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COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

DON L. BECK ASSOCIATES, INC.,
***Plaintiff, Cross-Defendant, Appellant and Cross-Respondent*,**
v.
SILICON VALLEY LAW GROUP,
Defendant, Cross-Complainant, Respondent and Cross-Appellant

SILICON VALLEY LAW GROUP,
***Plaintiff, Respondent and Cross-Appellant*,**
v.
DON L. BECK,
Defendant, Appellant and Cross-Respondent

Consolidated Appeals from the Superior Court of the State of California
in and for the City and County of San Francisco
Case Nos. CGC-06-452689 and CGC-06-452690
Hon. Richard L. Patsey (Ret.), Judge Pro Tem

APPELLANT AND CROSS-RESPONDENT DON L. BECK ASSOCIATES, INC.'S REPLY BRIEF

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INTRODUCTION

The Opening Brief highlighted two grievous and prejudicial errors: the trial court's ruling that Beck Inc. suffered no "actual injury" within the statute of limitations, and its determination that Beck Inc. failed to prove causation. The Respondent's Brief does nothing to dispel these errors, not least because it is riddled with mistaken or unsupported statements of law and fact and with diversions from the crucial issues.

Moreover SVLG has made a dispositive concession on the statute of limitations.

The Respondent's Brief's statute-of-limitations argument turns on the standard of review. It contends that whether a plaintiff suffered "actual injury" (Code Civ. Proc., § 340.6) is a purely factual question, the determination of which must be upheld on appeal if supported by substantial evidence. That is not the law. Where, as here, the historical facts are undisputed, determination of "actual injury" is a legal question subject to independent review. On this record, that review can only result in holding that "actual injury" was suffered well before the statute of limitations expired—*and SVLG has so admitted.*

SVLG concedes that the payment of $854,100 to settle the underlying litigation in 2002 (two years before the limitations cut-off) constituted "actual injury"—but asserts that Beck Inc. was not the injured party because a related entity provided it with the settlement funds. Neither the record nor the law supports this theory: It is undisputed that Beck Inc. incurred the payment obligation and that Beck Inc. made the payment. That is only the most clear-cut reason to reverse the erroneous statute-of-limitations ruling. As this brief demonstrates, there are many more.

On the causation issue, too, the court committed multiple errors. Most fundamentally, it failed to *conduct* the requisite trial-within-a-trial, but instead just speculated that Beck Inc. would have had a hard time winning. That is not sufficient. The Respondent's Brief essentially ignores this problem.

Equally flawed is the court's causation ruling, to the effect that legal malpractice victims who settle with their former attorneys rather than appeal the underlying judgment are automatically out of court unless they prove the futility of an appeal. Our Supreme Court has squarely rejected such a requirement, holding in *Laird v. Blacker* (1992) 2 Cal.4th 606, 615, that where "the former client loses the underlying action because of the attorney's malpractice," even "success on appeal does not negate an action for legal malpractice." We acknowledge we are citing *Laird* for the first time, on an issue that the parties previously believed was one of first impression in California. We explain below why the Court should exercise its discretion to consider the argument after allowing SVLG time to brief it. (See § III.B.1., *post,* fn. 9.)

But even if *Laird* did not require reversal, public policy would. SVLG completely ignores the Opening Brief's policy arguments, never even commenting on the reasonable-settlement approach urged there. It attempts to support the trial court's causation ruling with both California and out-of-state authorities, but those very authorities make clear that neither judicial error nor settlement automatically bars a malpractice claim.

Additionally, even if liability depended on analysis of the abandoned appeal, Beck Inc. carried any burden it might have had to demonstrate Hoge Fenton's malpractice and to show that an appeal would have been futile. Contrary to SVLG's contentions, Judge Huber did not erroneously fail to

make findings or abuse his discretion in any way, but even if he had, it would have been impossible to make the indispensable showing of prejudice. SVLG's position that a showing of prejudice is unnecessary was rejected years ago in *Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548—a case SVLG ignores. Finally, the record and the law are clear that neither Civil Code section 1501 (waiver) nor section 1442 (forfeiture) would have provided any basis for reversal had Beck Inc. pursued an appeal in the underlying action.

Since neither the statute of limitations nor the failure to pursue an appeal constitutes an absolute bar to Beck Inc.'s malpractice action, the judgment should be reversed in its entirety, and the case remanded for a trial on the merits.

I. STANDARD OF REVIEW

A. Statute of Limitations: Whether Undisputed Facts Constitute "Actual Injury" Within The Meaning Of Code Of Civil Procedure Section 340.6 Is A Question Of Law For The Court.

The Opening Brief cites the settled rule that when the decisive facts triggering of the statute of limitations are undisputed, the question is one of law. (AOB 21.) Ignoring the rule, and not mentioning a single disputed fact, SVLG contends that the determination of when actual injury occurred under Code of Civil Procedure section 340.6 (section 340.6) is always "a question of fact," citing *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739 (*Jordache*) and *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946 (*Radovich*). (RB 23.) Neither case so holds, nor could they have—both were decided as matters of law, on summary

judgment. Indeed, the *Jordache* court began its analysis with the observation that "[t]his case presents a relatively narrow *legal* question." (18 Cal.4th at p. 747, emphasis added.) And *Radovich* determined, on the basis of undisputed facts, that "such actual injury does so appear" outside the limitations period. (35 Cal.App.4th at pp. 970, 979.)

SVLG further contends that the trial court's findings are "accorded deference," and that "[t]herefore, the deferential 'substantial evidence' standard should apply" to the finding that Beck Inc. first suffered actual injury after the limitations period expired. (RB 23-24.) But SVLG cites no authority—and we have found none—that would support application of the substantial evidence standard to the ultimate determination of actual injury under section 340.6.

SVLG's reliance on *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791 (cited at RB 24) is likewise misplaced. That case—which did not involve section 340.6 or any statute of limitations issue—*rejected* application of the substantial evidence standard. Independently reviewing the trial court's finding of usury, the Supreme Court explained that it was not bound by the substantial evidence standard because the historical facts were undisputed and because that standard is not "as broad as may have previously been suggested." (*Id.* at p. 799.) The Court concluded that "the question of whether a transaction is subject to the usury law is [not] necessarily and in all respects a question of fact"—even though a previous decision of the Court had so characterized it—and the "trial court's finding of usury is not the last word." (*Ibid.*) In sum, "Once the historical facts of the transaction are determined, the question of whether *that type of transaction* is subject to the usury proscription is a question of law." (*Id.* at p. 800.)

So it is here: Once the extent and timing of the plaintiff's claimed damages are determined, the question whether those damages meet the statutory test of "actual injury" is a question of law. (*Adams v. Paul* (1995) 11 Cal.4th 583, 593 ["If the parties agree on the sequence of events and any other material matters, the court may then determine on summary judgment the point at which the fact of damage became palpable and definite even if the amount remained uncertain. . . ."]; *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457, 1473 [reversing sustaining of demurrer; "Whether plaintiffs have in fact sustained the damages which they claim, and when, are matters which they will have to prove," but such damages, "if proven, would constitute an actual injury for purposes of the accrual of their claim for attorney malpractice"].)

Not surprisingly, as the above authorities suggest, the vast majority of cases holding that actual injury under section 340.6 did or did not occur within the limitations period involved summary judgments or other motions presenting pure questions of law—including all of SVLG's authorities on this and related issues. (*Fritz v. Ehrmann* (2006) 136 Cal.App.4th 1374, 1377 (*Fritz*) [reversing defense summary judgment and holding on undisputed facts actual injury suffered when note became due]; *Baltins v. James* (1995) 36 Cal.App.4th 1193, 1196 (*Baltins*) [reversing judgment after demurrer sustained, and holding on undisputed facts actual injury occurs when underlying determination made]; *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1497 (*Shopoff*) [affirming judgment after demurrer sustained].)[1]

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[1] See also *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 221-222 (*Foxborough*) (affirming summary judgment for defendant); *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1173-1175 (*Hensley*) (affirming
(continued...)

Here, the trial court ruled that Beck Inc. did not sustain actual injury until Judge Huber's tentative decision in October 2005. (37 AA 8859, citing *Jordache*, *Baltins*, and *Fritz*.) That was a *legal* determination, not a factual one. When a trial court interprets statutes or judicial precedent, it "exercises independent judgment on pure questions of law," and its determination is subject to independent review. (*McAllister v. California Coastal Com'n* (2008) 169 Cal.App.4th 912, 921-922.)

