In the

Court of Appeal of the State of California

SECOND APPELLATE DISTRICT
DIVISION FIVE

B293641

RANDALL DOUTHIT,
Petitioner and Respondent,

v.

PATRICE JONES,
Appellant.

APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE MARK A. JUHAS · CASE NO. BD469787

RESPONDENT'S BRIEF

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Court of Appeal

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State of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: B293641

Case Name: Randall Douthit v. Patrice Jones

☑ There are no interested entities or parties to list in this Certificate per California Rules of Court,

☐ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
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/s/ David R. Carpenter
Signature of Attorney/Party Submitting Form

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INTRODUCTION

After Randall Douthit ("Randy") and Patrice Jones ("Patrice") separated in 2007, their dissolution proceedings resolved largely in Randy's favor. So Patrice fabricated a new dispute to extract more money: she supposedly found a computer CD-ROM containing a document, called a "treatment," that allegedly described the idea for a current television show. The document bore a cover page stating that it was "[c]reated by Randy Douthit" and dated "2005," during the marriage. Patrice thus claimed the treatment was an omitted community asset.

The central dispute at trial involved the treatment's authenticity and whether it was actually created during the marriage. After several days of testimony, the superior court issued a detailed Statement of Decision rejecting Patrice's claim. The record overwhelmingly supports the court's conclusion:

- Randy testified, consistently with other circumstantial evidence, that he did not create or work on the treatment.
- The treatment could not have been truly dated because it proposed a script that lifted text verbatim from an article published in *2008—after* the marriage.
- Patrice was not credible and her evidence was unreliable. For example, she and her forensic computer expert inexplicably produced *two different versions* of the treatment allegedly from the same CD-ROM, when the CD-ROM had only one file. While Patrice relied on the CD-ROM's metadata to show its creation date, her expert admitted that the metadata easily could be manipulated.

Facing these and other adverse factual findings, Patrice's appeal tries but fails to show any legal error. The trial court did not err by asking whether Randy "created" the treatment because that was *Patrice's theory* for why the treatment was community property. Moreover, the court found that the treatment was created *after* separation regardless of who authored it, and thus it could not be community property under any framing. The court also properly allocated the burden to Patrice, but as it observed, the issue is "academic": the court explicitly found that, even if the burden shifted to Randy, he met it.

Ultimately, Patrice has nothing to argue but a baseless sufficiency-of-the-evidence challenge. She has waived that challenge by failing to provide a fair summary of the evidence, including by failing to address a key exhibit discussed in the Statement of Decision and by distorting the evidence and the grounds for the trial court's findings. Patrice also ignores the standard of review by asking this Court to disregard the trial court's adverse credibility determinations, to re-weigh the evidence, and to draw competing inferences in her favor. Substantial evidence supports the trial court's order, which should be affirmed.

STATEMENT OF THE CASE

This section reviews (I) the procedural background leading up to trial, (II) the evidence presented at trial, and (III) the trial court's statement of decision and subsequent proceedings.

I. Procedural Background

A. The Marriage and Dissolution

Randy and Patrice married in 1995. (I AA 344.) Since before their marriage, Randy was a successful television producer. During the marriage, Randy had a company called Douthit Productions, Ltd. ("DPL"), through which he loaned his services to direct and produce the *Judge Judy* television show, starring Judge Judith Sheindlin. (I AA 48-49.)

The parties separated in July 2007. (I AA 344.) In 2013, the trial court entered a judgment dissolving the marriage and resolving issues of property and support. (I AA 342-361.)

Patrice appealed, and on August 6, 2015, this Court affirmed on all points except for the valuation of DPL's furniture and equipment. (*In Marriage of Douthit and Jones* (Aug. 6, 2015, B254719, 2015 WL 4661496), at pp. *11, 16.) Among other things, the Court agreed with the trial court's decision to award substantially less spousal support than Patrice wanted, and it confirmed Randy's award of $1.5 million from his post-separation development deal with Judge Sheindlin. (*Id.* at pp. *5-7.)

B. Patrice's Request for Order and Claim That Randy Created the "Legal Eagles" Treatment

Not long after losing her appeal, Patrice filed a request for order dated December 9, 2015 (the "RFO"), claiming to have discovered an omitted asset. (I AA 310-533.) Patrice alleged that a year earlier—in December 2014—her gardener had delivered to her some boxes that allegedly came from Randy's home. (I AA 322.) Patrice asserted that, in one of the boxes, she found a CD-

ROM computer disc with a single computer file—a treatment for a television show idea called "Legal Eagles." (*Ibid.*) The cover page of the treatment attached to the RFO stated "Created by Randall Douthit," followed by the year, "2005." (I AA 322, 363.)

The purported treatment was for a "court show series" with a "legal tribunal comprised of a Judge and 2 attorneys." (I AA 364.) The treatment proposed scripts for two cases: the first would be "a high profile case in the news—repackaged for the show," while the second would be "a new small claims case." (*Id.*)

Patrice alleged that the treatment provided the concept for the current show *Hot Bench*, which first aired in 2014 and which Randy executive produced for Judge Sheindlin's production company. (I AA 315-316, 322-323.) Her RFO sought relief including division of the treatment's value and any residuals as an omitted community asset. (I AA 314-315; see also I RA 33-36.) Patrice later claimed to have found, in boxes she took from a storage unit, additional paper versions of the treatment, also with cover pages purporting that they were "Created by Randy Douthit" and dated either "2005" or "2006." (See *infra* at p. 24.)

In a declaration opposing the RFO, Randy denied creating the treatment or even seeing it prior to the RFO. (I RA 14, 18, 24.) Randy also declared that the concept for *Hot Bench* came from Judge Sheindlin in 2013; he was never credited as a creator or co-creator and had no ownership in it. (I RA 20-22, 24.)[1]

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[1] Indeed, the show concept described in the treatment on the CD-ROM (involving one judge and two young attorneys) bears little resemblance to *Hot Bench* (which features three judges).

Prior to trial, the trial court bifurcated whether the treatments were community property from the issue of damages, including whether the treatments establish an ownership interest in *Hot Bench*. (See I RA 11; II RT B2-B5.) In her pre-trial statement for the first phase, Patrice explained she was entitled to derivative rights "if in fact the Treatments *were prepared by* [Randy]." (I RA 44, emphasis added; see also I RA 49 [alleging that Randy "wrote the Treatments"].) She asserted "**[t]he only issue for trial in this matter is whether the Treatments known as 'Legal Eagles' were prepared by Petitioner, Randall DOUTHIT and therefore** ... **are community property**." (I RA 52, bold in original.) The trial court at the pre-trial conference quoted and adopted Patrice's statement of the issue. (II RT B2-B3.)[2]

II. Evidence Presented at Trial

The trial took place over five days in March, June, and July of 2018. The sections below summarize the testimony and evidence as follows: (A) Patrice's forensic analysis of the CD-ROM and the deficiencies in that evidence; (B) Randy's testimony and evidence that the treatment was not created during the marriage; and (C) testimony regarding the paper versions of the treatment allegedly found in a storage unit.

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[2] This brief generally uses "treatment" and "treatments" interchangeably because the focus of the dispute is the alleged intellectual property interest in the show concept.

A. The Forensic Analysis of the CD-ROM

At trial, Patrice offered her story that, in December 2014, her gardener delivered some boxes to her, and that she later found within one of them a CD-ROM containing the "Legal Eagles" treatment. (II RT 181-186; III RT 205-207, 217-218, 442-443.) In November 2015—nearly a year later—she provided the CD-ROM to a computer forensics expert, Ernest Koeberlein, for analysis. (II RT 22, 24.) Koeberlein provided an unsigned report that Patrice filed as an attachment to her RFO (I AA 325-340), and Patrice subsequently filed a notice of errata to provide a signed but otherwise unchanged copy of the report (II AA 540-558). A version of his report was also admitted as Trial Exhibit 1004. (I AA 294-309.)

At trial, Koeberlein testified about his review of the CD-ROM metadata. (II RT 19-22.) Randy's counsel cross-examined Koeberlein about how easy it would be to manipulate the metadata, and counsel also identified discrepancies between the versions of the treatments that Koeberlein and Patrice proffered for the RFO.

1. Koeberlein's Limited Testimony Regarding the CD-ROM Metadata

At trial, Koeberlein described his process for analyzing the CD-ROM. Upon receipt, he used a write blocker to ensure nothing could be written to the disc when he imaged it. (II RT 24-25, 33.) He then used his forensic image to examine the contents. (II RT 25, 48.)

The CD-ROM contained "one file, one Word document," called "legaleagles.doc." (II RT 26.) The front cover read, "Created by Randy Douthit," and displayed the year 2005. (II RT 26-27.) Koeberlein printed the document. (II RT 27.)

