.

4. *Attorney fee award*

The trial court, relying on Civil Code section 1717, awarded Lewis Jorge $696,778 in attorney fees. The District maintains that this was error, since the contract did not contain an attorney fee provision.

Lewis Jorge based its right to attorney fees on two contract provisions. First, Lewis Jorge cites paragraph 85.2 of the Contract, which provides: "If a CONTRACTOR failed to furnish to the DISTRICT within ten (10) calendar days after demand by the DISTRICT, satisfactory evidence that a lien or stop notice has been so released, discharged, or secured, then DISTRICT may discharge such indebtedness and deduct the amount required therefore, together with any and all losses, costs, damages, and attorney's fees and expenses incurred or suffered by DISTRICT from any sum payable to CONTRACTOR under CONTRACT." Lewis Jorge maintains that, under the reciprocity provisions of Civil Code section 1717, the foregoing unilateral attorney fee provision was rendered mutual, entitling Lewis Jorge to recover its attorney fees. Lewis Jorge also cites the performance bond between Lewis Jorge and CNA, which was incorporated by reference into the construction contract and provided for attorney fees to the prevailing party in any lawsuit on the bond, as the source of its right to attorney fees. Neither of the cited attorney fee provisions authorizes the fee award in this case.

Section 1717 provides in part as follows: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees

in addition to other costs. [¶] Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." (Civ. Code, § 1717, subd. (a).)

Neither paragraph 85.2 of the Contract nor the performance bond provides for recovery of attorney fees incurred to enforce the Contract between the parties. Consequently, section 1717 simply does not come into play. "The California Supreme Court has determined that one may only recover attorney's fees pursuant to section 1717 if one 'would have been liable' for such fees had the opposing party prevailed. (*Reynolds Metals Co. v. Alderson* [(1979)] 25 Cal.3d [124,] 129.) Judging by this language, *Reynolds* and section 1717 require that the party claiming a right to receive fees establish that the opposing party actually would have been entitled to receive them if he or she had been the prevailing party." (*Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295, 1306-1307.)

Here, under no theory would the District have been entitled to an award of attorney fees had it prevailed at trial. Consequently, the trial court erred in awarding Lewis Jorge such fees pursuant to Civil Code section 1717.

5. *Prejudgment interest*

Finally, the District challenges the trial court's award of prejudgment interest on $1,017,678.

The jury found that, "[w]without applying any credit for payments by the District after termination, . . . the contract balance . . . , including all change orders and extra work to which Lewis Jorge was entitled . . . at termination" was $1,017,678. Of that amount, the District later paid a total of $655,007 to the surety CNA to finish the project. The difference between the amount due Lewis Jorge at termination and the District's post-termination payments to CNA was $362,671, which amount the jury awarded to

Lewis Jorge as contract damages to compensate it for "the benefits that Lewis Jorge would have received from the contract if the District had not terminated Lewis Jorge."

In a post-trial motion, Lewis Jorge argued that it was entitled to prejudgment interest not only on the $362,671 that the jury awarded but also on the $655,007 that the District paid to CNA, which the jury did not award to Lewis Jorge. The trial court agreed and awarded $167,186 in prejudgment interest, the full amount requested by plaintiff.

The District acknowledges that the trial court had discretion pursuant to Civil Code section 3287 to award prejudgment interest on the amount of the judgment. Subdivision (b) of that section provides as follows: "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." (Civ. Code, § 3287, sub. (b).) Clearly, this section authorizes an award of prejudgment interest on the contract damages reflected in a judgment. It does not, however, permit the award of prejudgment interest on sums which are not ultimately reduced to a judgment. Thus, while Lewis Jorge may have sought, as an item of damages, a jury award for interest on the sums which the District failed to pay when due (see, e.g., Civ. Code, § 3288), there is no authority for the award of prejudgment interest on any amount in excess of the judgment for contract damages, or $362,671. Accordingly, the order awarding prejudgment interest is reversed, and the matter remanded to the trial court for an award of pre-judgment interest based on the amount of the judgment alone.

LEWIS JORGE'S APPEAL

1. *Public Contract Code section 7107*

Public Contract Code section 7107 states in pertinent part: "(c) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the

original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. . . . (f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due."