In sum, there is no support whatever for SVLG's contention that the trial court's determination of when Beck Inc. first sustained actual injury should be accorded deference and reviewed under the substantial evidence rubric. This Court reviews the matter independently, according to the de novo standard of review.

B. Causation.

The parties agree (1) that as to the issues raised in section II.B. of the Opening Brief, concerning the legal standards to apply in evaluating the impact of Beck Inc.'s settlement with Hoge Fenton, the de novo standard of review applies and (2) that as to the issues raised in section II.C., concerning whether Beck Inc. carried any burden it may have had to prove causation, the substantial evidence standard applies to any disputed factual questions and the de novo standard applies to legal questions. (AOB 21-22; RB 24.) The parties disagree on the correct standard as to section II.A., concerning whether the trial court erred in failing to decide the trial-within-

[1] (...continued)
summary judgment for defendant); *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 40-42 (*Village Nurseries*) (reversing denial of defendant's summary judgment motion; holding on undisputed facts actual injury sustained when Trustee questioned liens).

a-trial represented by *Wheeler*. (AOB 21 [de novo]; RB 24 [substantial evidence].)

The standard is clearly de novo. The only issue raised is whether the trial court, in employing the trial-within-a-trial method for proof of causation set out in *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820 (*Mattco Forge*), was required to actually decide the issue that should have been tried or whether it could simply state a trial would have presented "a serious factual question." (AOB 37-39.)

SVLG ignores *Mattco Forge* and cites no authority other than a case stating the truism that questions of fact are reviewed for substantial evidence and questions of law are reviewed independently. (RB 24.) SVLG nowhere explains how issues concerning a trial court's obligations under *Mattco Forge* can be factual.[2]

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[2] Finally, the Respondent's Brief correctly notes that Beck Inc. fails to challenge the ruling that SVLG is not liable for Beck Inc.'s increased attorney fees based on a delayed filing of the complaint against Hoge Fenton. (RB 25.) But Beck Inc.'s decision not to pursue that particular claim (which relates to its Third Cause of Action for Tort of Another) in no way prevents it from challenging the ruling on its First Cause of Action for Legal Malpractice. Contrary to SVLG's conclusion, the two rulings present different issues, and Beck Inc.'s failure to challenge one does not affect its right to challenge the other.

II. BECK INC. SUFFERED ITS FIRST ACTUAL INJURY FROM HOGE FENTON'S MALPRACTICE NO LATER THAN 2002.

A. The Loss Or Diminution Of A Right Or Remedy, As Well As Monetary Loss, Constitute "Actual Injury" Under Section 340.6.

SVLG's mistaken view that the determination of "actual injury" is a question of fact reviewed for substantial evidence leads SVLG to twist the meaning of *Jordache* and to completely ignore other authorities. These establish as a matter of law that actual injury within the meaning of section 340.6 occurs when a right or remedy is either impaired or totally lost. (See *Jordache, supra*, 18 Cal.4th at p. 744 ["The loss or diminution of a right or remedy constitutes injury or damage," citing *Adams v. Paul, supra*, 11 Cal.4th at p. 590], 750 ["actual injury may consist of impairment or diminution, as well as the total loss or extinction, of a right or remedy"]; *Village Nurseries*, *supra*, 101 Cal.App.4th at pp. 40-41 [same]; *Foxborough, supra*, 26 Cal.App.4th at p. 227 ["when malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred," quoted with approval in *Jordache, supra*, 18 Cal.4th at p. 750]; *United States v. Gutterman* (9th Cir. 1983) 701 F.2d 104, 106 [actual damage is sustained when "enforceable obligation has come into existence," cited with approval in *Adams v. Paul, supra*, 11 Cal.4th at p. 590].)

Instead of acknowledging this unassailable point of law, SVLG zeroes in on one word in *Jordache*—"may"—lifted from the statement that "'actual injury may consist of impairment or diminution, as well as the total loss or extinction, of a right or remedy.'" (RB 22.) SVLG asserts that

"may" means "might, or might not," so if a trial court determines that actual injury occurred at some other point in time (e.g., when "a related action was adjudicated"), then that determination is a factual one reviewed for substantial evidence. (RB 22-24.) The result would be different, SVLG says, if *Jordache* had used "shall" instead of "may." (RB 22.)

This grammatical analysis cannot withstand scrutiny. Although it cites no authority, SVLG is presumably referring to the general rule used in interpreting statutes. (E.g., Gov. Code, § 14 ["'Shall' is mandatory and 'may' is permissive"].) But of course *Jordache* did not involve statutory interpretation. Moreover, even in statutes, "may" can mean "shall" when the context requires. As our Supreme Court has explained,

> "May" is a common grammatical term encompassing multiple meanings, including an expression of "ability" or "power" as well as "permission." (Webster's New World Dict. (3d college ed. 1988) p. 837 ["may" in law means "shall; must"].) Moreover, judicial authorities have construed "may" as both discretionary and mandatory. [Citations.]

(*People v. Ledesma* (1997) 16 Cal.4th 90, 95; see also *Hollman v. Warren* (1948) 32 Cal.2d 351, 356 ["may" construed as mandatory in Government Code]; Black's Law Dict. (7th ed. 1999) p. 993, col. 2 ["may . . . 3. Loosely, is required to; shall; must . . . . In dozens of cases, courts have held *may* to be synonymous with *shall* or *must*"].)

Here, context makes clear that the "may" sentence in *Jordache* means that it is not just the *total loss* of a right or remedy that will constitute actual injury, but also its impairment or diminution. This sentence follows the Court's observation that its previous decisions had *rejected* limited interpretations of "actual injury." (18 Cal.4th at p. 750.) It would make no

sense to read *Jordache* to hold that a trial court is free to disregard evidence that the plaintiff's right has been lost, impaired or diminished whenever the court in its discretion finds evidence of a later-occurring injury.

Of course, if no right has been lost or impaired and no significant expense has been incurred until the point of adjudication, then there may be no actual injury until that time. (*Jordache, supra*, 18 Cal.4th at pp. 755 [citing *Baltins, supra*, 36 Cal.App.4th at p. 1208], 761 [describing alleged negligence in *Baltins* as "the attorney predicted incorrectly how a court would resolve an issue in the future"]; *Fritz, supra*, 136 Cal.App.4th at pp. 1380-1387 [mere drafting error without consequences until later will not toll statute of limitations].) But a court cannot find an actual impairment or loss without also finding actual injury. Once the "loss or diminution of a right or remedy" is proved, actual injury is established. (*Jordache, supra*, 18 Cal.4th at p. 744.)

B. Undisputed Evidence Established That Beck Inc. Suffered Both A Diminution Of Its Legal Rights And Monetary Damages Before Expiration Of The Statute Of Limitations.

1. *Jordache* is directly on point.

SVLG twists not just the legal principles embodied in *Jordache* but its factual predicates as well. Ignoring Beck Inc.'s point-by-point comparison of the factual similarities between *Jordache* and the present case (AOB 25-27), SVLG contends that "[t]he *Jordache* damages were clearly incurred and did not depend on litigation to determine if there was an injury," so that "[t]he only question in *Jordache* was the extent of the injury," not "the speculation of whether a statute of limitation had or had not run." (RB 28-29.) In contrast, SVLG contends, in the present case

"there was no loss of a legal right until the underlying Court determined that such a right had been lost," and thus "actual injury did not occur until Judge Huber determined that written revocation notice was required." (*Id.* at p. 29.)

SVLG's purported distinction fails.

No fair reader of *Jordache* could conclude that its only question was the *extent* of the plaintiff's injury, and not *when* actual injury occurred. As the Court states at the outset: "This case presents a relatively narrow legal question: *When does a former client*—having discovered the facts of its attorneys' malpractice—*sustain actual injury* so as to require commencement of an action against the attorneys with one year?" (*Jordache, supra*, 18 Cal.4th at p. 747, emphasis added.) Reversing the Court of Appeal, *Jordache* answered that question by holding that the "loss or diminution of a right or remedy constitutes injury or damage" so as to commence running of the statute of limitations. (*Id.* at p. 744.)

