Filed 4/7/20

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RANDALL DOUTHIT,

Petitioner and Respondent,

v.

PATRICE JONES,

Respondent and Appellant,

B293641

(Los Angeles County
Super. Ct. No. BD469787)

APPEAL from an order of the Superior Court of Los Angeles County, Mark A. Juhas, Judge. Affirmed.

Kasowitz Benson Torres, Jerold Oshinsky and Tracy B. Rane for Respondent and Appellant.

Hersh Mannis, Joseph Mannis and Andrew Stein; Sidley Austin, David R. Carpenter and Chad S. Hummel for Petitioner and Respondent.

Appellant Patrice Jones (wife) and respondent Randall Douthit (husband) divorced in 2013. Following the judgment of dissolution, wife claimed to have discovered an omitted asset and asked the court to set aside the property division portion of the judgment. The court found that the subject asset had not been created during the marriage and was therefore not community property subject to division upon divorce. The court denied wife's request, and she appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Wife and husband separated in 2007. In 2013, the trial court entered judgment dissolving the marriage and resolving the issues of property and support. Wife appealed, and we affirmed on all grounds except for the valuation of certain furniture and equipment. (*In re Marriage of Douthit and Jones*, Aug. 6, 2015, B254719.)

In December 2015, wife filed a request for an order setting aside the property division in the 2013 judgment. She claimed to have discovered an omitted asset that husband had concealed. She alleged that, a year earlier, her gardener had delivered some boxes to her from husband's home. In one of the boxes, wife had discovered a computer disc with a single computer file—a treatment for a television show idea (the Treatment). The cover page of the Treatment stated that it was "[c]reated by" husband in 2005.

Husband, a television producer, denied creating the Treatment or having ever seen it prior to this proceeding. The trial court bifurcated the issues of whether the Treatment was community property from the issue of damages. At the first stage of trial, wife presented a computer forensics expert who testified that the computer disc's metadata showed the Treatment had been saved on November 10, 2006. However, on cross-

examination, the expert admitted it would be easy to manipulate the metadata, and he would not be able to detect such manipulation in his analysis. He further confirmed that the metadata showed the file's author as "Patrice Jones"—meaning the login used on the computer at the time the document was saved to the disc was "Patrice Jones"—and that the document was "last edited by Patrice Jones."

In apparent contradiction to wife's claim that she had discovered only one Word document on the subject computer disc, she filed two different versions of the Treatment with the court. One version of the Treatment was eight pages long, and contained nine textual differences from the second version which was seven pages long. Wife provided no explanation for these discrepancies.

Husband testified that he had never written a show idea similar to the Treatment and had never seen the Treatment before this court proceeding. Wife took the stand and said she had also discovered several paper copies of the Treatment during the pendency of this case that were located in a folder with the handwritten title "[Husband's] Show Ideas." Husband testified this was not his handwriting.

At husband's counsel's request, the trial court took judicial notice of an online article from an insurance journal that was first published in 2008. The subject matter of the article was a 2008 Connecticut appellate court decision about a dispute that was the basis for one of the Treatment's scripts. Although the Treatment was allegedly created in 2005, it duplicated verbatim language in the 2008 article. Husband's counsel argued that the overlap between the Treatment and article showed the Treatment was created after the article was published in 2008—which was also after the parties had separated.

The trial court concluded the Treatment was not a community asset because there was insufficient evidence the Treatment was created prior to the parties' separation in 2007. The court concluded that the two different versions of the Treatment found on the disc showed that the document had been manipulated, and this gave "the court pause about [wife's] credibility." The court further concluded that "the language similarities between the 2008 Insurance Journal article [] and the 2005 treatment cannot be ignored," and it was "unlikely" that the wording was repeated by "random means." Even if husband had "created the treatment . . . it seems far more likely, in light of all the evidence[,] that it was created *after* the date of separation." (Emphasis added.)

Wife moved for a new trial arguing, among other things, that the court incorrectly imposed the burden of proof on her even though husband failed to retain the computer on which the Treatment was prepared. The court held that husband "was not obligated to maintain the computer, thus, did not 'spoliate' the evidence," and there was "no evidence at all that [husband] destroyed the computer to defeat this or any other" of wife's claims. The court concluded, "it may be of academic interest only as to where the burden lies" because even if the burden shifted to husband, "he carried his burden of demonstrating that the treatments were not created during the marriage and thus are not a community property asset."

The motion was denied, and wife timely appealed.

DISCUSSION

Wife makes three arguments on appeal: (1) the trial court erred in requiring her to prove the Treatment was "created" by husband during their marriage; (2) the court erred in finding she did not meet her burden of proof; and (3) the court should have

shifted the burden of proof to respondent. We find no error, and conclude that substantial evidence supports the order.

We independently review questions of law and apply the substantial evidence standard to the trial court's findings of fact. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461–462.) Under the substantial evidence standard, we " '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.' " (*Id.* at p. 462.)