According to Koeberlein, the metadata indicated the Word file was created and saved to the CD-ROM the evening of November 10, 2006. (II RT 27, 31-35.)[3] The metadata did not allow him to confirm the 2005 date shown on the document's cover page. (II RT 40.)

On cross-examination and in response to the trial court's questions, Koeberlein admitted that it would be "quite easy" to manipulate the date/time metadata "if you have the knowledge." (II RT 43-44; see also II RT 49 ["If you know to do it, it's not difficult to do."].) That is because the "date and the time on the CD is dependent on the date and time on the computer" used to burn the CD. (II RT 46 [Koeberlein agreeing with the court's question].) As Koeberlein conceded, if one changed the date and time on the computer before burning the CD-ROM, "you could make it look like [the CD-ROM] was created in 1896." (*Ibid.*) Koeberlein also admitted that, if someone had changed the date and time before creating the document, he would not be able to detect it in his analysis of the CD-ROM metadata. (II RT 50-51.)

Koeberlein thus admitted that he had "no idea … when the actual document that [he] looked at was prepared." (II RT 43.)

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[3] The time-stamp was the morning of November 11, 2006, Greenwich Mean Time, which would be the evening of November 10, 2006, Pacific Time. (II RT 34-35.)

He agreed that he had "never been given the assignment of providing a definitive opinion as to when this document was actually created." (II RT 45.)

The CD-ROM metadata had little other useful information to support Patrice's claim. Koeberlein did not examine the CD-ROM or call its manufacturer to determine its manufacture date. (II RT 46.) Koeberlein did not know whether the document was created on a Mac or PC and did not "know how the computer was logged onto from which the CD was created." (II RT 28, 30.) Nor could he confirm who authored the document, although the Word metadata showed the file's author as "Patrice Jones" and that it was "last edited by Patrice Jones." (II RT 29-30, 25-36.)

To provide any further opinion, Koeberlein would have needed the original computer used to create the Word document and CD-ROM. (II RT 40, 43, 45, 51.) Randy testified, unsurprisingly, that he no longer had the computers that he used in 2005-2006; they were "dead." (IV RT 646-647.) Koeberlein, meanwhile, never asked Patrice whether she had the hard drive or computer used to create the document. (II RT 42-43, 44-46.)

2. Discrepancies in the Treatments that Koeberlein Attached to His Original Report and that Patrice Proffered

Besides the obvious limitations in his testimony, Koeberlein's report raised a serious problem for Patrice. With the RFO, Koeberlein attached an eight-page version of the treatment that differed in small but material ways from the

seven-page version Patrice attached. (Compare I AA 333-340 with I AA 363-369; see also IV RT 696-703.)[4]

At trial, Koeberlein acknowledged there were differences but wondered "if that's just the way it got printed, converted to a PDF, whatever." (III RT 352.) As reflected in the Table below, the differences were not mere formatting; they included fixes to typographical errors, word omissions, and changes in capitalization—i.e., edits to the text itself.

Table 1: Text Differences between Treatments in the RFO
(Differences reflected by **bold underline** *type)*[5]

Koeberlein Report in RFO	Patrice's Exhibit B in RFO
The **j**udge will render the final verdicts. (I AA 334, ¶ 4)	The **J**udge will render the final verdicts. (I AA 364, ¶ 4)
In 2003, Connecticut bride-to-be Maureen Murphy **stated** planning (I AA 335, first full ¶.)	In 2003, Connecticut bride-to-be Maureen Murphy **started** planning (I AA 365, first full ¶.)
Maureen Murphy bride suing for … 15**k** in emotional distress (I AA 335, ¶ 3.)	Maureen Murphy bride suing for … 15**K** in emotional distress (I AA 365, ¶ 3.)

[4] Patrice's Notice of Errata—which provided a signed Koeberlein report—attached the same eight-page version of the treatment that Koeberlein attached to his initial, unsigned report. (II AA 540, 551-559.) The RFO and Notice of Errata were admitted into evidence as Exhibits 22 and 23. (IV RT 590.)

[5] In addition, there are differences in paragraph spacing and pagination in the treatment at I AA 334, 337, as compared to I AA 364, 366.

… Jennifer waited to "fire" her **form** being a bridesmaid (I AA 338, ¶ 1.)	… Jennifer waited to "fire" her **from** being a bridesmaid (I AA 367, ¶ 1)
A couple **of** weeks later (I AA 338, ¶ 4)	A couple weeks later (I AA 367, ¶ 4.)
D **W**itness – Ashley (I AA 367, last heading.)	D **w**itness – Ashley (I AA 338, last heading)
She totally dropped the ball on the Bridal **S**hower (I AA 367, last ¶.)	She totally dropped the ball on the Bridal **s**hower (I AA 338, last ¶.)
Closing argument**s** (I AA 368, second heading.)	Closing argument (I AA 339, second heading.)
Not only am I out a lot of money (I AA 368, ¶ 1.)	Not only am I out **of** a lot of money (I AA 339, ¶ 1.)

These discrepancies had no explanation. Koeberlein confirmed there was only one document on the CD-ROM. (II RT 26.) Patrice testified that, when she filed the RFO in December 2015, she had only one version of the treatment—the one she had printed from the CD-ROM. (IV RT 588, 590-591.) If Patrice's story were true and her version and Koeberlein's version both came from the CD-ROM, they should have been identical. But they were not.[6]

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[6] Compounding the confusion, the Appellant's Appendix includes a third version of the Koeberlein report that (a) was unsigned and (b) included a seven-page version of the treatment that differs from what Koeberlein attached to his previously filed reports. (See I AA 302-309 [Trial Exhibit 1004].)

B. Randy's Testimony and Evidence That the Treatment Was Not and Could Not Have Been Created During the Marriage

Randy also presented affirmative testimony and evidence that the treatment was not authentic and could not have been created during the marriage.

1. Randy Denies Creating the Treatment

Randy testified that the "Legal Eagles" treatment was not his. (II RT 143-144.) He had never written such a show idea or worked on the treatment. (II RT 144.) He had never even seen the treatment until he was served with Patrice's RFO. (IV RT 636.) There was no testimony from Patrice that she had ever discussed "Legal Eagles" with Randy, even though Patrice was also in the entertainment industry. (See II AA 772-773.)

Although Patrice's counsel tried to connect the "Legal Eagles" treatment to *Hot Bench*, Randy explained that "there was never a treatment for Hot Bench." (IV RT 642.) Randy was not involved in pitching *Hot Bench*, which was not developed until around 2013 and did not air until 2014. (IV RT 638-639.)

2. The Treatment Derived One of Its "Cases" from an Article Published in 2008, *After* the Marriage

As noted above, the treatment provided scripts for two cases, including one described as a "high profile case in the news." (I AA 363.) Called "Lord of the Weddings," that first case featured bride-to-be Maureen Murphy suing a wedding venue for cancelling at the last minute. (I AA 365-366.)

The script was based on *Maureen Murphy v. Lord Thompson Manor, Inc.*—an actual Connecticut case that involved a colorful appellate decision issued in January 2008, and that was featured in a February 14, 2008 *Insurance Journal* article available online. The trial court took judicial notice of the Connecticut Superior Court file, the Connecticut appellate decision, and, to a limited extent, the article. (I RA 65-226; III RT 320-322.) Ultimately, the court admitted the article into evidence as Exhibit 16 after Randy's counsel laid a foundation establishing its authenticity and its initial publication in 2008. (IV RT 476-516; II RA 366-367.)

From those materials, it was apparent that much of the "Lord of the Weddings" script (allegedly created in 2005 or 2006) was copied verbatim from the 2008 article and included quotes from the 2008 appellate decision:

Table 2: Lines from the Treatment,
Compared to the 2008 *Insurance Journal* Article
*(Identical language in **bold**)*

"Legal Eagles" Treatment	***Insurance Journal* Article**
… Maureen Murphy and Jason Martin, are suing … for their deposit and 15 K for emotional distress for **a "Shakespearean drama of confusion and lost opportunities" that resulted in her having to move her wedding location two years after booking it.** (I AA 10, 365; see also I AA 18, 26.)[7]	A Connecticut appeals court has affirmed a … ruling that awarded a bride $15,000 for emotional distress following **a "Shakespearean drama of confusion and lost opportunities" that resulted in her having to move her wedding location two years after booking it.** (II RA 366 [quoting 2008 appellate decision, II AA 612, I RA 169].)[8]

[7] Trial Exhibit 1001 (I AA 10-11) and Exhibit B to Patrice's RFO (I AA 365-366) are identical versions supposedly taken from the CD-ROM. The "see also" cites are to the alleged paper versions of the treatments (Trial Exhibits 1008-1011), discussed further below at pp. 24-26, 42.