SVLG's notion that the sole question in *Jordache* was the extent of damages rests on the patently incorrect premise that the plaintiff's right to insurance benefits, and its attorneys' negligence in failing to procure them, were indisputably established at the point actual injury occurred. Not so. SVLG disregards the Supreme Court's statement that "Jordache's right to an insurer-funded defense *existed or not* when that action first embroiled Jordache. The right to that insurance benefit, the impairment of that right, and Jordache's expenditures while that right was unavailable, did not arise for the first time when Jordache settled with the insurers." (*Id.* at p. 753, emphasis added.) SVLG also ignores the Opening Brief's pointing out the Court's carefully chosen language—the insurers' defense was only "objectively viable," not absolute—underscoring that the Court did not

require an adjudication of a claim or defense to establish actual injury. (AOB 27, fn. 9.)

2. Beck Inc.'s monetary losses.

a. Beck Inc. did not admit it suffered no actual injury.

Beck Inc. proved that it sustained significant monetary damages—and thus actual injury—long before April 2004, discussing three separate losses. (AOB 28-29.) SVLG denies that Beck Inc. suffered any actual injury during the relevant period, relying on purported "admissions" in Don Beck's April 2005 deposition in *Wheeler* where he said he did not have a claim against Towery and Hoge Fenton because "'nothing has happened yet, I haven't lost anything from it yet.'" (RB 31; 35 AA 8097:2-3.)

The deposition excerpt can carry no weight here for at least three reasons:

- When Mr. Beck testified he had not "lost anything" yet, he could only have meant he hadn't lost *the case*—the *Wheeler* litigation—yet. He obviously was well aware he was paying his lawyers (SVLG) at least for the work involved in his multi-day deposition, so he could not reasonably have meant he had not lost any *money* yet.[3]

- SVLG was defending Mr. Beck's deposition, and objected vigorously to this line of questioning as "completely outside the ambit of

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[3] As SVLG acknowledges, it was spending considerable time "trying to remedy" the Towery Error. (RB 31.) Much of SVLG's work during this period was devoted to Mr. Beck's deposition and related document productions. (26 AA 6014-6022, 6023-6034 [SVLG's invoices to Don Beck dated March 31, 2005 [$24,207.08] and April 30, 2005 [$75,875.70].)

permissible discovery," instructing its client not to answer further questions on the subject. (35 AA 8097:8-25.) Therefore, Mr. Beck was never given the opportunity by his own counsel to explain his statement. And of course it was in SVLG's own interest to let the statement stand without explanation, perhaps anticipating its own litigation with Beck Inc.

- As we have demonstrated, whether and when a lawyer's former client has suffered "actual injury" within the meaning of section 340.6 is a legal determination within the court's province to decide. Since even experts cannot testify about the law (Evid. Code, § 801; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884), a lay person's testimony is manifestly irrelevant to the inquiry.

For all these reasons, the single sentence quoted from Mr. Beck's deposition does not constitute substantial evidence that Beck Inc. had not suffered actual injury under section 340.6 as of April 2004. Substantial evidence is "evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. . . . [It] is not synonymous with 'any' evidence. Instead, it is substantial proof of the essentials which the law requires." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [interior citations and quotation marks omitted], 652 ["it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial"].) The sentence SVLG offers here as an "admission" does not rise to the level of substantial evidence.

b. The parties agree that actual injury was suffered at the time of the Beck Inc./Wheeler settlement in April 2002.

The Opening Brief demonstrates that the April 2002 settlement with Mr. Wheeler caused Beck Inc. to impair a substantial amount of its equity

capital by making an entirely illiquid investment of $854,100 in order to buy out, for cash, Mr. Wheeler's interest in Silvertree Associates—money that Mr. Wheeler then used to fund his litigation with Beck Inc. (AOB 28.)

SVLG concedes this payment constituted actual injury, but argues that the expenditure "was not incurred by [Beck Inc.] but by Beck Trust, when it allegedly paid the money to buy Wheeler out." (RB 33 ["it was Beck Trust that suffered such injury"; "The injured party was Beck Trust."].)

SVLG provides no record citation for these statements, but earlier in its brief SVLG asserts—this time getting it right—that Beck Inc. "did not have sufficient cash to pay this amount to Wheeler, so the Trust controlled by Don L. Beck, the individual, paid the sum to Beck, Inc., which then paid the money to Wheeler." (RB 9, citing Exhibit Tab 32, 8 AA 2168-2169.) The cited exhibit is a March 28, 2002, email from Mr. Beck instructing his bank to transfer $851,874.01 to Hoge Fenton's escrow account; the email indicates it was "approved" by Don Beck and his wife as "TRUSTEE." (*Ibid.*) SVLG's statement at RB 9 and the exhibit cited there are entirely consistent with other—more direct—evidence of who paid what to whom. For example, the April 1, 2002, settlement document states plainly that "BECK [meaning Beck Inc.] will pay to WHEELER" sums totaling approximately $850,000. (8 AA 2194-2197, ¶ 7; 2179.)

Not surprisingly, SVLG tried but failed to convince the trial court that it was Beck Trust that had incurred the $854,100 expenditure. SVLG asked the court to make such a finding, but the court did not do so. (Compare 37 AA 8808-8809 [SVLG's Proposed Statement of Decision] with 8855-8880 [Statement of Decision].)

That Beck Inc. paid Mr. Wheeler with funds provided by Beck Trust does not mean that Beck Inc. suffered no actual injury. Beck Inc. was the party contractually obligated to pay Mr. Wheeler, as well as the party that actually paid him. The source of the funds is as irrelevant as if Beck Inc. had borrowed the money from a bank or found it on the street.[4]

c. Beck Inc. indisputably suffered actual injury by paying Hoge Fenton almost $24,000 in fees to remedy the botched fix.

Citing undisputed evidence, including uncontradicted expert testimony, Beck Inc. demonstrated that Hoge Fenton's attempts to remedy the Towery Error between March 2001 and March 2002 only created further damage, costing Beck Inc. $23,978.32 in attorney fees and costs. (AOB 8-9, 28, citing 26 AA 5862 [payment summary]; 3 RT 469-479 [Mr. Sheppard's expert opinion that Towery Error generated need for remedy, and that Hoge Fenton's failure to secure conflict waivers violated ethical duties to Beck Inc.].)

SVLG responds that the evidence was disputed as to whether there was any connection between these fees and the Towery Error, but it fails to cite any meaningful evidence showing a dispute. (RB 31-32.) SVLG claims the $23,978.32 in fee payments was for "unspecified work" (RB 32), ignoring the *31 pages* of detailed bills that follow the summary, broken down by specific task, attorney, and time spent, and clearly showing the link

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[4] Because Beck Inc. suffered an actual injury, SVLG's argument that the injury was outside the scope of the operative pleadings as a "trust malpractice" issue (RB 33-34) is completely misguided. The injury was to Beck Inc. and it was an issue squarely within the scope of the operative pleadings.

between the fees and Hoge Fenton's attempts to remedy the botched fix (26 AA 5863-5894).

Completely ignoring the undisputed testimony of Mr. Sheppard (whose expertise SVLG conceded and whom SVLG chose not to cross-examine), SVLG contends that Hoge Fenton's legal work would have been necessary even without the Towery Error. (RB 32-33; see 3 RT 468:24-469:1, 482:22-24.) But the only evidence SVLG cites for this contention is (1) testimony of SVLG partner and non-expert Kathryn Barrett that was *not admitted for its truth,* but only to establish her "understanding" and "state of mind" as to what Beck Inc. and Hoge Fenton were trying to accomplish during this time (7 RT 829:25-830:14, 832:7-833:17) and (2) a May 14, 2001, letter from Mr. Towery to Mr. Wheeler's then counsel offering either to terminate the Silvertree Partnership and sell the property or have the clients meet and discuss their "business dispute" (8 AA 2119-2120). Neither piece of evidence creates a factual dispute with the uncontradicted documentary and expert evidence cited above establishing the $24,000 fee payments to Hoge Fenton constituted actual injury to Beck Inc.

d. Beck Inc. paid SVLG almost $130,000 in fees to defend against the *Wheeler* litigation, including fees to demur to Mr. Wheeler's allegation that Beck Inc.'s revocation was untimely.

As Beck Inc. demonstrated, from August 2002 on, Beck Inc. was locked in litigation with Mr. Wheeler, costing Beck Inc. $129,138.32 in payments to SVLG, including $3,335.50 for Kathryn Barrett's work on Beck Inc.'s demurrer, *inter alia,* to Mr. Wheeler's August 2003 allegations related to the Towery Error. (AOB 28-29; 13 AA 3070 [Second Amended

Complaint, Third Cause of Action, alleging Beck Inc. "did not revoke its option election in a timely manner"].)

