1st Civil No. A102296

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FRITZI BENESCH,

Plaintiff and Appellant,

vs.

WILLIAM HOISINGTON and
ORRICK, HERRINGTON & SUTCLIFFE LLP,

Defendant and Respondents.

Appeal from the San Francisco Superior Court, Case No. 317187
Honorable Kevin M. McCarthy, Judge

APPELLANT'S REPLY BRIEF

SHARON GREEN, LAWYER, SBN 43392
1721 Waldman Avenue
Las Vegas, Nevada 89102
(702) 387-8124

GREINES, MARTIN, STEIN & RICHLAND LLP
IRVING H. GREINES, SBN 39649
FERIS M. GREENBERGER, SBN 93914
5700 Wilshire Blvd., Suite 375
Los Angeles, California 90036
(310) 859-7811 / (310) 276-5261 (fax)

Attorneys for Plaintiff and Appellant Fritzi Benesch

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INTRODUCTION

The Respondents' Brief advances a seemingly countless array of arguments. What it does not do, however, is address what matters.

What matters is the burden of proof on summary judgment and defendants' failure to satisfy the governing standard. On that, defendants' brief is silent. Tellingly so.

To prevail on summary judgment, defendants were required to establish an absence of triable issue of fact as to the date on which they ceased representing appellant Fritzi Benesch as to the "specific subject matter" giving rise to her legal malpractice claim. Defendants never carried that burden.

What constituted the "specific subject matter" of defendants' representation and when that representation terminated depended on what Fritzi and defendants mutually agreed was the subject matter and scope of that representation. Significantly, defendants' motion did not address the parties' agreement on these dispositive questions.

Since the terms of the parties' agreement present a classic question of fact, triable by a jury, there was no basis for entering summary judgment here. For this reason, the judgment must be reversed. Everything else defendants say is beside the point – it doesn't change the dispositive fact that defendants failed to prove their summary judgment case.

LEGAL DISCUSSION

I.

THE SUMMARY JUDGMENT MUST BE REVERSED BECAUSE DEFENDANTS DID NOT CARRY THEIR SUMMARY JUDGMENT BURDEN TO DEMONSTRATE AN ABSENCE OF TRIABLE ISSUES OF FACT ON THE DISPOSITIVE QUESTION WHETHER THE STATUTE OF LIMITATIONS WAS TOLLED BY DEFENDANTS' CONTINUOUS REPRESENTATION.

In granting summary judgment, the trial court held that Fritzi failed to file her legal malpractice action within one year after defendants stopped representing her continuously in regard to the specific subject matter in which their alleged wrongful acts and omissions occurred. (See AA 1371-1383; Code Civ. Proc., § 340.6, subd. (a)(2).)

It was defendants' burden in the trial court, and it remains their burden here, to support the summary ruling with a conclusive demonstration that there is no triable issue of fact as to whether Fritzi's suit beat the one-year deadline. (AOB 17-20.) Defendants have failed to make the required showing.

True, defendants try to defend the judgment, advancing an assortment of arguments. For example, they insist their representation of Fritzi was divided into a series of discrete assignments; they assert that Orrick's representation ceased, at the latest, when Hoisington retired; they maintain that the final phase of Hoisington's representation addressed a

separate subject matter from the particular transactions that figure prominently in Fritzi's complaint. (RB 22-46.)

The fatal problem with these assertions is that they are merely *arguments*; they are not founded on *fact*, and certainly not on undisputed facts.

Without presenting the *facts* establishing the terms of their retainer agreement with Fritzi, how can defendants possibly establish – let alone *conclusively* establish – that the representation was necessarily dissected into discrete segments, rather than involving Fritzi's estate plan as a whole? Without *evidence* as to the terms of the retainer agreement, how can defendants possibly establish – let alone *conclusively* – that, despite a continuous two-decade estate planning relationship with Fritzi, the Orrick firm's representation would suddenly terminate automatically just because the responsible partner retired or because work was not continuously performed on the file?

The viability of the judgment depends on there being *no triable issues of fact* on any of these points. Defendants have not made (nor even tried to make) the required showing. Indeed, the record here demonstrates that there *are* triable factual disputes as to each of these issues.

A. Defendants Failed To Negate The Existence Of Triable Issues Of Fact Concerning What Constituted The "Specific Subject Matter" Of Fritzi's Representation.