[8] Because the Appellant's Appendix has a marked up version of the Connecticut case materials, the Respondent's Appendix includes a clean copy, including of the appellate decision.

[Person playing Maureen Murphy:] I was looking for a venue that could hold **a three-day wedding bash - Friday night rehearsal, Saturday evening reception and after-party and a Sunday brunch -** for **the weekend of Sept. 10, 2005.** (I AA 10, 365; see also I AA 18, 26, 34, 42.)	Murphy visited the Manor with her mother … in search of a location that could accommodate **a three-day wedding bash - Friday night rehearsal, Saturday evening reception and after-party and a Sunday brunch -** on **the weekend of Sept. 10, 2005.** (II RA 366.)
Less than a year later, letters, unreturned phone calls and unanswered e-mails were traded between the Manor's owner, Andrew Silverston, and Powers. Confusion ensued, as did numerous unreturned letters, phone calls e-mails [sic] **by both parties.** (I AA 10, 365; see also I AA 18, 26, 34, 42.)	**Less than a year later, letters, unreturned phone calls and unanswered e-mails were traded between the Manor's owner, Andrew Silverston, and Powers. Confusion ensued, as did numerous unreturned letters, phone calls e-mails** [sic] **by both parties.** (II RA 366.)
After calling numerous sites, I **was able to find** only **one venue with availability, but had to hold the wedding in the morning and the reception could last only until 4 o'clock in the afternoon**. (I AA 11, 366; see also I AA 19, 27, 34, 42.)	"**After calling numerous sites,** the plaintiff **was able to find one venue with availability, but** she **had to hold the wedding in the morning and the reception could last only until 4 o'clock in the afternoon.**" (II RA 366 [quoting 2008 appellate decision, II AA 616].)

My **wedding that took place was a far cry from the weekend celebration** that we had **originally had planned**! **These events were the most stressful in** my **life**! (I AA 11, 366; see also I AA 19, 27, 34, 42.)	The **wedding that took place** on that date **was a far cry from the weekend celebration** the plaintiff **originally had planned**. The plaintiff testified that **these events were the most stressful in** her **life** …. (II RA 366.)
[Defendant:] We **never received a deposit, nor affirmation that the couple had reserved the location, and** so we **booked another wedding.** (I AA 11, 366; see also I AA 19, 27, 35, 43.)	The Manor claimed it **never received a deposit, nor affirmation that the couple had reserved the location, and** subsequently **booked another wedding** on the date. (II RA 366.)
[Mother Sandra Powers:] My **daughter** was **devastated** ... (I AA 11, 366; see also I AA 19, 27, 35, 43.)	Powers described her **daughter** as **devastated**. (II RA 366.)

As Randy's counsel argued and showed at trial, the treatment did not only include quotes to the 2008 appellate decision; the treatment borrowed language that was uniquely found in the 2008 article, and that was in neither the appellate decision nor the superior court file. (See, e.g., IV RT 710-711; II AA 591-606, 609-623; I RA 65, 73-77, 89-104, 120-121, 147-162, 165-179, 210, 219.) Randy's counsel thus argued that the

treatment could not have been created in 2005 or any time prior to the parties' separation in 2007. (IV RT 708-711.)

C. Testimony and Evidence Regarding Paper Versions Allegedly Found in a Storage Unit.

Patrice also claimed that, in November 2016—nearly a year after filing her RFO based on the CD-ROM—she found additional, paper copies of the "Legal Eagles" treatment. (III RT 222-232, 239, 258-259, 285-286, 291-292, 295, 361-362, 370-371, 374-377.) Patrice allegedly was going through old boxes in a storage unit; after taking some of the boxes home, she allegedly found the paper copies in a folder with the handwriting, "Randy's Show Ideas." These additional copies all had similar cover pages stating "Created by Randy Douthit" and dated either 2005 or 2006. (I AA 16-47 [Trial Exhibits 1008, 1009, 1010, 1011].)

Randy's counsel disputed the authenticity of the paper copies for many of the same reasons as the CD-ROM version. For example, the paper copies also copied much of their text verbatim from the 2008 *Insurance Journal* article. (Compare II RA 366 with I AA 18-19, 26-27, 34-35, 41-43; *supra* at pp. 21-24 & tbl. 2.) Randy also denied ever seeing the paper copies or the "Randy's Show Ideas" folder; indeed, he said that the handwriting on the folder was not even his. (II RT 144-145.)[9]

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[9] Patrice proffered a friend-of-a-friend, Chantelle Vachon, as a purported witness to the discovery of the paper copies. (II RT 55-56, 61, 70, 80.) Although Patrice initially proffered that *Vachon* discovered the paper treatments (I RA 38), at trial Patrice claimed to have discovered them herself (III RT 222-232, 239,

The parties also spent a substantial amount of trial time addressing the contents of the storage unit and who had access to it. The unit was rented in the name of Patrice's gardener, Isidro Castro, who had previously worked for both Patrice and Randy (the same gardener who also found the boxes allegedly containing the CD-ROM). (See II RT 150-154.) Castro testified that Randy's assistant had asked him to store some of Randy's boxes in the unit. (II RT 104-105-106, 119-120, 124.) But Castro—who had 40 clients—stored boxes there for many clients, including Patrice. (II RT 106, 114, 120; see also III RT 370.) Castro also testified that he believed Patrice had been to the unit, and that sometime in 2016, he had given her the key to the unit, which she never returned. (II RT 112-113, 121-123.)

Patrice's testimony regarding the storage unit was frequently equivocal and inconsistent. For example, Castro had testified that *he* had paid for the storage unit. (II RT 114, 121.) But Patrice—after initially professing no opinion on who paid for the unit—was confronted with bank statements to the contrary and ultimately admitted that *she* had been paying for the unit since 2008 and could have accessed it any time upon request. (III RT 400-401; see also III RT 378-396; II RA 356, 362 [Patrice's

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258-259, 285-286, 291-292, 295, 361-362, 370-371, 374-378; see also IV RT 683 [admission by Patrice's counsel]). On cross-examination, Vachon was thoroughly impeached, as she could not recall various details, admitted to going over her testimony with Patrice and Patrice's counsel, and testified that Patrice paid for her to fly out from Florida to testify. (II RT 69, 74-75, 87, 92-93.)

2012 income and expense declaration, listing $100 monthly figure for LA Security Storage System]; III RT 423-424 [Patrice admits the $100 payment was for unit 303].) She also admitted that Randy maintained a separate storage unit for his production company (DPL) and documents that he controlled. (III RT 403, 422-423; see also II RT 158, 161, 164-165 [testimony from Randy's bookkeeper regarding the storage units].)

The parties agreed to the appointment of a referee to inventory nine boxes obtained from the storage unit. (III RT 297-299; II AA 642-719; I RA 60-64.) Overall, the inventory reflected contents ranging from 1990 to 2013, plus 2016. (II AA 642, 644-718.) Indeed, the boxes included multiple papers from throughout the month of November 2016—*after* Patrice said she had removed the boxes from the storage unit. (See II AA 643, 712 [folder with 4 receipts dated 11/2016 among records from 1999-2000]; II AA 715 [Patrice's 11/14/2016 small-claims pleadings]; II AA 642, 718 [Patrice's 11/15/2016 medical receipt]; see also IV RT 575-577, 595-597 [Patrice testifying that, after removing the boxes from the storage unit, she "accidentally" or "mistakenly" placed various personal documents in them].) The inventory also reflected other documents that belonged to Patrice and post-dated the separation. (See, e.g., II AA 668-670 [documents from 2010 from Patrice's divorce attorneys]; V RT 797.)[10]

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[10] Between Randy's filing of the petition and the concluding of Patrice's omitted-asset RFO, she had thirteen sets of attorneys, as reflected in her substitutions, associations of counsel, and pro

III. The Trial Court's Statement of Decision and Subsequent Proceedings

A. Statement of Decision

On July 24, 2018, the court entered its final statement of decision. (II AA 770-775.) It summarized Patrice's claim as being that Randy "created a treatment during [the] marriage … [that] ultimately resulted in the TV show, Hot Bench." (II AA 771.) The court recognized that "any property acquired during marriage is presumptively community property. This also applies to intellectual property, if it is created during marriage …." (*Ibid.*) The court explained that, since Patrice brought the RFO, she had the burden of proof. (II AA 771.)

The court observed that "[t]here was no direct evidence presented at any time during the trial as to when the treatment was created." (II AA 772.) The court then considered Patrice's allegations and evidence, as well as the competing evidence, and found numerous flaws in her case, including the following.