SVLG completely ignores the cited evidence, claiming only—with no citation to the record—that "the trial court correctly found that these fees were not related to the alleged Towery error, but rather were a result of Wheeler's claims that had nothing to do with the revocation issue." (RB 31.) The record is devoid of any such finding. To the contrary, SVLG admitted below that at least $600 of these fees was spent prior to April 2004 to address the Third Cause of Action alleging untimely revocation. (37 AA 8773, fn. 8.) That was sufficient. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 128 [client's payment of $1500 retainer to attorney constituted "actual injury" under section 340.6]; *Jordache, supra*, 18 Cal.4th at p. 752 [in changing standard from "significant" to "actual" injury in section 340.6, Legislature shifted focus from amount to fact of damage].)

Although SVLG has nothing more to say about the $130,000 payments in the argument section of its brief, elsewhere SVLG asserts it considered the revocation issue in the Second Amended Complaint "groundless" and therefore ignored it, because Mr. Wheeler had previously admitted in deposition that Towery's oral revocation was timely. (RB 14 ["SVLG did not spend time addressing, curing, or attempting to fix any alleged error by Towery"].) But Mr. Wheeler's deposition contains no such "admission"—as SVLG certainly knows because its partner Christopher Ashworth took the deposition. In fact, Mr. Wheeler's testimony can be read

to mean that the revocation was *not* timely; at the very least, it is equivocal.[5] Nothing in the deposition suggests that the untimely revocation allegation in the Second Amended Complaint was "groundless" or could safely be ignored. And of course, SVLG didn't ignore it, as its billings and admission clearly show.

SVLG further attempts to minimize its work on the revocation issue by stating that the demurrer to the Third Cause of Action "simply referenc[ed] Wheeler's deposition testimony which had contradicted the timely [*sic*; untimely] notice allegations." (RB 15.) But the demurrer did far more than that; it raised at least two additional arguments in opposition to the Third Cause of Action. (2 AA 486-488 [Mr. Wheeler's conduct consistent with timely revocation; Mr. Wheeler waived claim of untimely revocation].)

SVLG's final response to Beck Inc.'s demonstration of the various ways it sustained actual injury before April 2004 is this: "Appellant complains that the trial court ignored Hoge's trust malpractice issue as a potential point of actual injury to Appellant." (RB 33-34.) True to form,

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[5] Mr. Wheeler testified that Mr. Beck "only had a certain amount of days to say no. He didn't say no by the time the time had expired. His bookkeeper came by and told me that he was in the process of getting a loan on the bank and was going to buy the building. So, actually, we thought he was going to buy. His attorney told us that he was not going to buy, but then when we told Towery that the bookkeeper said he was getting a loan, Towery said, 'Well, I don't even know. I haven't talked to him lately, maybe he is.' And then the 30 days expired or what the time frame was. So it wasn't until after that that all of a sudden we got another communication from Towery that says, 'Oh yeah, he's not buying it for that, he thinks it's too much, but he will pay you 2.3 or something.'" (13 AA 3054 [Deposition of David. G. Wheeler, June 26, 2003].)

SVLG provides no record citation for this supposed complaint, which does not in fact appear anywhere in the Opening Brief.

Nothing in SVLG's brief refutes the evidence showing that Beck Inc. sustained actual injury by paying SVLG significant fees to defend Beck Inc. in the *Wheeler* litigation.

C. SVLG Ignores Settled Law Holding That Entering Into A Contract Constitutes A Jural Act That Itself Can Produce Actual Injury Even If Future Events Remedy Some Of The Damages.

Beck Inc. cited settled law holding that "'[e]ntering a contract is a jural act which alters the legal relations of the parties and creates an obligation,'" and that an attorney's negligent advice inducing a client to enter into a contract resolving particular issues "'results in actual injury at the point of entry.'" (*Radovich, supra*, 35 Cal.App.4th at pp. 976-977, quoting *Hensley, supra*, 13 Cal.App.4th at p. 1175, discussed at AOB 29-31.) Beck Inc. demonstrated that entering into the 2002 settlement agreement with Mr. Wheeler changed the parties' jural relationship and thus constituted actual injury to Beck Inc. at the time of contracting. (AOB 31.)

SVLG completely sidesteps the law concerning contractual jural acts and the factual premise that Beck Inc. sustained actual injury at the time of the April 2002 settlement contract. Instead, SVLG contends that in *Radovich* (and *Jordache*), the attorney's advice or lack thereof "resulted in the client losing immediate access to assets to which they were otherwise legally and/or contractually entitled," whereas in the present case, the alleged injury to Beck Inc. "in May of 2001 through 2005" was "speculative and/or contingent" and thus not actual injury. (RB 34-36.)

This just isn't so. There was nothing "speculative and/or contingent" about the April 2002 agreement—just like the plaintiff in *Radovich*, because of this agreement Beck Inc. indisputably lost jural rights and "immediate access to assets" *in April 2002*. (See AOB 25-29.) This supposed basis for distinguishing *Radovich* is of no avail.

SVLG's reluctance to meet the issue head-on may stem from its concession that actual injury *was* sustained at the time of the 2002 settlement, but by Beck Trust, not Beck Inc. (RB 33.) But, as shown above, the undisputed evidence proves that the party suffering the injury was Beck Inc., not Beck Trust. (§ II.B.2.b., *ante*.)

D. Neither *Baltins, Fritz* Nor *Shopoff* Supports The Trial Court's Finding That Actual Injury First Occurred In October 2005.

The Opening Brief demonstrates that to the extent the two cases on which the trial court relied—*Baltins, supra*, 36 Cal.App.4th 1193 and *Fritz, supra*, 136 Cal.App.4th 1374—are found to actually support the present judgment, they are contrary to *Jordache, supra*, 18 Cal.4th 739, and this Court should decline to follow them. (AOB 31.)[6]

SVLG responds that *Baltins* and *Fritz* must be followed because they were "recently re-affirmed . . . as having the correct standards on the issue of actual injury" in *Shopoff & Cavallo LLP v. Hyon, supra*, 167 Cal.App.4th 1489. (RB 39.) Actually, all that means is that there are now three Court of Appeal decisions that are contrary to *Jordache*.

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[6] *Baltins* is contrary to *Jordache* because even though *Jordache* did not disapprove its result, *Jordache* completely eviscerated its rationale. (AOB 32-33.) *Fritz* is contrary to *Jordache* because it ignores *Jordache*'s key language that "'actual injury may consist of impairment or diminution, as well as the total loss or extinction, of a right or remedy.'" (AOB 35-36.)

But even if *Shopoff* were not contrary to *Jordache*, it has no relevance here. It has nothing to do with any statute of limitations, section 340.6 or the meaning of "actual injury" under that statute. The issue in *Shopoff* was whether the plaintiff had sustained *any* damages proximately caused by its attorney's malpractice (167 Cal.App.4th at p. 1509)—not *when* damages were sustained or *whether* they satisfied statutory definition of "actual injury" under section 340.6. Since cases are not authority for propositions not considered (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1081, fn. 3), *Shopoff* provides no guidance as to the "correct standards" of actual injury relevant to this case.[7]

Beck Inc. also demonstrated that even if *Baltins* and *Fritz* were consistent with *Jordache*'s legal analysis, they would not compel affirmance because they turned on circumstances entirely different from those here, which are precisely like those in *Jordache*. (AOB 33-34; 36-37.) As to these crucially distinguishing factors, SVLG has no meaningful response—failing, for example, even to attempt to address Beck Inc.'s argument that Towery's Error had immediate deleterious effects on Beck Inc. (See AOB 34, 36.) SVLG simply summarizes the two cases and then concludes that any damages sustained before April 2004 should be rejected

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[7] SVLG highlights *Shopoff*'s quotation from a case that used the term "'actual injury.'" (RB 39-40, quoting *Shopoff* at p. 1511, in turn quoting *Van Dyke v. Dunker & Aced* (1996) 46 Cal.App.4th 446.) But *Van Dyke* did not involve section 340.6 either or even legal malpractice, but rather accountant malpractice. (See *Jordache, supra*, 18 Cal.4th at pp. 763-764 [decisions involving accountant malpractice do not "provide rules for legal malpractice actions"].) More fundamentally, *Van Dyke*—a pre-*Jordache* case—is indisputably contrary to *Jordache*, since it expressly relied on the "bright-line cases" that *Jordache* overruled or limited. (*Van Dyke, supra*, 46 Cal.App.4th at pp. 452-454; *Jordache, supra*, 18 Cal.4th at p. 763.)

as "speculative and contingent," just as in *Baltins* and *Fritz.* (RB 36-39.) That's no answer at all.