Lewis Jorge contends that the trial court erred in failing to include in the judgment "an award of a 2% monthly charge on any wrongfully withheld amounts in lieu of interest otherwise due." The District maintains that the amount in dispute was in excess of 150 percent of the retentions, and that Lewis Jorge was therefore not entitled to a two percent monthly charge in lieu of interest. Lewis Jorge counters that there was no "good faith" dispute, and the District should not escape charges in lieu of interest by "concocting a dispute where none existed." Lewis Jorge further contends that "there was no disputed amount," and that the District was thus not entitled to withhold any amounts from Lewis Jorge.

The trial court concluded, not surprisingly, that there was an actual, good faith dispute between the parties. The court also impliedly determined that the amount in dispute was in excess of 150 percent of the sums withheld from Lewis Jorge. Those findings are supported by substantial evidence.

In its respondent's brief, the District describes the amount in dispute as follows: cost of work completed by the replacement contractor, $258,240; cost of work remaining unfinished by the replacement contractor, $50,424; estimated cost of corrective electrical work, $318,325; cost of west line retaining wall and grading, $123,000, for a total amount in dispute of $749,989. Lewis Jorge responds to this argument as follows: "On appeal, and for the first time ever, the District asserts that the amount of work in dispute was approximately $750,000. The District never argued that the amount in dispute was $750,000 whether at trial, pre trial or post trial proceedings." However, whether or not the District made this argument below, each of the cost elements of the District's

calculation of the amount in dispute was introduced in evidence, and thus provides substantial evidence for the trial court's finding that the amount in dispute exceeded 150 percent of the retentions.

In short, after presiding over a seven-week trial, and after the rendition of a multi-million-dollar judgment for Lewis Jorge which fully compensated it for the damages its suffered as a result of the District's breach of contract, the trial court determined that a two percent charge in lieu of interest pursuant to Public Code section 7107 was not justified. We can find no fault with that ruling.

2. *Pass-Through Claims*

Lewis Jorge next complains that the trial court disallowed the presentation of evidence of its subcontractors' pass-through claims against the District, arguing "Pass-through claims are recognized by many states and have recently been discussed approvingly in the case of *Howard Contracting Inc. v. G.A. MacDonald Construction Co., Inc*. (1998) 71 Cal.App.4th 38." The District maintains that Lewis Jorge's complaint did not assert such claims, and that due process therefore demands that the claims not be allowed. It also argues that Lewis Jorge lacks standing to appeal the trial court's ruling, since any recovery based on the pass-through claim would go to Lewis Jorge's subcontractors. Because we agree that Lewis Jorge lacks standing, we do not consider the District's due process argument.

Howard Contracting summarized the status of pass-through claims, as follows: "As a matter of law, a general contractor can present a subcontractor's claim on a pass-through basis. (*Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670.) When a public agency breaches a construction contract with a contractor, damage often ensues to a subcontractor. In such a situation, the subcontractor may not have legal standing to assert a claim directly against the public agency due to a lack of privity of contract, but may assert a claim against the general contractor. In such a case, a general contractor is permitted to present a pass-through claim on behalf of the subcontractor

against the public agency. (*D. A. Parrish & Sons v. County Sanitation Dist*. [(1959)] 174 Cal.App.2d 406.) As a subcontractor, [the appellant] had no standing to sue the City directly, particularly on a breach of contract theory, because [the subcontractor] and the City were not in privity of contract. [¶] The settlement and litigation agreement was predicated on the availability of the pass-through claim process. If the process is not available to the parties, [the general contractor] has potential exposure to [the subcontractor] through an action for rescission of the agreement based on a failure of consideration. From a public policy standpoint, the initiation of separate litigation against a general contractor should not be compelled merely to enable a subcontractor to obtain standing when the general contractor previously agreed to pursue the subcontractor's damages claim against the public agency on a pass-through basis. To hold otherwise would be to insist on needless additional and duplicative litigation." (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co*., *supra*, 71 Cal.App.4th at p. 60.)

While *Howard Contracting* provides authority for the prosecution of pass-through claims by a general contractor on behalf of a subcontractor, the parties in that case also recognized the rules regarding standing on appeal. Code of Civil Procedure section 902 provides: "Any party aggrieved may appeal in the cases prescribed by this title." A party is legally aggrieved for purposes of appeal if its "rights or interests are injuriously affected by the judgment." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) In *Howard Contracting*, the general contractor did not appeal the trial court's decision disallowing the pass-through claim; rather, the aggrieved subcontractor appealed that ruling. Division Seven of this District Court of Appeal concluded that the subcontractor, although not initially a party to the action, became a party of record by moving to vacate the judgment under Code of Civil Procedure section 663.[5] Thus, as an aggrieved party, the contractor had standing to appeal the trial court's ruling.