1. "Petitioner [Randy] categorically denied creating the 'Legal Eagles' treatment." (II AA 772.) The court explained that, while Randy performed services for Judge Sheindlin's company—which made court-related shows—Patrice "never established Randy's role in creating show ideas." (*Ibid.*) The court cited

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hac vice orders dated September 27, 2010, January 5, 2011, June 7, 2011, October 5, 2011, April 4, 2014, October 23, 2014, December 9, 2015, January 19, 2016, April 13, 2016, January 20, 2017, February 6, 2017, April 5, 2017, February 6, 2017, April 5, 2017, March 5, 2018, August 8, 2018, September 7, 2018, and October 12, 2018.

circumstantial evidence that supported Randy, including that the treatment was supposedly created in 2005 but *Hot Bench* was not produced until long after, and that there was no testimony that Randy had ever discussed the show concept with Patrice. (See II AA 771-772, 773-774.)

2. The court considered that paper copies of the treatment were found in storage boxes among other similarly dated documents. It agreed "that this *tends* to give credence to [Patrice's] position." (II AA 772, emphasis added.) But it did not give that evidence much weight because "these storage boxes were hardly maintained in a pristine evidentiary manner," they were under various people's control (including Patrice's), and "numerous people had access to them which allows documents to get mixed in at random." (II AA 772-773.)

3. The court recognized the problem that the treatment Koeberlein extracted from the CD-ROM—as attached to his report in the RFO and to his signed report—differed from the treatment that Patrice attached to the RFO. (II AA 773 ["Inexplicably, these two treatments differ in slight but material ways. Thus, contained within the RFO in the court file are two 'Legal Eagles' treatments which are different."].) As the court observed, "[t]his makes no sense at all" because there was "one CD-ROM with one Word file on it." (*Ibid.*) The differences, the court concluded, are "simply not possible absent some manipulation of the text itself," and that gave "the court pause about the respondent's [Patrice's] credibility." (*Ibid.*)

4. The court further found that "the language similarities between the 2008 Insurance Journal article (exhibit 16) and the 2005 treatment cannot be ignored." (II AA 774.) The court found it "unlikely" that the wording was repeated by "random means." (*Ibid.*)

The court concluded that, "[i]n light of all of the evidence, the court is not convinced, even by a preponderance, that the treatment was actually created in 2006, or earlier." (*Ibid.*) It found that even if Randy "created the treatment (although he denies it) … it seems far more likely, in light of all the evidence[,] that it was created *after* the date of separation." (*Ibid.*, emphasis added [further citing Randy's argument that Patrice "found a treatment in one of the boxes back dating it, making it appear to be a community asset"].) The court explained that, under such scenarios, "the treatment is not a community asset and respondent [Patrice] would have no interest in it." *(Ibid.*)

Hence, the court found Patrice "failed to carry her burden of proof." (II AA 774.)

B. Denial of Patrice's Motion for New Trial

Patrice moved for a new trial, which Randy opposed. (II AA 720-755, 892; I RA 307-332.) On October 5, 2018, the court denied Patrice's motion and entered its formal order denying her RFO. (II AA 760-764, 767-775.) The court directly addressed and rejected each of the motion's grounds while confirming the bases for its decision. (II AA 760-762.)

1. Patrice claimed the court "failed to address" Randy's "non-disclosure of critical assets" and "ignored" his "continuing

obligation" and failure to "disclose the treatment." (II AA 760.) The court responded that, unless it found the treatment to be a community asset, it had no concern about its disclosure, adding that Randy had denied its creation during marriage. (*Ibid.*)

2. Patrice argued the court "incorrectly imposed the burden of proof" on her for the entire case, and that Randy should have had the burden based on his alleged exclusive control of "the key boxes of documents" after separation and alleged spoliation of "the computer on which the subject treatment was prepared." (II AA 760.) The court explained that Randy did not exclusively manage the boxes post-separation. (*Ibid.*) It also found that there was no spoliation because Randy had no obligation to preserve his old computers, and there was no evidence Randy "destroyed the computer to defeat this or any other of [Patrice]'s claims." (*Ibid.*)

3. Patrice argued that she was entitled to a presumption that the treatment was truly dated under Evidence Code section 640, and that the court failed to give sufficient credit to her forensic expert's analysis of the CD-ROM. (II AA 760-761.) The court responded that "it may be of academic interest only as to where the burden lies," and that the presumption carried little weight on the facts of this case. (II AA 761.)

The court emphasized that "[t]he computer forensic expert could not establish when the treatment was created" and that "[t]he CD-ROM is not reliable or credible." (II AA 761.) The court referred to Koeberlein's concession that the treatment's

date and time could be manipulated based "on how the computer clock was set up." (*Ibid.*) The court continued:

> [T]he fact that there are two different versions printed from one file is simply not credible, reliable or explainable. This irrefutable fact throws the entire credibility of all the computer evidence into question. This credibility determination adversely effects [Patrice] as at all times in the matter, she had control of the CD-ROM.

(*Ibid.*)

4. The court also considered that "4 other copies of the treatment were found in the boxes bearing similar dates." (II AA 761.) It assigned little weight to that fact because "[t]hese boxes passed through several hands at different times." (*Ibid.*; see also II AA 762 [observing that not all of the documents were dated during the marriage and that "the boxes were not maintained in a pristine evidentiary state"].)

In a key passage, the court made it clear that—whoever the bore the burden—the evidence did not show that the treatments were community property and that, if the burden shifted to Randy, he carried it:

> To the extent that [Patrice] had the burden to establish the treatments as community property, she failed to carry it. If at any point the burden shifted to [Randy], he carried his burden of demonstrating that the treatments were not created during the marriage and thus are not a community property asset.

(II AA 761.)

STANDARD OF REVIEW

"Generally, appellate courts independently review questions of law and apply the substantial evidence standard to a superior court's findings of fact." (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461-462.) "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of ("IRMO") LaMusga* (2004) 32 Cal.4th 1072, 1093 [quotation omitted].) The appellate court will imply all findings necessary to support the judgment where, as here, the Statement of Decision resolves all of the controverted issues, and the appellant did not object to the statement as deficient or ambiguous. (*IRMO Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)[11]

The substantial evidence standard "applies to both express and implied findings of fact made by the superior court in its statement of decision." (*SFPP*, *supra*, 121 Cal.App.4th at p. 462.) This Court must "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Ibid.* [quotation omitted].) It does not re-assess the credibility of witnesses or re-

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[11] The trial court found (and Patrice does not dispute) that Patrice's request for a statement of decision was improper because it propounded 111 interrogatories and merely attempted to re-argue the case. (II AA 771.) Patrice did not lodge objections to any alleged ambiguities or omissions in the Statement of Decision beyond the arguments raised in her motion for new trial, which the court addressed in detail. (II AA 760-762.)

weigh the evidence, as "that is the province of the trier of fact." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630; see also *Hicks v. Reis* (1943) 21 Cal.2d 654, 659 ["The trier of the facts is the exclusive judge of the credibility of the witnesses."]; *IRMO Greenberg* (2011) 194 Cal.App.4th 1095, 1099 ["The trier of fact is the sole judge of the credibility and weight of the evidence," quotation omitted].) The "sole inquiry is whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, supporting the court's finding." (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822-823, italics original, internal quotes omitted; see also, e.g., *IRMO Burkle* (2006) 139 Cal.App.4th 712, 728, 736-740 [substantial evidence standard applies to whether any applicable presumption has been rebutted]; *IRMO Dekker* (1993) 17 Cal.App.4th 842, 849 [substantial evidence standard governs characterization of property as community or separate].)

Where, as here, the appellant had the burden of proof at trial and failed to meet it, "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) The appellant's evidence must be "uncontradicted and unimpeached," and "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." (*Ibid.*, quotation omitted.)

ARGUMENT

Patrice's arguments on appeal all fail. First, the trial court did not commit any legal error by focusing on whether the

treatment was created by Randy and/or created during the marriage. That was Patrice's theory of the case, and she offered no other theory for how the treatments could be community property. Second, Patrice's sufficiency-of-the-evidence challenge is baseless. She has waived it by failing to provide a fair summary of the evidence and by omitting key documents—including the *Insurance Journal* article—from her appendix. The trial court's findings are supported by substantial evidence, and Patrice cannot seek reversal by asking this Court to reweigh the competing evidence and disregard the lower court's credibility findings. Third, the trial court correctly allocated the burden of proof, but the issue is immaterial: the court found that even if the burden shifted to Randy, he met it.