III. THE TRIAL COURT APPLIED INCORRECT LEGAL STANDARDS IN HOLDING BECK INC. FAILED TO PROVE HOGE FENTON'S MALPRACTICE.

A. The Trial Court Failed To Decide The Trial-Within-A-Trial Represented By *Wheeler*.

The Opening Brief demonstrated that part of the required procedure for evaluating Beck Inc.'s malpractice claim was for the trial court to determine "what should have been" the result of the *Wheeler* action absent Hoge Fenton's malpractice (AOB 37-38, citing *Mattco Forge, supra*, 52 Cal.App.4th 820, 840), and that the trial court failed to do this.

SVLG's response is no response at all: It articulates the same requirement, but fails to acknowledge what the trial court here actually did—or didn't do.

A trial-within-a-trial is just that—a *trial* of the underlying case, resulting in a *decision* reflecting what should have happened. The trial court did not do that; it just found that "[t]here would have been, had Hoge tried this case, *a serious factual question* whether it was Beck or Hoge that was to do the revocation notice. Thus, Beck has not proven that it is more likely than not that he would have prevailed against Hoge for this reason." (37 AA 8864:20-23, emphasis added.)

SVLG construes the second sentence in the above quote to mean that Beck Inc. did not "satisf[y] its burden of providing [*sic*; proving] malpractice" (RB 41), but the first sentence negates this interpretation. The first sentence says that Beck Inc. would have had a tough time winning,

because there was a "serious factual question" about who was to prepare the revocation notice—that's all. But because the trial court did not *decide* that "serious factual question," it could not *decide* whether Beck Inc. should have won. The failure to decide this central issue requires a new trial.[8]

B. Legal Malpractice Victims May Settle With The Attorneys Who Represented Them In The Underlying Litigation Without Appealing The Judgment In That Litigation Or Demonstrating An Appeal Would Be Futile.

1. The Supreme Court has rejected any requirement that a malpractice plaintiff must pursue an appeal or demonstrate its futility.

The trial court concluded that Beck Inc. failed to prove causation in its malpractice case against SVLG by failing to prove that it had "no viable appeal" from the *Wheeler* judgment that resulted from Hoge Fenton's malpractice. (37 AA 8871.) In fact, however, Beck Inc. had no such burden, according to undisputed Supreme Court authority.[9]

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[8] This Court cannot imply findings in favor of the judgment, because Beck Inc. called the omission to the trial court's attention (37 AA 8883, 8885, fn. i) and the trial court made no changes (38 AA 9016:20-21). (Code Civ. Proc., § 634.)

[9] We acknowledge that we are presenting this new authority for the first time on appeal, and in the reply brief at that. But the issue it concerns—the effect of a settlement pending appeal on a legal malpractice claim—not only is purely legal, but also is extremely important. Moreover, if, as we contend, *Laird v. Blacker* (1992) 2 Cal.4th 606, is the controlling authority but this Court nevertheless declines to apply it, the resulting decision will necessarily be flawed regardless of its basis. The Court should therefore exercise its discretion to consider the argument, after providing SVLG an opportunity to brief it. After all, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." (*Henslee v. Union*
(continued...)

Laird v. Blacker (1992) 2 Cal.4th 606 (*Laird*), makes clear that where "the former client loses the underlying action because of the attorney's malpractice," even "*success on appeal does not negate an action for legal malpractice.*" (*Id.* at p. 615, emphasis added.) The reason, the high court explained, is that by the time the underlying action is lost, the client has already suffered injury from the attorney's negligence, and the damages are only increased by pursuing an appeal, successful or not. (*Ibid*.) Moreover, "'since most appeals result in affirmances, deferral of the malpractice action is a postponement, not an avoidance.'" (*Id.* at p. 617.)

The client in *Laird*—like Beck Inc. here—lost the underlying action because of her attorney's malpractice (her action was dismissed for failure to prosecute); she appealed, settled with her adversary, dismissed her appeal and then, 19 months after the underlying dismissal, sued her attorney for malpractice. (*Id.* at p. 610.) The trial court denied the defendants' nonsuit motion based on the one-year statute of limitations, but the Court of Appeal reversed and the Supreme Court affirmed the Court of Appeal. The issue was when Laird had sustained "actual injury" for purposes of triggering the statute of limitations under section 340.6—upon Laird's dismissal of her appeal within the statutory period (as Laird contended), or when her underlying lawsuit was dismissed (as the defendants contended). (*Ibid*.) The Supreme Court held that Laird sustained injury upon entry of the dismissal order, when her case "lost considerable settlement value" and when she "was compelled to incur legal costs and expenditures in pursuing an appeal." (*Id.* at p. 615 [when appeal is taken from adverse judgment,

[9] (...continued)
Planters Nat. Bank & Trust Co. (1949) 335 U.S. 595, 600, 69 S.Ct. 290, 293, 93 L.Ed. 259 (dis. opn. of Frankfurter, J.).)

"'an injury does not disappear or become suspended because a more final adjudication of the result it sought' (citation)"].)[10]

Although *Laird* concerns the accrual of the malpractice statute of limitations and this case concerns damages causation, for present purposes there is no difference—injury is injury. The accrual of a cause of action, which is what happens for statute of limitations purposes when a malpractice plaintiff sustains "actual injury," means that "'the cause of action is complete with all of its elements.'" (*Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 897-898, internal citations omitted.) If entry of judgment makes the cause of action "complete," then the plaintiff doesn't have to show anything more to prevail.

Thus, the trial court's determination that Beck Inc. had to demonstrate it had "no viable appeal"—and, conversely, that a successful appeal would have negated the malpractice action—is wrong under *Laird* and subsequent California authorities.[11] (See *Tchorbadjian v. Western Home Ins. Co.* (1995) 39 Cal.App.4th 1211, 1221 ["The crux of the analysis in *Laird* was that a cause of action against an attorney for malpractice

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[10] The Supreme Court later clarified that *Laird* did not establish an absolute rule making accrual dependent on "some form of final adjudication, as by judgment or settlement." (*Adams v. Paul, supra*, 11 Cal.4th at p. 591.) Rather, the harm in *Laird* "occurred *no later than* the loss of the underlying action"; the case "did not address the question of whether it could have arisen earlier." (*Id.* at fn. 4, emphasis in original.)

[11] Indeed, the trial court's ruling mirrors the *dissent* in *Laird*, which argued that a malpractice claim should not arise until the underlying action is "won or lost" on appeal. (*Id.* at pp. 621, 626 (dis. opn. of Mosk, J.) ["The status of the malpractice claim is uncertain until the appeal in the underlying case is resolved, because if it is ultimately decided in the client's favor the malpractice suit may well become moot for lack of damages"].) The Supreme Court majority *rejected* that view.

accrued upon the adverse judgment and was not negated by success on appeal"]; *Fantazia v. County of Stanislaus* (1996) 41 Cal.App.4th 1444, 1451-1452 [applying *Laird* analysis to criminal cases].)

2. Even if *Laird* did not require reversal, the same result must follow as a matter of policy.

Since *Laird* is dispositive and requires reversal, the Court need not address policy questions or consider what other jurisdictions have to say. But even if the Court declines to apply *Laird*, the result should be the same: There are strong policy reasons to apply the reasonable-settlement test we urged in the Opening Brief (AOB 41-42), and SVLG offers no compelling reason not to do so.

a. The impact of a settlement pending appeal should be judged by the reasonableness of the settlement.

The Opening Brief proposed this test: "[S]ettlement of an underlying case does not prevent proof of causation in a legal malpractice action where a reasonable person, unconstrained by the need to preserve a malpractice claim, would enter into the specific settlement the plaintiff made, considering both the chances of success on appeal and the attendant risks and costs of pursuing an appeal." (AOB 42.) We noted California's strong policy of encouraging settlements, and the fundamental unfairness of forcing a plaintiff to forgo a reasonable settlement, and bear the cost and risk of a long-shot appeal, in order to preserve a claim. (AOB 41-42.)

SVLG's answer? Silence. The word "policy" doesn't even appear in its argument on this subject. Indeed, it isn't even clear what rule SVLG proposes, other than that there must be a causation analysis—a proposition

with which we do not disagree, but which is not negated by the reasonable-settlement approach.

b. Neither judicial error nor settlement automatically bars a malpractice claim.

One thing is absolutely clear from SVLG's own authorities: Neither judicial error nor settlement erects any automatic bar to the plaintiff's malpractice claim.

