

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FOURTH APPELLATE DISTRICT
DIVISION THREE

Adam Bereki)	
Plaintiff and Appellant)	Court of Appeal No. G055075
)	
vs.)	
)	(Superior Court No. 30-2015-00805807)
)	
Gary Humphreys and Karen Humphreys)	
Defendants and Respondents)	
)	
)	
)	

OPPOSITION TO APPELLANT'S MOTION
TO CONSIDER NEW EVIDENCE

Appeal from a Judgment of the
Orange County Superior Court
Honorable David Chaffee, Judge

WILLIAM G. BISSELL
State Bar #93527
14 Corporate Plaza Drive, Suite 120
Newport Beach, CA 92660
Telephone: (949) 719-1159
Attorney for Defendants/ Respondents
GARY HUMPHREYS and
KAREN HUMPHREYS

Respondents Gary Humphreys and Karen Humphreys, in opposition to Appellant's motion to consider new evidence, submit the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

APPELLANT BY HIS MOTION SEEKS TO CONVERT THE APPELLATE COURT INTO A TRIER OF FACT.

As Stated in Sminia v. Department of Water & Power (1931), 119 Cal. App. 428, "... (former CCP § 956a and now CCP § 909) was not intended to convert the appellate courts into triers of fact, nor to abrogate the general rule that the findings of the trial court founded upon substantial evidence are conclusive on appeal; and an appellate court is not vested by the statute with absolute power to retry a case de novo as a trial court of original jurisdiction..."

Code of Civil Procedure section 909 does not apply where the production of original evidence is sought in the appellate court and the purpose of its production is to lead to a reversal of the cause and entry of a different judgment, nor can the appellate court pass on the credibility of a witness who testified at the trial. Helmer v. Helmer (Cal. App. Sept. 22, 1948), 87 Cal. App. 2d 682.

Despite the very clear limitations on the use of C.C.P. §909 as outlined in the above cited cases and many others holding for the same proposition, what Appellant seeks through his pending motion is to introduce, at the appellate level, purportedly new evidence ostensibly in conflict with evidence introduced at trial, have this Court weigh the "new" evidence against the conflicting evidence and render a judgment. Appellant's request in effect asks this Court to act outside its purview of authority and to usurp the authority of the trial court.

II.

C.C.P. §909 IS NOT TO BE UTILIZED TO WEIGH CONFLICTING EVIDENCE

It is long established, and, as the court in Logoluso v. Logoluso (Cal. App. 5th Dist. 1965), 233 Cal. App. 2d 523 held, it was never intended that the appellate court should utilize authority vested by C.C.P section 909 to make determinations of fact from conflicting evidence presented to the trial court. Only where there is no conflict in evidence and where no conflicting inferences can be drawn does the trial court's finding amount to conclusion of law not binding on a reviewing court. Industrial Indem. Co. v. Golden State Co. (1953), 117 Cal. App. 2d 519. Appellant here seeks to "introduce", at the appellate level and have this Court weigh, evidence which is purportedly in conflict with evidence introduced at trial, contained in the record on appeal and cited in Respondent's brief. Evidence which, although existing and available at the time of trial, was ignored by Appellant. In so doing Appellant's aim is to simply retry the case in the Court of Appeal on grounds which would not support a motion for new trial if appropriately brought in the trial court Estate of Schluttig (1950), 36 Cal. 2d 416. Once again, this would require this Court to impermissibly weigh and rule on conflicting evidence which of course is the sole purview of the trial court.

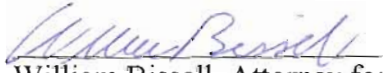
III.
THE "EVIDENCE" WHICH IS THE SUBJECT OF THE
INSTANT MOTION COULD HAVE BEEN PRODUCED AT TRIAL

A motion to produce additional evidence before an appellate court will be denied where the evidence sought to be introduced could have been presented on the trial of the case and no facts are shown to excuse the failure to produce such evidence at trial. Baker v. Ferrel (1947) 78 Cal. App. 2d 578. Appellant's motion is titled "Motion to Consider New Evidence". However, with the exception of the invoice from Suretec Insurance (proposed Exhibit A-1 to Appellant's motion, the relevancy of which is questionable in the extreme) there is nothing new about any of the evidence Appellant now seeks to introduce. Each of the offered documents comprising Appellants "new" evidence (again, with the exception of Exhibit A-1) existed at the time of trial and no showing of any kind has been made to attempt to excuse or explain why the documents were not made a part of Appellant's case at trial. As to the testimony of Mr. Overly offered as a declaration (proposed Exhibit A-2), there has been no showing as to why that testimony could not have been given by Mr. Overly at trial.

For the reasons set forth above, Respondent's respectfully request that Appellant's motion to consider new evidence be denied.

Respectfully Submitted

Date: March 7, 2018


William Bissell, Attorney for
Respondents Gary Humphreys and
Karen Humphreys

CERTIFICATION OF SERVICE & FILING

I, William Bissell, certify:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the within action. My business address is 14 Corporate Plaza Drive, Suite 120, Newport Beach, CA 92660.

On March 7, 2018 I served the **Respondent's Opposition to Motion to Consider New Evidence** ,in this matter by depositing a copy of thereof in the United States mail in Newport Beach, Orange County, California, in a sealed envelope, with postage fully prepaid, addressed to:

J. Scott Russo, Esq.
Russo & Duckworth LLP
9090 Irvine Center Drive, 2nd Floor
Irvine, CA 92618

Attorney for Plaintiff The Spartan Associates and Cross-Defendant Suretec Insurance Company

Carlos E. Sosa Esq.
Hausman & Sosa LLP
20750 Ventura Blvd
Ste 105
Woodland Hills, CA 91364-6646

Attorney for Cross-Defendant Old Republic Insurance Company.

On March 7, 2018 I further served Respondent's Brief electronically on Appellant Adam Bereki by transmitting the brief to Appellant at:

abereki@gmail.com

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on March 7, 2018, at Newport Beach, California.


William Bissell

STATE OF CALIFORNIA

Court of Appeal, Fourth Appellate District Division 3

**PROOF OF
SERVICE**

(Court of Appeal)

Case Name: **Bereki v. Humphreys et
al.**

Court of Appeal Case Number: **G055075**

Superior Court Case Number: **30-2015-00805807**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **wbissell@wgb-law.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type		Document Title	
OPPOSITION - OPPOSITION TO PETITION		opposition to motion to consider new evidence	
MISCELLANEOUS - ADDITIONAL DOCUMENTS		Respondents Transmission of Trial Exhibits	

PERSON SERVED	EMAIL ADDRESS	Type	DATE / TIME
Adam Bereki Adam Bereki Pro Per	abereki@gmail.com	e-Service	3/7/2018 11:02:43 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

--

Date

/s/William Bissell

Signature

Bissell, William (93257)

Last Name, First Name (PNum)

Law Office of William Bissell

Law Firm