Ever since the parties separated twelve years ago, Patrice has attempted to harass Randy with baseless, collateral litigation, including a suit for civil battery that resulted in a defense verdict and a request for a domestic violence restraining order that she then dismissed. (See I RA 228-249, 265-268; IV RT 474, 658-660.) This RFO and appeal reflect her continuing abuse of the judicial system as a means to harass and extort Randy with fabricated allegations. It is time to put an end to the drama. The Court must affirm.

I. THE TRIAL COURT DID NOT COMMIT ANY LEGAL ERROR IN HOW IT FRAMED THE ISSUE.

Patrice is wrong to argue that the trial court somehow erred by framing the issue as whether Randy "created" the treatment. (AOB 37-38.) *Patrice's theory of case* was that Randy

created the treatment during the marriage, thereby making it community property. The trial court cited the correct legal standards, and then properly turned to addressing and rejecting her particular theory. Moreover, the trial court was not focused merely on authorship but on "*when* the treatment was created" (II AA 772, emphasis added), and ultimately found that—whoever wrote it—the treatment was created *after the marriage* (II AA 774). Thus, Patrice failed to prove that the treatment was an omitted community asset under any conceivable framing.

A. Patrice Cannot Claim Error When the Trial Court Was Simply Applying the Law to Her Theory of the Case.

At the beginning of its Statement of Decision, the trial court correctly described the legal issue as whether the treatment constituted community property. (II AA 771.) It cited Family Code section 760 for the rule that "any property acquired during marriage is presumptively community property," and it recognized that this rule "also applies to intellectual property." (*Ibid.*) It then accurately summarized Patrice's claim as being that the treatment was community property *because* it was created by Randy during the marriage. (*Ibid.*)

Patrice herself framed her theory in that way from the outset and throughout the proceedings. In her RFO, she alleged that the treatment "was created by Randy" in 2005 or 2006, and "[a]s such" was community property. (I AA 315, 316.) Her counsel in pretrial proceedings described "the only issue for trial" as whether the treatments were "*prepared by* Petitioner Randall

DOUTHIT and therefore, . . . are community property." (I RA 52, emphasis added, bold omitted.)

Patrice repeated this refrain during trial. On the first day, her counsel confirmed her theory was that the treatment "was created in 2005 … and 2006 by Mr. Douthit" (II RT 12), and she agreed with the court that, if Patrice "created them [after the marriage] in some sort of attempt to defraud the court or [Randy]," then the treatments would not be community property. (II RT 18.) In closing argument, Patrice's counsel again argued the treatments constituted community property because Randy had written them during the marriage. (IV RT 683-684, 687-688 ["We contend that [Randy] wrote the Legal Eagles treatments."]; IV RT 735-736 [asserting that Randy developed "Legal Eagles," which ultimately became *Hot Bench*].)

Thus, the trial court did not err when it weighed the evidence as to whether Randy "created the treatment" and "when the treatment was created." (See, e.g., II AA 772.) The court was simply applying the law—that property acquired by a spouse during marriage is presumptively community property—to Patrice's theory that the treatment reflected community intellectual property because it was created by Randy during the marriage. Indeed, Patrice has failed to identify any other theory that, on the facts here, could establish an "ownership interest" in the treatment (and by extension *Hot Bench*), unless Randy created it during the marriage. (Cf. AOB 13, 39.)

Patrice has also waived any alternative ownership theory because she invited the trial court to frame the issue as it did,

and she has failed to develop any argument or cite any evidence in support of an alternative ownership theory. (See *Graddon v. Knight* (1950) 99 Cal. App. 2d 700, 705 [calling it "axiomatic that a party cannot try his case on one theory and on appeal shift to another theory" that was not presented to the trier of fact]; *People v. Weber* (2013) 217 Cal.App.4th 1041, 1055 [party forfeits argument by failing, on appeal, to provide record citations to where the argument was preserved below]; *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 [same]; cf. *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212 ["Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error."].)

B. The Court Found the Treatment Was Not Created During the Marriage, Which Is Dispositive Under Any Framing of the Issue.

Even if Patrice had presented an alternative ownership theory, her claim still would have failed because the trial court found that the treatment was created after separation, regardless of who created it. In this respect, Patrice's argument on appeal misreads the Statement of Decision. The trial court was not concerned solely or even primarily with *who* created the treatment. It was focused on "*when* the treatment was created" (II AA 772), and whether the evidence purportedly establishing the treatment's date was reliable (II AA 773-774).

That inquiry was proper because the treatment could only be community property if it were created *during* the marriage. (See *IRMO Lehman* (1998) 18 Cal.4th 169, 177 [in assessing

character of property, "[w]hat is determinative is … a single concrete fact—time"]; *IRMO Haines* (1995) 33 Cal.App.4th 277, 291 ["Perhaps the most basic characterization factor is the time when property is acquired in relation to the parties' marital status"]; cf. II RA 341 [Patrice's reply on new-trial motion: "The question at the hearing was whether the treatments were community property, i.e., *when they were written,*" emphasis added].) If the treatment was created only after the separation—e.g., if Patrice found a document and then backdated it—it would not be community property, regardless of authorship. (See Fam. Code, § 771, subd. (a); *IRMO Klug* (2005) 130 Cal.App.4th 1389, 1393, 1396 [upholding denial of omitted-asset motion as to cause of action arising after separation]; *Lehman, supra*, 18 Cal.4th at p. 177; cf. *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 655 ["normal community property law" made all husband's post-divorce Star Trek income his separate property]; *Douthit & Jones*, *supra*, 2015 WL 4661496, at pp. *5-7 [affirming that Randy's post-separation deal was separate property].)

The court concluded that the CD-ROM and the paper versions of the treatment—despite bearing 2005 or 2006 dates—were not credible or reliable evidence. (II AA 773-774; see also II AA 761.) It further found that, even if Randy had created the treatment, it is "far more likely, in light of all of the evidence, that it was created *after the date of separation.*" (II AA 774, emphasis added.) Based on these findings, the treatment could not reflect a community property asset under any framing.

In sum, the court did not err by asking whether Randy "created" the treatment. Even if did, the alleged error was not prejudicial given the additional finding that the treatment was created *after* separation and thus would not be community property in any event. That finding is supported by substantial evidence as explained below, and it is dispositive because this Court "will affirm a judgment or order if it is correct on any theory of law applicable to the case." (*Klug, supra*, 130 Cal.App.4th at p. 1393 [internal quotes omitted]; see *ibid*. ["A trial court decision will be upheld even where it is based on an incorrect rule of law, as long as a sound basis for the decision exists."]; see also *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069 [explaining that legal error does not require reversal unless it is prejudicial and results in a miscarriage of justice].)

II. PATRICE'S "SUBSTANTIAL EVIDENCE" CHALLENGE IS BASELESS.

When, as here, an appellant brings a sufficiency-of-the-evidence challenge, "the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment." (*Boeken v. Phillip Morris Inc.*(2005) 127 Cal.App.4th 1640, 1658.) Appellants must "set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived." (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, emphasis in original.) A "selective discussion of the evidence" does not satisfy an appellant's burden of showing error even under the general substantial evidence standard, and "[i]t necessarily cannot

suffice" when, as here, the appellant must show her evidence "was uncontradicted and unimpeached and of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1164, internal quotation marks, citation, and alteration omitted.)

As explained below, Patrice has waived her sufficiency-of-the-evidence challenge by giving an utterly deficient summary of the evidence and ignoring key exhibits. She also fails to provide a complete statement of the standard of review, which she effectively ignores by disregarding the trial court's credibility determinations and asking this Court to re-weigh competing evidence and draw conflicting inferences in her favor. (See *In re IW*, *supra*, 180 Cal.App.4th at p. 1528 [rejecting appeal that implicitly asked appellate court "to retry the case" and reevaluate competing evidence; citing propositions that "arguments should be tailored according to the applicable scope of appellate review," and "failure to acknowledge the proper scope of review is a concession of a lack of merit"]; see also *IRMO Greenberg*, *supra*, 194 Cal.App.4th at p. 1099 [warning that "sanctions could be ordered for appeals based upon a theory asking to substitute our judgment for that of the trier of fact"].) Even if the Court were to consider Patrice's challenge on the merits, it fails.

A. Patrice Never Adequately Responds to the 2008 Article or the Discrepancies in the Treatments Attached to Her RFO.

The trial court's Statement of Decision and order denying a new trial highlight two critical pieces of evidence: (1) the

uncanny similarities between the treatment (allegedly created in 2005-2006) and the 2008 *Insurance Journal* article; and (2) the inexplicable discrepancies between the treatment Koeberlein attached to his original report and the treatment Patrice attached to the RFO. The trial court found that these issues undermined the credibility of Patrice and her computer evidence (II AA 761, 773) and indicated that the treatment was likely created after separation (II AA 774). Patrice does not fairly summarize the record underlying either finding, and to the extent that she touches on those issues at all, her arguments fail.