California law. SVLG's sole California authority is *Church v. Jamison* (2006) 143 Cal.App.4th 1568 (cited at RB 41-42). But that does not reach our situation: It holds only that the court in a legal malpractice case can reexamine judicial action in the underlying case for error—"where the underlying proceeding was decided by a trial court's ruling, that ruling will come under scrutiny in the malpractice case when the issue of what should have been the result of the underlying proceeding is addressed." (*Id*. at p. 1585.) There was no settlement pending appeal, and accordingly no discussion of how a settlement might affect the causation analysis. Most important, the court did not hold, as SVLG seems to imply, that judicial error would be an absolute defense to a malpractice claim, but only that the malpractice defendant was not *precluded* from asserting it as a superseding cause of damage. (*Id*. at p. 1584.)

Indeed, *Church* explicitly recognizes that judicial error does *not* necessarily exonerate the lawyer, by contrasting its procedural setting to that in this Court's decision in *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656. In *Lombardo*, the trial court nonsuited a malpractice plaintiff on the ground that the trial court's judicial error—disapproval of a trust amendment prepared by the defendant lawyer—superseded the lawyer's alleged negligence. This Court reversed, finding there were factual

questions as to whether the lawyer should have handled the trust amendment differently so as to avoid the possibility of judicial error. (*Id*. at pp. 666-669, discussed in *Church v. Jamison*, *supra*, 143 Cal.App.4th at p. 1584.) That analysis applies equally here: Regardless of whether written notice of revocation was legally required or waived, Hoge Fenton's failure to give written notice paved the way not only for litigation but for the specific judicial error SVLG complains of, a supposedly erroneous ruling on the legal effect of Hoge Fenton's conduct. The analysis further demonstrates that Judge Patsey's belief that Judge Huber might have erred (as we have discussed, Judge Patsey erroneously failed to decide the question) should have been the beginning, not the end, of his analysis. And it underscores the complexity of the analysis, the uncertainty of appellate outcomes, and the corresponding wisdom of allowing the malpractice plaintiff to enter into a reasonable settlement.

The law in other states. SVLG cites two out-of-state cases that, as SVLG presents them, seem to hold that judicial error automatically negates malpractice causation: *Crestwood Cove Apartments Business Trust v. Turner* (Utah 2007) 2007 UT 48 [164 P.3d 1247] (*Crestwood*) and *Hewitt v. Allen* (Nev. 2002) 118 Nev. 216 [43 P.3d 345] (*Hewitt*) (cited at RB 42). Neither comes close, and both emphatically reject any notion that settlement pending appeal automatically bars a malpractice claim.

In *Crestwood, supra*, 164 P.3d 1247, the client suffered a substantial judgment because of the imposition of treble damages under a statute that may not have properly applied in the case. The client settled while the appeal was pending, and then sued its lawyer for malpractice on the basis that the lawyer had failed to timely challenge the assertion of treble damages. The trial court granted summary judgment for the lawyer on the

ground that the client had forfeited its malpractice action by settling the underlying action instead of pursuing the appeal.

The Utah Supreme Court rejected this reasoning. Conducting a nation-wide review of the law, the court concluded that while a number of courts had articulated a so-called "abandonment doctrine," none had truly imposed a forfeiture. Rather, the courts undertook a causation analysis, and later decisions "have significantly narrowed [the abandonment doctrine's] possible uses to instances where the alleged attorney malpractice was not the proximate cause of the client's loss." (*Crestwood*, *supra*, 164 P.3d at p. 1253.) Turning to the case before it, the court found both that the lawyer had timely disputed treble damages and that the trial court erred in rejecting his contention. "Thus, it was judicial error, not [the lawyer's] timeliness in presenting [the contention], that proximately caused [the client] injury." (*Id*. at pp. 1257-1258.) It is in this context that *Crestwood* makes the statement SVLG quotes, that where the lawyer has done everything right and the court nevertheless errs, "the attorney's actions cannot be considered the proximate cause of the client's loss." (*Id*. at p. 1255, quoted at RB 42.)

This statement is correct as far as it goes, but it has no application here. That is because in *Crestwood*, the court found that *there was no malpractice to begin with*—meaning that the *only* possible cause of the client's loss was the trial court's error in rejecting the contention that the lawyer advanced. Here, for purposes of the present analysis it must be assumed that there *was* malpractice by Hoge Fenton in connection with the revocation notice—thus the lawyer had *not* "raised and preserved all relevant legal considerations in an appropriate manner." (*Ibid*.) Beyond that, unlike the malpractice in *Crestwood* that occurred during the course of the litigation, here the malpractice was one of the *causes* of the litigation.

Not only had Beck Inc. already suffered significant damage before the lawsuit even got to trial, but in addition the malpractice had created ambiguity that required the litigation of a variety of claims and defenses—a fertile ground for judicial error. Under these circumstances, any judicial error was at most *a* cause of damage, and not necessarily a superseding cause. (See *Lombardo v. Huysentruyt*, *supra*, 91 Cal.App.4th 656.)

In *Hewitt*, *supra*, 118 Nev. 216, the court likewise rejected the proposition that abandoning an appeal automatically forfeits a malpractice claim. There, an injured party sued the State of Utah and some governmental agencies for personal injuries, but the suit was dismissed because her counsel filed deficient notices of claim. (*Id*. at pp. 218-219.) She appealed, sued the lawyer, and then settled the underlying case on the basis of an opinion by Utah counsel that that the appeal was futile. (*Id*. at p. 219.) The lawyer then moved to dismiss the malpractice action on the basis that the plaintiff was required to prosecute her appeal to conclusion. The trial court agreed, and also found that the Utah counsel's opinion that the appeal would have been futile was insufficient. (*Id*. at pp. 219-220.)

The Nevada Supreme Court reversed. It rejected the lawyer's argument that there should be a bright-line rule that the abandonment of an appeal always requires dismissal of the malpractice claim, holding instead that "[i]f an appeal would be a futile gesture, that is, the appeal would most likely be denied, then litigants should be able to forgo an appeal, or dismiss a pending appeal, without abandoning their legal malpractice actions." (*Id*. at p. 222.)

SVLG's reliance on *Hewitt* ignores a key distinction between Nevada and California law: The basis of the lawyer's effort to impose the

abandonment doctrine, and the starting point of the Nevada Supreme Court's analysis, was not causation at all, but rather a contention about the accrual of the malpractice cause of action. Under Nevada law, "when the malpractice action is alleged to have caused an adverse ruling in an underlying action, *the malpractice action does not accrue while an appeal from the adverse ruling is pending*." (*Id.* at p. 221, emphasis added.) So all *Hewitt* really decided was that a claim could accrue without an appeal—the futility of the appeal meant that the cause of action was sufficiently accrued upon entry of judgment. This question could not arise in California, because under *Laird v. Blacker, supra*, 2 Cal.4th 606, the cause of action accrues no later than entry of judgment. In any event, *Hewitt* does not involve a causation analysis, and certainly it does not negate a court's ability to find multiple causes of damage, of which judicial error may be only one.

Other aspects of *Hewitt* demonstrate why it cannot apply here:

• Like *Crestwood*, *Hewitt* is a litigation malpractice case in which it was easy to match litigation conduct with judicial rulings to determine where the error lay. Here, in contrast, the underlying transactional malpractice fueled the litigation, contributed to the likelihood of judicial error, and rendered any such error complex and uncertain of resolution.

• Although *Hewitt* uses the word "futile" to describe the chance of appellate success, it defines the term as that "the appeal would *most likely* be denied." (118 Nev. at p. 222, emphasis added; see *id.* at p. 224 ["there is a basis for Utah counsel's conclusion that the order of dismissal would not have been reversed on appeal . . . the Utah appeal was *not likely* to succeed . . . "; no automatic abandonment "where the judgment is *not likely* to be reversed due to a finding of judicial error," emphases added].) "Not

likely to succeed" is far from the same thing as the "no viable appeal" standard that the trial court seems to have imposed on Beck Inc. (See 37 AA 8869:4-6, 8871:13.)[12]

- "[T]he attorney defendant has the burden of proof to establish that an appeal would have been successful." (*Hewitt, supra*, 118 Nev. at p. 222). Here, the trial court saddled Beck Inc. with the burden of disproving the appeal's potential success. (37 AA 8855, 8866-8871.)

c. A reasonable-settlement test is not incompatible with a causation analysis.