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[5]The court continued: "Further, any entity that has an interest in the subject matter of a judgment and whose interest is adversely affected by the judgment is an aggrieved

Here, however, none of the subcontractors whose claims Lewis Jorge wished to prosecute made any appearance in the action below, or filed a notice of appeal. Lewis Jorge acknowledged at trial that "if we recover for [the subcontractor], Lewis Jorge wouldn't get a dime of it." It further represented that the liquidation agreements which formed the basis of Lewis Jorge's right to pursue the pass-through claims (but which were not introduced in evidence) provided that Lewis Jorge would not be liable to the signatory subcontractors regardless of whether any sums where recovered on their behalf. Clearly, the resolution of this issue results in no pecuniary or other benefit to Lewis Jorge.[6] Consequently, Lewis Jorge has no appellate standing to pursue the matter on the subcontractors' behalf.

3. *CNA payments*

Finally, Lewis Jorge argues, "At trial, the court below allowed Lewis Jorge to put on evidence of costs incurred by CNA as a result of the District's breach of the prime contract. Although CNA's Mark Torp testified to the costs it incurred in completing the punch list, the court refused to allow Lewis Jorge to put on evidence of certain payments

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party and is entitled to be heard on appeal. However, the aggrieved party's interest must be immediate, pecuniary and substantial, and not merely a nominal or remote consequence of the judgment. (*Slaughter v. Edwards* (1970) 11 Cal.App.3d 285, 291.)" (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.*, *supra*, 71 Cal.App.4th at p. 58.)

[6] In its reply brief, Lewis Jorge challenges this conclusion, stating "Lewis Jorge is an aggrieved party since, under the liquidation agreement with [the subcontractor], it was required to present [the subcontractor's] claim, and in fact, although Lewis Jorge would not receive any of [the subcontractor's] monies, it would be entitled to charge the District overhead and profit under the prime contract change order provision, should [the subcontractor] recover any damages against the District." As noted above, the liquidation agreement was not admitted into evidence, and thus Lewis Jorge may not rely on its contents in prosecuting this appeal. Additionally, its claim to entitlement of "overhead and profit" damages based on the subcontractors' claims should appear in its complaint for damages, not in its reply brief on appeal.

CNA made on behalf of Lewis Jorge to the various subcontractors, and for which CNA sought reimbursement from Lewis Jorge pursuant to its General Indemnity Agreement. It appears the court below believed that such evidence would require a mini trial to determine the reason(s) such payments were made, or was concerned about a possible double recovery."

The District maintains that this argument has been waived, for three reasons. First, characterizing the argument as "virtually impenetrable," the District cites the principle that an appellate court may treat an issue as abandoned "if the opening brief fails to articulate any pertinent or intelligent legal argument." Second, the District maintains that Lewis Jorge's failure to make an offer of proof explaining what the excluded evidence would show precludes a finding of prejudicial error. And lastly, the District faults Lewis Jorge for failing to provide citations to the record of "any evidentiary support for plaintiff's characterization of CNA's payments," which Lewis Jorge had described as "payments [] made by CNA to various subcontractors to compensate them for extra work performed, claims for delays in payment under PCC § 7107, or other legitimate claims they might have had."

The subcontractors settled out of this lawsuit prior to trial. Some apparently settled for less than the contract price, and some for more. During a discussion of the introduction of the evidence concerning CNA's payments to subcontractors, the trial court indicated its concern that "it would be necessary to have a sort of mini-trial on each one of these events or each one of these claims." Ultimately, the court excluded the evidence, presumably pursuant to Evidence Code section 352.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of

justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124, internal citations omitted.)

Here, Lewis Jorge has failed to establish an abuse of discretion. In the absence of evidence of the total amount of damages which Lewis Jorge claims that it was entitled to recover on account of CNA's overpayments to subcontractors, we have no means of assessing whether the exclusion of evidence of which Lewis Jorge complains resulted in a manifest miscarriage of justice. Consequently, we are without authority to reverse the judgment based on this assignment of error.

DISPOSITION

The judgment against Christopher Butler is reversed; the award of prejudgment interest is reversed; and the award of attorney fees is reversed. In all other respects, the judgment is affirmed. The matter is remanded to the trial court for an award of prejudgment interest consistent with this opinion. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P.J.

MOSK, J.