1. As shown above, the script for the "Lord of Weddings" case—billed as a "high profile case in the news"—was derived, largely verbatim, from a 2008 article. (See *supra* at pp. 21-24 & tbl. 2; I AA 365-366; II RA 366.) Although the trial court specifically cited the article (Trial Exhibit 16) in its Statement of Decision (II AA 774), Patrice inexcusably omits it from her Appendix. (See Cal. Rules of Court, rule 8.124(b)(1)(B) [requiring appellant to include "any item that the appellant should reasonably assume the respondent will rely on"].)

Patrice also misstates the record by pretending as if the only similarity was one quote—a "Shakespearean drama of confusion and lost opportunities"—from the 2008 appellate decision. (AOB 29, 46-47.) In fact, *multiple passages* in the "Lord of the Weddings" case matched the 2008 article. Although the peculiar "Shakespearean drama" quotation was telling, the similarities went far beyond that one quoted phrase, as Randy's counsel specifically pointed out at trial. (See *supra* at pp. 21-24 &

tbl. 2; see also I RA 73-78; IV RT 710 [Randy's closing argument noting that the treatment contained other language that appeared in the *Insurance Journal* article but not in the Connecticut trial court or appellate court decisions].)[12]

By failing to acknowledge or address the multiple matches to the 2008 article, Patrice has waived her sufficiency-of-the-evidence challenge. Even if the Court were to consider Patrice's responses, they fail.

Patrice argues that two of the four paper versions of the treatment (Exhibits 1010 and 1011) lacked the "Shakespearean drama" quote (see AOB 46), but she ignores that those treatments matched the 2008 article in all the other respects. (Compare I AA 34-35, 42-43, with II RA 366; see *supra* at pp. 21-24 & tbl. 2.) Moreover, the CD-ROM version of the treatment contained the "Shakespearean drama" quote from the 2008 article and appellate decision, and if the CD-ROM version is not authentically dated, that undermines the credibility of Patrice's entire case.

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[12] Moreover, the treatment has quotation marks around the line, "'Shakespearean drama of confusion and lost opportunities,'" confirming that the sentence was copied from the 2008 article, which was quoting the appellate decision. (Compare I AA 10, 365 [treatment describing case as "a 'Shakespearean drama of confusion and lost opportunities' that resulted in her having to move her wedding location two years after booking it"]; with II RA 366 [article describing case as "a 'Shakespearean drama of confusion and lost opportunities' that resulted in her having to move her wedding location two years after booking it"]; cf. II AA 612; I RA 168.)

Patrice also perversely insists this evidence somehow "destroys [Randy]' s assertion that [she] forged the treatments," claiming that "it defies logic to assert that [she] forged or doctored the treatments in an effort to show that they were created prior to their separation in 2007, but then included language that could be traced to a 2008 Connecticut appellate decision." (AOB 47.) The sloppiness of the forger or plagiarizer is not a valid defense (as many high school and college students have likely discovered). Moreover, Patrice could have found a treatment (or treatments) prepared by someone else and then altered and backdated the cover page, without realizing what the source material was or that it was traceable.

Ultimately, it was not Randy's burden to show precisely what Patrice did or how the treatment was created because the *only* reasonable inference is that the treatment was copied from the 2008 article. It is not plausible to argue that the language would so consistently match merely by chance. The evidence sufficiently supports the trial court's conclusion that, under any scenario, the treatment was likely created after their separation in 2007 and thus could not be community property. That alone requires this Court to affirm.

2. Patrice also has no explanation for how or why, in her RFO, she and her expert attached different versions of the treatment that purportedly came from the same computer file.

She wrongly asserts that the court may have "based its findings on the version of the RFO that [Randy] introduced at the hearing" – i.e., Randy's service copy of the RFO – "which the

court acknowledged was not the version that [she] filed the court." (AOB 44; cf. II RA 368-578 [Trial Exhibit 21, Randy's service copy].) In its Statement of Decision, the trial court was clear: the different versions of the treatment were "contained within the RFO *in the court file*." (II AA 773, emphasis added); see also *ibid* ["[I]n the same pleading filed on December 9, 2015 there were two different treatments."].)[13] The court also observed that those same discrepancies were found in Koeberlein's signed report, which Patrice filed with her December 21, 2005 Notice of Errata. (II AA 773; see also I AA 329, 333-340; II AA 551-558; IV RT 585.) This Court can look for itself: Patrice's RFO, including her "Exhibit B" and the original Koeberlein report, is in the Appellant's Appendix, and it contains the two different versions of the treatment. (See *supra* at pp. 16-18 & tbl. 1; I AA 310-533.)

Patrice's argument is nonsensical for another reason. In Randy's service of copy of the RFO, the Koeberlein report did not include a copy of the "Legal Eagles" treatment; the treatment appeared only once, as Exhibit B to Patrice's declaration. (See II RA 384-391, 412-418.) Thus, when the trial court observed that Patrice "filed with the RFO an unsigned report from Mr. Ernest Koeberlein *containing a copy of a treatment*" that differed from

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[13] Patrice finds it "inconceivable" that Randy would have introduced a copy of the RFO different from what she filed (AOB 48), but that is because *Patrice served* Randy with an erroneous copy of the RFO. (See IV RT 580-581, 731-734.) The trial court was aware that Randy's service copy was not the version in the court file (II AA 774, fn. 1), and it stated on the record that it was taking judicial notice of what was "in the court file" (IV RT 734).

the treatment attached as "Exhibit B" (II AA 773, emphasis added), the court could *only* have been referring to the RFO that Patrice filed. It could not possibly have been referring to Randy's service copy.

Patrice's refusal to acknowledge or account for the discrepancies in the treatments included within her RFO is "fatal to the appeal." (*IRMO Greenberg*, *supra*, 194 Cal.App.4th at p. 1099.) As the trial court observed, the differences reflect edits and alterations to the text itself. (II AA 773.) That would not be possible if Patrice's story were true and she had only one version of the computer file (as she claimed). (See *supra* at pp. 11-12, 15, 18.) Yet she was the one with "exclusive control" over the CD-ROM, which she allegedly held for almost a year before requesting Koeberlein's examination. (I AA 322-323; II AA 761.) Substantial evidence supports the trial court's findings that the existence of two versions allegedly printed from one file "throws the entire credibility of all the computer evidence into question," and "adversely [a]ffects" Patrice's credibility as well. (II AA 761; see also II AA 773-774.)[14]

* * *

Under the substantial evidence standard, this Court generally "will look only at the evidence and reasonable inferences supporting the successful party, and disregard the contrary showing." (*Howard*, *supra*, 72 Cal.App.4th at p. 631

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[14] Patrice points out "that a writeblocker was not installed on the CD-ROM until Koeberlein received it" (AOB 49), but she fails to explain why that helps her or explains the text edits.

["If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld."]; see also *In re IW*, *supra*, 180 Cal.App.4th at pp. 1526-1527 [same].) Here, it is irrefutable that the treatments track a 2008 article, and that Patrice's RFO attached different printouts of what was supposed to be a single computer file. The Court can stop here because that alone constitutes "substantial evidence" sufficient to affirm, regardless of any allegedly conflicting or competing evidence that Patrice proffered at trial or cites on appeal. In any event, the rest of the record also supports the trial court's findings, as explained below.

B. Patrice Cannot Challenge the Order by Asking This Court to Re-weigh the Evidence and Ignore the Trial Court's Credibility Findings.

Patrice's remaining arguments about the record are easily dismissed. She improperly ignores and discounts Randy's testimony while distorting the evidence, ignoring the trial court's credibility determinations against her and her expert, and asking this Court to re-weigh competing evidence in her favor. (See *In re IW*, *supra*, 180 Cal.App.4th at pp. 1528-1529.)

1. On review, this Court must accept Randy's testimony as true. He unequivocally denied creating the treatment or working on "Legal Eagles"; he had never even seen the treatment before being served with the RFO. (II RT 636.) He also testified the folder marked "Randy's Show Ideas"—the one allegedly found in the boxes from the storage unit, and which allegedly contained paper copies of the treatment—did not bear his handwriting and was not his. (II RT 144-145.) The trial court found this

testimony was consistent with other circumstantial evidence: *Hot Bench* was not developed until many years after the treatment was allegedly created; the evidence did not establish Randy's role in creating new shows for Judge Sheindlin; and there was no testimony that, during their marriage, Randy and Patrice even discussed developing such a show. (II AA 773-774.)