There is no dispute that defendants represented Fritzi in connection with Benesch family estate matters from 1977 into 1999. (See, e.g., RB 8-15.) Fritzi contends the "specific subject matter" of the representation was the family estate plan, defendants' assignment being to develop, implement,

revise, manage and keep the plan current over the years. (AOB 35-41.) Defendants, in contrast, contend that Fritzi's characterization is too broad and that, instead, each transaction they undertook on the Benesches' behalf constituted a discrete subject matter. (RB 24-36.)

This is a classic issue of fact, determinable by a jury, not by a court considering a summary judgment motion. Defendants never offered a single piece of evidence to establish that their view of the terms and scope of their agreement with Fritzi was the *only* view. They never even tried. Thus, they never came close to carrying their burden on summary judgment.

This dispute boils down to one side's word against the other's. If that isn't a triable issue of fact, then nothing is.

B. Defendants' Failure To Support Their Motion With Facts Showing The Nature Of The Agreement Between Them And Fritzi Precluded Entry Of Summary Judgment.

Defendants argue the trial court correctly segregated the "specific subject matter" of their representation of Fritzi into discrete components, so that the various inter vivos stock transfers were each separate transactions, rather than being parts of implementing an estate plan. (RB 24-36.) The fatal problem with this position is that there is not a single fact offered to support it, let alone to establish it as a matter of law.

The attorney-client relationship is contractual in nature. (E.g., *Curtis v. Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 504; *Baum, Duckor, Spradling & Metzger* (1999) 72 Cal.App.4th 54, 65.) As with any other contract, the specific subject matter of an attorney's undertaking depends entirely on what the parties agree. Absent conclusive evidence as to the terms of the agreement, it is for the *trier of fact* to determine those terms,

based on "all credible evidence concerning the parties' intentions . . . ." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165; accord, *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710; see also BAJI No. 10.75 (8th ed. 1994).)[1]

Here, defendants' motion never pointed to a written agreement and never purported to state the terms of any oral agreement. Thus, there is *no evidence* to support defendants' assertion that the scope of their assignment was limited. There is not a shred of evidence to substantiate their contention that the "specific subject matter" of their representation was as they attempt to describe it.

The nub of the "specific subject matter" determination lies in identifying what contract terms, what mutual understanding, governed a two-decade attorney-client relationship. After all, if the parties' agreement (whatever it might have been) contemplated that the defendants' representation would be continuous until terminated and that implementing an advantageous family estate plan would be its specific subject matter, that is something the parties had every right to agree upon.[2]

1/ "A contract must be so interpreted as to give effect to the mutual intent of the parties." (Civ. Code, § 1636.) "The terms of a contract are determined by objective rather than by subjective criteria. The question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; see, e.g., *Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942-943; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts § 684 et seq., p. 617 et seq.)

2/ "[O]rdinarily the representation is on the same specific subject matter *until the agreed tasks have been completed* or events inherent in the representation have occurred." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1528, emphasis added; *Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1497, quoting 2 Mallen & Smith, Legal Malpractice, Statutes of Limitations (3d ed. 1989) § 18.12, p. 120

(continued...)

The agreement is the thing. But defendants' motion never addressed that central ingredient. The void is particularly telling when the specific subject matter of the representation involves estate planning.

In the estate planning field, the "specific subject matter" of the representation typically is broadly defined as being the estate plan *as a whole*, unless the parties otherwise agree. (E.g., 1 Cal. Transaction Forms: Estate Planning (West 1999) § 2:8, p. 13, emphasis added ["For the estate planning attorney, the 'specific subject matter' will usually be the *estate plan itself*"]; 1 Cal. Estate Planning (Cont.Ed.Bar 2003) § 2.32, p. 94, emphasis added ["The relationship between the estate planning attorney and client is usually *open-ended*, and, unless the engagement letter or some other document makes it clear when the relationship will end, the question of *ongoing representation can continue until the client's death* (and sometimes beyond"].)

Although the opening brief cites numerous authorities establishing that estate-planning representation is often open-ended (AOB 27, 32-33), defendants' brief ignores these authorities.

In order to establish conclusively that the family estate plan was not the "specific subject matter" of defendants' representation of Fritzi, defendants were required to identify the terms of an attorney-client contract

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2/(...continued)
["'Ordinarily, an attorney's representation is not completed *until the agreed tasks or events have occurred*, the client consents to termination or a court grants an application by counsel for withdrawal'" (emphasis added)]; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 887-888 [same].)

that showed otherwise.[3] This was *their* burden. They never satisfied it. They never even tried to satisfy it.