1. *Did the Trial Court Err in Requiring Wife to Prove that Husband Created the Treatment*

Under Family Code section 2556, the trial court has continuing jurisdiction to award community assets that have not been previously adjudicated by a judgment in the proceedings. Wife first argues that, under this statute she only had to show that the Treatment was (1) community property that (2) had been omitted from the judgment. She contends the trial court "erroneously imposed the additional requirement" that she "also establish that [husband] *wrote* or *created*" the Treatment.

The trial court did not impose a "creation" requirement on anyone. The issue was framed by wife who argued that husband had created the Treatment. In a written statement of wife's position filed with the trial court, wife's counsel stated wife "contends that there are derivative rights to which she is entitled if in fact the Treatments were prepared by [husband]."

The court concluded the Treatment was not community property because there was insufficient evidence the Treatment "was actually created in 2006, or earlier." To the extent the court followed wife's lead that husband created the Treatment, wife cannot assign error when it was wife's theory of the case and which the court addressed. Wife offered no theory as to how the

Treatment was community property if husband had not created it.

2. *Was There Substantial Evidence the Treatment was Not Created During the Marriage*

Wife next argues that substantial evidence does not support the court's finding the Treatment was not created during marriage. Husband argues that wife has forfeited her claim for insufficiency of the evidence by only summarizing the evidence in her favor. When an appellant argues insufficiency of the evidence, she is " ' "required to set forth in [her] brief *all* the material evidence on the point and *not merely [her] own evidence.* Unless this is done the error is deemed to be waived." ' [Citation.]" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 749.) Here, wife has not set forth all the material evidence, but has summarized the evidence in a one-sided fashion. She has thus waived her argument that insufficiency of the evidence supported the court's finding.

We nevertheless choose to consider wife's insufficiency of the evidence argument, and find it without merit. Wife's argument that the Treatment was an omitted asset turned on the credibility of her claim that she had, in fact, "discovered" the Treatment on a computer disc in a storage box. However, the court found reason to doubt wife's credibility, highlighting two discrepancies in her evidence. First, although her expert testified there was only one document on the computer disc, the court found wife had filed two "different versions" of the Treatment "with no explanation as to why they are different." The court concluded there must have been "some manipulation of the text itself," and found this undermined wife's credibility. Second, the court found the timing "suspect," stating that the overlap between the 2008 insurance journal article and the 2005

treatment which wife's expert said was created in 2006 "appears suspicious."

In summary, there was evidence that (1) wife filed two copies of the document saved on the computer disc despite claiming the disc contained only one document, and (2) the Treatment contained text from a 2008 article. The court drew reasonable inferences from this evidence that the Treatment was created post-2007, after the date of the separation. Substantial evidence supported the court's finding.

3. *Did the Trial Court Err in Not Shifting the Burden of Proof to Husband*

Lastly, wife argues the trial court erred in not shifting the burden of proof to husband because he was the "managing spouse" in control of the Treatment. In support of this argument she cites to *In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252 for the principle that once a non-managing spouse makes a prima facie showing of the existence of a community asset in the control of the other spouse after separation, the burden of proof shifts to the managing spouse to prove the proper disposition of that asset. (*Id.* at p. 1268.) In *Prentis-Margulis*, at "trial[] wife argued the court should charge husband with the missing [investment] funds unless he proved he did not misappropriate the money." (*Id.* at p. 1257.) The trial court disagreed, and the Court of Appeal reversed. "Based on relevant Family Code provisions, equitable principles, and case law, we conclude the trial court erred in failing to shift to the managing spouse the burden of proof concerning the missing community assets." (*Id.* at pp. 1257–1258.) !

Here, wife argues that husband had been in control of the evidence after separation because he "still had possession of the computers on which the treatments were drafted." According to

wife, because "there was unequal access to" the evidence, the trial court "should have deemed [husband] to be the managing spouse, and shifted the burden of proof" to him. She argues the trial court should have held that husband had the burden of proof which, among other things, would have required husband to produce the computer he no longer had.

Procedurally, this argument was first raised in wife's motion for a new trial. We review de novo a court's denial of a new trial based on an alleged error of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.)

Prentis-Margulis is not applicable here. That case concerned the shifting of the burden of proof to a managing spouse when determining the disposition of a missing asset. The asset here, the Treatment, was not missing. More fundamentally, even if the burden should have shifted to husband, any error would have been harmless in light of the trial court's express findings. The trial court found, "it may be of academic interest only as to where the burden lies" because even if the burden shifted to husband, "he carried his burden of demonstrating that the treatments were not created during the marriage and thus are not a community property asset."

Wife does not address the point on the merits. Instead, she dismisses the trial court's statement as "nothing more than a single line of dicta." We view the language differently: the statement reflects the court's alternate conclusion that if husband had the burden of proof, he satisfied it. It is, thus, not dicta. (*People v. Mendoza* (2020) 44 Cal.App.5th 1044, 1056, fn. 5.) As such, any error in attaching the burden of proof to wife was harmless. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631–632 [appellant has burden on appeal to establish error was prejudicial].)

DISPOSITION[1]

The order is affirmed. Respondent is awarded his costs on appeal.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.

[1] Respondent's motion for sanctions is denied.