Ultimately, the reason SVLG's decisions should not govern the present case is that the simplicity of the facts in those cases, and the corresponding simplicity of the causation analysis, are worlds apart from what happened here. In *Crestwood*, *supra*, 164 P.3d 1247, there was no malpractice at all, so no possible causation. In *Hewitt*, *supra*, 118 Nev. 216, the claim was just as clear the other way—the lawyer had blown the claims statute as a matter of law, so there couldn't be a claim of superseding judicial error. In both cases there was a straight line of causation from the malpractice to the loss of the claim.

Here, the answer to the core question—what should have been different without Hoge Fenton's malpractice?—is far more complex.

As SVLG itself presents the case, Hoge Fenton's malpractice was not just an on-off switch, like failing to comply with a governmental claims statute or blowing a statute of limitations. Rather, the absence of written

[12] The trial court ascribed this test to Beck Inc., but "no viable appeal" was not how Beck Inc. described its chances on appeal. Rather, it urged that prevailing on appeal was long shot that made settlement reasonable in light of the circumstances. (36 AA 8648; 3 RT 506.)

notice of revocation gave Beck Inc.'s negotiating partner, Mr. Wheeler, a multi-faceted claim that was rooted in ambiguity: Was written notice required at all? If so, was the requirement waived? Was Mr. Wheeler estopped to assert it, or was its assertion barred as a matter of law? At least some of these questions involved factual disputes that could only be resolved in a trial, and possibly in a way unchallengeable under the substantial evidence rule. But one thing was clear: If Hoge Fenton *had* given written notice, none of these things would have been in issue, none would have had to be litigated at trial, and at least on this point there could have been no judicial error and Beck Inc. would not have suffered a judgment.

With this damage already sustained—and a cause of action already accrued, regardless of any future reversal—where did things stand? Beck Inc. now faced an appeal, which on this issue would be just as multi-faceted as the trial. While SVLG presents the evaluation of the appeal as a simple matter to be addressed as a matter of law—which admittedly is the correct articulation of the test as generally stated—the reality is that the question immediately confronting Beck Inc. wasn't what the ultimate appellate outcome would be, but rather what it would take to get there. Beck Inc.'s evidence showed that Beck Inc. was facing bankruptcy; that its appellate counsel felt that the appeal was a long shot; and that an affirmance would require Beck Inc. to pay not only the judgment but also substantial interest and further attorneys fees. And in the end, even an appellate reversal might not reach the particular issues connected with Hoge Fenton's malpractice.

Why was Beck Inc. in this position?

Hoge Fenton's malpractice, pure and simple.

In the real world, it is no answer to say that Beck Inc. should have known that the judgment would be reversed. When malpractice has already brought the plaintiff to the point of having to confront an expensive and risky appeal, to ask that he proceed unless he can prove the appeal futile, on pain of forfeiting his malpractice claim, stretches the causation analysis beyond common sense.

Instead, the question should be the extent to which the settlement is reasonable in light of the various factors that brought the plaintiff to the point of settlement. These can include both the underlying malpractice and any judicial error. (See *Jordache, supra*, 18 Cal.4th at pp. 754-755 ["Many different factors can influence the decision to settle a suit; a related malpractice claim may or may not be decisive"].) The plainer the judicial error, the better the settlement must be to be reasonable. Conversely, where, as here, the very best that can be said is that any claimed judicial error is highly debatable—especially looking at it from the standpoint of the threshold of the appeal, under the pressure of the need to make a decision rather than in hindsight—the burden of showing unreasonableness should be much higher. And, as *Hewitt* states, the burden rests on the defendant, not the plaintiff.

C. Even If Liability Turned Entirely On A Straight Trial-Within-A-Trial Analysis Of The Abandoned Appeal, Beck Inc. Carried Any Burden It Might Have Had To Demonstrate That Hoge Fenton Committed Malpractice And That An Appeal Would Have Been Futile.

1. Beck Inc. established the fact of Hoge Fenton's underlying malpractice.

The Opening Brief detailed how Beck Inc. established malpractice at trial, including by way of uncontradicted expert testimony that the trial court was not at liberty to disregard. (AOB 45-46; see also 3 RT 469-472, 5 RT 606-608.) This proof covered not only Towery's failure to send written revocation but also his attempt to foist the error on Beck Inc. and the botched attempt to remedy the malpractice. SVLG's response, devoid of record citations, ignores the expert testimony entirely and ignores everything but the initial failure to send written notice. (RB 43-44.) And, because Beck Inc. objected that the trial court erroneously failed to *decide* this trial-within-a-trial issue—but merely concluded there was "a serious factual question" (37 AA 8864:21; see AOB 37-39)—SVLG does not have the benefit of favorable implied findings. (Code Civ. Proc., § 634.) The net effect of all of this is that Hoge Fenton's malpractice must be deemed established.

2. Beck Inc. established that an appeal from the *Wheeler* judgment would not have been successful.

Faced with an appeal that the malpractice plaintiff did not pursue, a trial court must evaluate the appeal as though it were the reviewing court—it must actually decide the appeal, addressing the appellate issues as questions of law. (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853,

865 [“The issue presented to the trial court was whether an appeal of these issues would have been successful. In determining that issue, the trial court addresses the subject as though it were sitting as a Court of Appeal”].) The Opening Brief demonstrates that the trial court failed to this—it merely found “serious appellate issues” (37 AA 8869:21-22) and concluded that some of Judge Huber’s rulings were “arguably reversible” (*id*. at 8870:4). (AOB 43-44.) But since the questions are legal, this Court faces the same task in any event: It must decide what should have become of Beck Inc.’s appeal on the revocation notice question. Under this standard, the record compels reversal.

SVLG claims that Judge Huber made two types of error: (a) he failed to make findings on the effect of Civil Code section 1501 despite SVLG’s request—essentially a complaint that the statement of decision was inadequate; and (b) he erred as a matter of law by rejecting the claim that Mr. Wheeler had waived, or was estopped from asserting, the requirement of written notice of revocation. (RB 45-56.) Neither claim has merit.

a. Judge Huber did not erroneously fail to make findings.

SVLG’s claim that it properly requested findings (RB 46-47) obscures the real issue—how a Court of Appeal would likely treat a situation in which SVLG failed to follow any recognized procedure for requesting findings, and the trial court exercised its discretion to treat SVLG’s filings as what they purported to be: disagreement with the trial court’s proposed ruling, rather than requests for findings. (See AOB 15, quoting 37 AA 8690:8-11.) Beck Inc. would have had to convince the Court of Appeal that SVLG’s complaints about the proposed judgment so clearly qualified as requests for findings that Judge Huber was required to

view them that way as a matter of law and had no discretion to construe them otherwise. But that would have been virtually impossible, given the unfavorable factual presumptions that would otherwise constrain the Court of Appeal's review of Judge Huber's statement of decision. Plainly, Judge Huber acted well within his discretion in not viewing SVLG's complaints as formal requests for findings. He was reacting to issues raised only minimally or at the last minute.[13] Indeed such issues would not even qualify as "principal controverted issues" under Code of Civil Procedure section 632.

Doubtless Judge Huber's view of SVLG's filings was colored by SVLG's earlier explicit admission that "[t]he 1998 Partnership Agreement called for written notice . . . ." (21 AA 4765:22-24, quoted at AOB 14.) SVLG's claim that this straightforward admission was really a "typographical error" (RB 18, fn. 1) finds no support in the record and defies belief. SVLG cites only Kathryn Barrett's trial testimony, stating that she *didn't believe* this was SVLG's position, that she *thought* the document "should have said 'assuming arguendo.'" (8 RT 962.) But to interpret an agreement clear on its face to mean exactly the opposite of what it says based on such flimsy and self-serving testimony would contradict not just common sense but the law itself. (See *Roddenberry v. Roddenberry, supra*, 44 Cal.App.4th at p. 654 ["Whatever the nature of the evidence, truth is an ascendant value in litigation. . . . Transparent prevarication is not an acceptable basis for decision. . . . [C]ourts must be diligent not to base an award on testimony tailored by financial expediency rather than by truth"].)

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[13] See 13 AA 3075, 3081, 3093; 18 AA 3868, 3885-3886; 21 AA 4765, 4788, 4810, 4814-4815; 22 AA 4899, 4914.

Judge Huber did not err or abuse his discretion in his statement of decision.

b. Even if Judge Huber erred by not making findings as to the application of Civil Code section 1501, the error was harmless.