Under the substantial evidence standard, "[t]he testimony of a single witness, even the party himself or herself, may be sufficient." (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 369 [citing, inter alia, *IRMO Mix* (1975) 14 Cal.3d 604, 614].) Accordingly, Randy's testimony alone is sufficient to affirm.

Patrice improperly asks this Court to discount Randy's testimony based on her allegedly competing circumstantial evidence, such as the fact that Randy's production company, DPL, had an exclusivity clause in its agreement with Judge Sheindlin's company, and that Randy used researchers to gather show ideas. (AOB 14, 20, 43.) Patrice misstates the record and the import of the cited evidence. For example, Randy testified that he used researchers to find *active* cases to air on *Judge Judy*—not that he used researchers to develop ideas for new shows. (Cf. AOB 20 with IV RT 624-632, 640 ["[T]he researchers, they're not out there to find new shows. They're trying to get claims so that we can get the show booked so we can get on the air. Totally different."].)[15] Even if some circumstantial evidence

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[15] Similarly, nothing in the 2006 agreement (Trial Exhibit 1038, I AA 48-49) required Randy to create shows for Judge Sheindlin

did support Patrice, that at most would raise an ordinary evidentiary conflict and could not defeat the substantial evidence in favor of the order.

For similar reasons, the Court must disregard Patrice's self-serving testimony about how she supposedly discovered the treatments or how she purportedly remembers Randy working the night of November 10, 2006 (when the CD-ROM allegedly was created). (See, e.g., AOB 22-24, 25-26, 31.) The trial court found that the different treatments filed with the RFO called into question Patrice's credibility (II AA 761, 773); as such, the court was entitled to disbelieve everything she said. (See CACI No. 107.) Patrice also was impeached repeatedly at trial, including as to her alleged discovery of the treatment. (See, e.g., III RT 273, 275-279 [testifying at trial that she first viewed the CD-ROM at a friend's office in Malibu, but stating in deposition that she could not recall whose computer she used and that it was not in Malibu]; III RT 360-369, 378-396, 400-401, 407, 413-424 [cross-examination and impeachment of Patrice regarding the storage

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or states that he was developing any new projects at the time, and the trial court specifically found that the agreement "has little bearing on this matter." (II AA 774, fn. 2.) Patrice also selectively and inaccurately summarizes the evidence about Randy's post-separation projects stemming from his 2012 deposition testimony. (AOB 20-21.) During that deposition, Randy testified that he was working on projects, *which he offered to disclose subject to a protective order*. (IV RT 615-616, 618-619.) Patrice cites no record evidence that her counsel ever followed up on the offer, and nothing in the cited deposition testimony reveals any projects originating during the marriage. (See generally IV RT 611-619, 722-723; I RA 20.)

unit].) On appeal, Patrice's testimony has no value whatsoever and cannot possibly satisfy her obligation to show that the evidence *compels* a conclusion in her favor.

2. Patrice also asserts that the trial court was somehow required to accept the purportedly "uncontradicted" testimony of her forensic expert, who—she claims—"definitively" opined that the document was saved to the CD-ROM in 2006 and found no evidence of manipulation. (AOB 25, 49.) Patrice misstates the testimony and again misunderstands the standard of review.

The trial court actively questioned Koeberlein about the scope, bases, and limitations of his opinion. (See, e.g., II RT 24, 26, 28-29, 32-35, 44, 46-50.) As the court observed, Koeberlein could only opine as to what the metadata showed; he could *not* definitively opine as to when the treatment or CD-ROM were created. (II AA 761.) Critically, Koeberlein admitted that it would be easy to manipulate the time/date metadata by resetting the clock on the computer before creating the Word file and burning the CD-ROM. (*Supra* at p. 15; II RT 43-46, 49.) He also admitted that, if someone had done that, it would not leave any trace on the CD-ROM and thus he would not have detected it in his analysis. (II RT 50-51; III RT 345; see II AA 761.) The court also observed that Patrice had "exclusive control" over the CD-ROM before sending it to Koeberlein (II AA 761)—in other words, she had ample opportunity to create a back-dated computer file and disc.

Under the circumstances, it was unnecessary for Randy to call an expert to contradict Koeberlein's metadata analysis.

A trier of fact is free to reject expert testimony—even if it is not refuted by an opposing expert—where other evidence in the record undermines the foundation for the opinion. (*Howard*, *supra*, 72 Cal.App.4th at pp. 631-636 [rejecting assertion that lack of an opposing expert witness testimony made the expert's testimony "uncontradicted" when other evidence undermined its foundation]; 1 Witkin, Cal. Evid. (5th ed. 2019) Expert Evidence: Effect of Expert Testimony, § 86 [recognizing same principle].) Expert testimony is entitled to little weight when (as here) it cannot substantively explain a crucial question. (See *Kotla v. Regents of Univ. of Cal.* (2004) 115 Cal.App.4th 283, 293; *People v. Taylor (*1992) 6 Cal.App.4th 1084, 1095, fn. 10; *San Bernardino County Dept. of Pub. Social Services v. Superior Court (Sun Newspaper)* (1991) 232 Cal.App.3d 188, 206, fn. 10.)

The trial court honored these principles when weighing the computer forensics against the competing evidence, including (a) the inexplicable discrepancies in the treatments allegedly printed from the same computer file, (b) the fact that a treatment allegedly created in 2005 or 2006 extensively copied from a 2008 article, and (c) Randy's own testimony that he never created or worked on the treatment. Contrary to what Patrice asserts, the ability to manipulate the CD-ROM's metadata was not mere "speculation" or a "hypothetical question." (AOB 49-50.) It was a reasonable, common-sense inference given the facts. Substantial evidence supports the trial court's finding that the CD-ROM and forensic evidence were not reliable or credible.

3. Finally, Patrice relies heavily on her testimony that, in November 2016, she purportedly found four additional, paper copies of the treatment among boxes containing similarly dated documents. The trial court agreed "that this *tends* to give credence to [Patrice's] position," but it found that other factors undermined the weight of the evidence. (II AA 772, emphasis added.) On appeal, the standard is not whether some evidence *tends* to support Patrice's case, but whether the evidence is uncontradicted and unimpeached and *compels* a conclusion in her favor. As in *In re IW*, the trial court here "considered the conflicting, competing evidence and essentially discounted [Patrice's] evidence in concluding that [she] had failed to carry her burden of proof." (*In re IW, supra*, 180 Cal.App.4th at p. 1528.) The trial court's weighing of the evidence is supported by the record and cannot be second-guessed on appeal.

First, as the trial court observed, the boxes and storage unit were not maintained in a secure evidentiary manner. (II AA 762, 772-773.) Many different people (including Patrice) could have had access to the storage unit. While many documents were from the 2005-2007 period, the inventory also included documents that *post-dated the 2007 separation and belonged to Patrice.* (II AA 642, 644-718.) Indeed, Patrice admitted placing other documents in the boxes *after removing them* from the storage unit in November 2016. (IV RT 575-577, 595-598; see II AA 642-643, 712, 715, 718.) Accordingly, it would have been easy for Patrice to plant the paper copies as further support for her RFO, which she had filed nearly a year earlier.

Second, Patrice's alleged discovery of the paper treatments depends on accepting Patrice's credibility over Randy's. For the reasons explained above, Patrice was not credible, including as to the circumstances surrounding the storage unit. (See *supra* at pp. 28-31, 38, 40-42, 45, 48.) Under the substantial evidence standard, this Court is required to credit Randy's testimony that he had never seen the treatments or the folder they allegedly came in.

Third, as referenced above, the paper treatments also contained multiple passages taken verbatim from the 2008 *Insurance Journal* article. (See *supra* at pp. 21-24, 42 & tbl. 2; *id.* at pp. 21-24 & fn. 7; I AA 18-19, 26-27, 34, 42; II RA 366.) Thus, the paper versions of the treatments—purportedly dated 2005 and 2006—are just as dubious as the CD-ROM version.

* * *

In sum, substantial evidence supports the trial court's credibility determinations and its weighing of the evidence. Patrice does not accurately describe the evidence supporting the order, and her argument effectively disregards the standard of review. Her sufficiency-of-the-evidence challenge is baseless.

III. PATRICE'S BURDEN-SHIFTING ARGUMENTS FAIL.

Patrice also argues for reversal on the theory the trial court should have shifted the burden to Randy—either based on Evidence Code section 640, or because he was allegedly the "managing spouse" and spoliated evidence by getting rid of his old computers. (AOB 40-42, 50-53.) Patrice's burden-shifting

arguments are meritless and completely ignore the trial court's findings in denying her motion for new trial.