As the Opening Brief notes, Judge Huber explicitly found there was no waiver or estoppel, and an appellate court would have to presume he found all necessary underlying facts. (AOB 47.) SVLG does not respond to this point, but complains only that Judge Huber did not make findings regarding whether there was a waiver under Civil Code section 1501 (section 1501) despite SVLG's proper request for them, and that this error was prejudicial. Regardless of whether there was an error—the Opening Brief shows why there was none (AOB 47-50)—SVLG has failed to meet its burden of showing prejudice. (SVLG's brief implicitly acknowledges that, although SVLG is the respondent here, on this issue it is urging the appellant's position and therefore must bear the appellant's normal burden of showing that the error was prejudicial.)

SVLG's argument doesn't discuss prejudice in any meaningful way, but rather simply asserts that the claimed error was "'reversible per se.'" (RB 47-48.) With exceptions too rare to bother mentioning, there's no such thing—and there hasn't been since 1994. That was when our Supreme Court decided *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, in which it said that "[n]o form of civil trial error justifies reversal and retrial . . . where in light of the entire record, there was no actual prejudice to the appealing party." (*Id.* at p. 580.) SVLG doesn't mention *Soule*, even though we quoted this exact language in the Opening Brief. (AOB 50.) As for the decisions SVLG does cite—*Sperber v. Robinson* (1994) 26

Cal.App.4th 736 and *Social Service Union, Local 535 v. County of Monterey* (1989) 208 Cal.App.3d 676—both predate *Soule*, and neither applies here in any event.

While *Sperber* does say that a failure to make material findings can result in reversal, SVLG ignores the language from *Sperber* we quoted in the Opening Brief, to the effect that an omission to make findings is harmless "unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings." (*Sperber*, *supra*, 26 Cal.App.4th at p. 745, quoted at AOB 50.) Besides, the usual effect of an erroneous failure to make a finding is not reversal; rather, the prevailing party loses the benefit of implied findings in its favor on the issue. (Code Civ. Proc., § 634.) But none of this really matters because, as we demonstrated in the Opening Brief (AOB 54-55) and further demonstrate below, SVLG's section 1501 argument is meritless under any circumstances. The trial court's failure to make findings therefore cannot have been prejudicial.

Social Service Union, Local 535 v. County of Monterey, *supra*, 208 Cal.App.3d 676, likewise provides no basis for reversal. There, the trial court didn't just fail to make findings—it refused to issue *any* statement of decision. (*Id.* at p. 678.) Equally important, the Court of Appeal did not direct entry of judgment for the respondent, but rather only remanded "to permit the [trial] court to issue a statement of decision." (*Id.* at p. 681.) Assuming that here the issue was factual—since otherwise there would be no need for a remand anyway—Judge Huber could once again have found for Mr. Wheeler and against Beck Inc., just with more detail, leaving Beck Inc. with an even longer shot on appeal than it already had.

c. **Neither Civil Code section 1501 (waiver) nor section 1442 (forfeiture) would have provided any basis for reversal had Beck Inc. pursued an appeal in *Wheeler*.**

Section 1501. The Respondent's Brief does not answer the arguments of the Opening Brief (AOB 54-56), but rather attempts to establish that section 1501 creates some kind of automatic waiver or estoppel divorced from a party's intent (RB 48-52). SVLG has no choice but to make that argument, since if Mr. Wheeler's intent were at issue Judge Huber's statement of decision would have foreclosed review. (See 22 AA 4948:2-3 ["insufficient evidence to find that Mr. Wheeler waived (or is estopped) from asserting his right to written revocation"].) But the argument is wrong.

Section 1501 says nothing about intent either way, but even assuming section 1501 did not require intent, there is no basis for applying it here. The primary obstacle is that the statute addresses an "offer of performance," like the exercise of an option. But Beck Inc.'s right to revoke didn't involve any kind of "performance"—it gave Beck Inc. the right to *refuse* to perform.

Certainly nothing in SVLG's only authority, *Collins v. Marvel Land Co.* (1970) 13 Cal.App.3d 34 (*Collins*) provides any basis for SVLG's claim that section 1501 rather than decisional law defines the elements of waiver under the facts of this case. For one thing, *Collins* involved an option, not a right to refuse to perform. For another, the plaintiffs' oral exercise of their option was followed three days later—and within the original option period—by their opening escrow and depositing escrow instructions. (*Id.* at p. 39.) It was not until well over a month later, after the

defendants had objected to the terms of the escrow instructions (but not the option exercise) and the plaintiffs had submitted revised instructions, that the defendants first claimed that the option exercise had been ineffective. (*Id*. at pp. 39-40.) The court held, with minimal discussion, that "plaintiffs have adequately pleaded facts showing a waiver of the requirement that the exercise be made in writing." (*Id*. at p. 40.) There is no discussion of section 1501 or the role of intent; the decision merely cites section 1501 along with other authorities for the proposition that "[t]he acceptance of the exercise of the option without objection to the form of the exercise waives any objection to the form of the exercise." (*Ibid*.)

In marked contrast, Mr. Wheeler never did anything to suggest that oral revocation was sufficient; he did just the opposite. (8 AA 2116-2118.) Further, in *Collins* there was no doubt that there was, in fact, an unambiguous oral exercise of the option. Here, however, Judge Huber found that "[t]he clarity of this oral notice is disputed by Wheeler who testified that he was told by Towery that he (Towery) did not know what Beck planned to do." (Exhibit Tab 119, 22 AA 4946:11-13.)

In any event, section 1501 does, in fact, require that there be intent to waive. For example, *Sanguansak v. Myers* (1986) 178 Cal.App.3d 110, holds that section 1501 is designed to protect debtors from suffering harm at the hands of creditors who "*intentionally* fail to demand proper tender." (*Id*. at p. 1117, emphasis added.) Whatever else Judge Huber's Statement of Decision may or may not have found, it was explicit in finding that Mr. Wheeler never intended to waive his right to written notice of revocation. (Compare RB 48-52 [discussing alleged irrelevance of intent under § 1501] with Exhibit Tab 119, 22 AA 4947:15-23 [finding no intent to waive on Mr. Wheeler's part].)

Finally, SVLG makes no argument and cites no authority disputing Beck Inc.'s showing that there was no basis for the trial court's conclusion that Mr. Wheeler could have been found estopped under section 1501 from asserting a lack of written notice. (Compare AOB 54-55 with RB 48-52.)

Section 1442. The Respondent's Brief's lengthy attempt to demonstrate that applying Civil Code section 1442 would have led to reversal of the *Wheeler* judgment (RB 53-57) nowhere addresses Beck Inc.'s key argument on this point: That there was never any question about how to interpret the requirement of written notice, so Beck Inc. never held any contractual right that was subject to a forfeiture analysis. (See AOB 52-54.) Section 1442 was thus always irrelevant to any issue in *Wheeler*.

Rather than confront this issue head on, SVLG instead seeks to finesse it by treating Judge Huber's Statement of Decision as if *the decision itself* somehow violated section 1442 because *it* supposedly created a forfeiture. (See RB 53, heading II.C.3.b(iv)(2) ["Judge Huber's Decision mechanically effected a forfeiture"].) This makes no sense. Section 1442 applies only to contract provisions, not to judicial decisions—it is a rule of interpretation. There was nothing to interpret here. The revocation clause's requirement of a writing was unambiguous, and Judge Huber was powerless to interpret it out of existence.

No reversal was ever remotely possible on the basis of section 1442. Rather, the rule that governed Beck Inc.—and any judge interpreting the agreement, including Judge Huber and any court reviewing his decision—was this: "Wise or not, a deal is a deal." (*United Food & Commercial Workers Union v. Lucky Stores, Inc.* (9th Cir. 1986) 806 F.2d 1385, 1386.)

CONCLUSION

Don L. Beck Associates, Inc.'s malpractice suit against Silicon Valley Law Group is not barred by the statute of limitations or a failure to prove causation. The judgment should be reversed and the cause remanded for a trial on the issues of duty, breach, causation and damages.

Dated: August ___, 2009

Respectfully submitted,

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Certificate of Compliance (Word Count)

Pursuant to rule 8.204(c)(1) of the California Rules of Court, I certify that the text of the foregoing Appellant and Cross-Respondent Don L. Beck Associates, Inc.'s Reply Brief, including footnotes and headings, contains 11,982 words, as calculated by the computer program with which the brief was created, and I certify that the text, headings, and footnotes are in 13-point Times New Roman typeface.

DATED: August ___, 2009 McGrane Greenfield LLP

By:___________________________
William McGrane
(S.B.N. 057761)