A. Patrice's Burden-Shifting Arguments Are Immaterial and Waived.

The Court does not even need to reach the merits of Patrice's arguments because the allocation of the burden is immaterial to the outcome. In denying Patrice's motion for a new trial, the trial court called the allocation of the burden "of academic interest only." (II AA 761.) That is because, "[i]f at any point the burden shifted to [Randy], he carried his burden of demonstrating that the treatments were not created during the marriage and thus are not a community property asset." (*Ibid.*) That finding—which was supported by substantial evidence—renders Patrice's burden-shifting argument moot. (See *IRMO Burkle*, *supra*, 139 Cal.App.4th at pp. 728, 736-740 [holding that burden-shifting presumption did not apply, but even if it did, the judgment would be affirmed because substantial evidence supported a finding that it was rebutted]; *IRMO Klug*, *supra*, 130 Cal.App.4th at p. 1393 [explaining that this Court "will affirm a judgment or order if it is correct on any theory of law applicable to the case"].)

Independently, Patrice has waived any claim of error by failing to make any timely argument or objection. (*In re Seaton* (2004) 34 Cal.4th 193, 198-199 [party must object to avoid forfeiture as to procedural errors]; *IRMO Deamon* (2019) 35 Cal.App.5th 476, 482-483; *IRMO Binette* (2018) 24 Cal.App.5th 1119, 1131.) At trial, Patrice's counsel accepted that Patrice had

the burden of proving her claim by a preponderance of the evidence. (See, e.g., II RT 1-2; IV RT 688, 691.) Patrice's counsel also never cited Evidence Code section 640 until her *reply* brief in support of her motion for new trial. (See II AA 760; cf. *IRMO Hoffmeister* (1984) 161 Cal.App.3d 1163, 1168-1170 [explaining rule against presenting new arguments in reply]; II RA 349 [Randy's objections to new materials in reply].)

"Raising an evidentiary issue only belatedly in a motion for a new trial does not preserve the issue for appeal." (*People v. Memory* (2010) 182 Cal.App.4th 835, 864, fn. 6.) "[I]t is settled that a party may not remain quiet, taking his chances upon a favorable verdict, and, after a verdict against him, [use a motion for new trial to] raise a point of which he knew and could have raised during the progress of the trial." (*Gray v. Robinson* (1939) 33 Cal.App.2d 177, 183; see also *People v. Welch* (1972) 8 Cal.3d 106, 115, fn. 7 ["Even if defendant's remarks at the motion for a new trial raised the objection, this, of course, did not constitute a timely objection at the trial."].) Thus, Patrice's arguments are both immaterial to the outcome and waived.

B. Patrice's Arguments Also Fail on the Merits.

Even if this Court were to consider the arguments on their merits, the trial court did not err in any respect.

1. Evidence Code section 640 states that a writing is presumed to be truly dated, but that provision merely creates "a rebuttable, not a conclusive[,] presumption and [can] be controverted by other evidence, direct or indirect." (*People v. Geibel* (1949) 93 Cal.App.2d 147, 168 [addressing predecessor

version of statute; finding, on appeal from conviction for forgery of a will, that the will's date was not dispositive given circumstantial evidence to the contrary].) An evidentiary presumption merely means that a fact is presumed to be true "unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence *and without regard to the presumption*." (Evid. Code, § 604, emphasis added.)

On the record here, Patrice' s reliance on Evidence Code section 640 is grossly misplaced. The trial court reasonably found that any presumption here was "quite weak" given that the treatments were not formal records, such as bank statements. (II AA 761.) Moreover, Randy presented evidence to refute any presumption, including the different versions of the treatment in the RFO, the language copied from the 2008 article, and Randy's own testimony. At that point, any presumption dropped away (Evid. Code, § 604), and substantial evidence supports the trial court's finding that the treatments were not reliable and not truly dated. The case Patrice cites on appeal is inapposite, as that case involved "no evidence whatsoever" to dispute the date of the writings at issue. (*In re Carr's Estate* (1949) 93 Cal.App.2d 750, 755.) That is not the situation here.

2. The trial court also correctly found that Patrice bore the ultimate burden of proof on her RFO. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for

relief or defense that he is asserting." (Evid. Code, § 500; see also Evid. Code, §§ 520, 550.) The party bringing a motion to adjudicate an omitted asset bears the burden of proving—by a preponderance—the existence of an asset that was not previously disclosed and adjudicated, and the asset's community character. (See Fam. Code, § 2556; *IRMO Hixson* (2003) 111 Cal.App.4th 1116, 1126 [because wife "failed to demonstrate that there were any unadjudicated assets ..., the trial court did not err in denying her" claim]; *cf. Goodwin v. Robinson* (1937) 20 Cal.App.2d 283, 288 [stockholder suing directors for failing to turn over corporate assets allegedly in their hands at dissolution had burden to prove those assets existed then].) Patrice cites no law to the contrary.

Instead, she argues that the burden should have shifted to Randy as the "managing spouse" because he "allegedly failed to retain the computers that he used during the marriage" and because there purportedly "was unequal access to the requisite evidence." (AOB 53.) In making these arguments, Patrice ignores the trial court's findings on the motion for new trial, in which it specifically addressed and rejected her contentions.

As the trial court found, Randy was not the "managing spouse" for purposes of the RFO and did not engage in spoliation. (II AA 760.) Patrice—not Randy—was the person who had exclusive control of the CD-ROM, and she also had access to the storage unit containing the boxes with the alleged other treatments. (II AA 760-761.) Moreover, Randy had no obligation to preserve his old computers, and there is nothing suspicious or untoward about a party's discarding old devices once they become

"dead" or outdated. (II AA 760; cf. CACI No. 204 [allowing adverse inference only in cases of "willful suppression of evidence"].) Indeed, Patrice never produced her computers to her own forensic expert, who never bothered to ask whether she had them. (See *supra* at p. 16; II RT 42-46; see also III RT 282 [Patrice acknowledging that she regularly loses computers].)

Patrice's argument devolves to circularity, as she claims that Randy "has unique knowledge concerning the treatments" because he "was listed as the author of the treatments." (AOB 53.) Randy could only have "unique knowledge" of the treatments *if he actually created them*. It makes little sense to shift the burden to Randy to prove a negative—i.e., to prove that he did not create a document that, according to his testimony, he had never seen before. This case is nothing like *IRMO Prentis-Margulis*—cited by Patrice—where the wife produced an itemized financial statement prepared and signed *by her husband*, and the Court of Appeal held that the burden should have shifted to the husband to prove what had happened to the assets listed on the statement. (*IRMO Prentis-Margulis* (2011) 198 Cal.App.4th 1252, 1257, 1261-1262, 1267, 1273.)

Even if a burden-shifting framework did apply, the burden of proof still would lie with Patrice, as the person bringing the RFO. The term "burden" can refer either to "the burden of initially producing or going forward with the evidence," or to the ultimate "burden of proving the issues of the case." (1 Witkin, Cal. Evidence, *supra*, Burden, § 1 [emphases removed].) A burden-shifting framework generally refers to the parties' initial

obligations to *produce* evidence: the claimant has an initial burden of making a prima facie case, at which point the opposing party must present responsive evidence to avoid a judgment as a matter of law in the claimant's favor. (See *ibid*.) But "the burden of going forward with evidence does not operate to shift the burden of proof," which "remains with the party who had the burden in the first instance." (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 346; see also Evid. Code, §§ 110, 115, 604, 606.)

Even if Patrice had met her initial burden of production, Randy presented ample evidence to impeach Patrice's showing and to demonstrate that the treatment was not created during the marriage. At that point, the trial court's task was simply to weigh all of the evidence, with Patrice bearing the burden of proof on her RFO. (See *Mathis*, *supra*, 11 Cal.App.4th at p. 346.)

The trial court proceeded properly in its Statement of Decision, when it reviewed the evidence submitted by both parties and concluded that Patrice failed to establish her claim. (II AA 771-774.) Then, in ruling on the motion for new trial, the trial court reiterated its findings that Patrice failed to carry her burden, and it also found that, even if the burden shifted to Randy, he met it. (II AA 760-762.) Because those findings are supported by substantial evidence and unaffected by any legal error, this Court must affirm.

CONCLUSION

For all of the foregoing reasons, Petitioner and Respondent Randall Douthit respectfully requests that this Court affirm the superior court's denial of the request for order.

Dated: October 22, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel for Petitioner and Respondent hereby certifies, pursuant to Rule 8.204(c), that the text of the foregoing brief, including footnotes, consists of 12,734 words as counted by the word processing program used to generate the brief.

Dated: October 22, 2019

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