Having failed to offer a single fact that would limit or narrow the "specific subject matter" of their representation, defendants failed to negate *conclusively* (or at all) that the specific subject matter of their representation of Fritzi was the family estate plan. The grant of summary judgment on that issue was prejudicially erroneous. The judgment must be reversed.

C. In Addition To Being Factually Unsupported, Defendants' Position Is Contradicted By Their Own Words.

Until it became convenient for them to argue otherwise on appeal, defendants repeatedly characterized the subject matter of their representation as having been the *family estate plan*. One would not know this from their Respondents' Brief, where they avoid dealing with the evidence favorable to Fritzi and even appear to avoid confronting the reality that they represented the Benesches for 22 years in connection with formulating, effectuating, revising and implementing their estate plan.[4]

3/ Raymond G. Ellis, the Orrick firm's designated agent (see AA 675), did not produce a retainer agreement at his deposition and, while he averred that the firm's representation of the Benesches lasted "[f]rom January 1977 through March 31, 1999," he stated he did not know how those dates were determined, nor whether any retainer agreement existed, and "would just be guessing" if he tried to articulate how the duration of the representation was established. (AA 885.)

4/ For example, defendants now mince words, saying things like, "Fritzi and Ernie worked with their lawyer, Bill Hoisington of Orrick, Herrington & Sutcliffe LLP, to ensure that the family business could continue to operate after their deaths" (RB 1), "Hoisington helped Fritzi and Ernie devise a series of asset transfers to their daughters and granddaughters" (RB 8), and "the attorney's alleged errors concerned

(continued...)

Defendants' approach violates the most elementary of summary judgment principles – the principle that commands that all facts must be interpreted and all inferences must be drawn in Fritzi's favor. (AOB 17-20.)

The Respondents' Brief does not even attempt to explain away the numerous instances in the trial court where *defendants themselves* characterized the subject matter of their representation – including the transactional components involving *inter vivos* transfers of estate wealth – as having been *the entire family estate plan.* Although dozens of additional examples could be cited, here are just a few, each using *defendants' own words*[5]:

• Reading *How to Avoid Probate* prompted Fritzi and Ernie "to retain Orrick partner Bill Hoisington *to develop an estate plan.* . . . ¶ Early on, *the estate planning* focused on a very tangible and common estate tax problem that arises with a family-owned business. . . . To avoid this

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4/(...continued)
transfers that were made *during the client's life* in order to prevent assets from ever becoming part of their estate, and that became *irrevocable* as soon as the parties signed the necessary documents" (RB 28, original emphasis).

However, defendants were unguarded in their trial court briefing, where they described the same involvement this way: (1) "Over several decades, Fritzi and Ernie worked steadily with their *trusts and estates* lawyer, Bill Hoisington . . . to pass a substantial portion of [their] wealth on to their daughters and granddaughters, while lawfully minimizing the potentially crushing effect of federal estate taxes (AA 12, emphasis added); (2) "*This estate planning work* necessarily depleted Fritzi and Ernie's personal stock holdings, but still left them with considerable wealth . . . to live on" (*Ibid.*, emphasis added).

5/ Briefs and argument "are reliable indications of a party's position on the facts as well as the law, and a reviewing court may make use of statements in them as admissions against the party." (9 Witkin, Cal. Procedure (4th ed. 1996) Appeal, § 329, p. 370.)

problem, Bill Hoisington assisted Fritzi and Ernie in *developing an estate plan* . . . to pass control of the company to Valli and her family, and to transfer cash and some company stock to Connie, with a minimum of taxation." (AA 563 [defendants' summary judgment points and authorities, emphasis added].)

• "Over a 20-year period, Fritzi signed more than 40 *estate planning documents*." (AA 35 [purported Undisputed Fact No. 10, from defendants' separate statement of undisputed material facts, emphasis added].)[6]

• "In 1990, Bill Hoisington sent Fritzi and Ernie a memorandum *regarding draft estate planning documents* for them and for Valli and Bob, which states that he wants to know when 'everyone' would be 'getting together' to discuss the transaction." (AA 36 [purported Undisputed Fact No. 20, from defendants' separate statement, emphasis added].)[7]

• Defendants' counsel asked Fritzi at her deposition, "What do you understand *your estate plan* to be? What did you think *the plan* was when

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6/ Although defendants now insist that "Fritzi's claim has *nothing* to do with the wills, revocable trusts, and other 'estate planning' instruments that Hoisington drafted over the years"(RB 28), this is refuted by defendants' own trial court papers that included the various inter vivos stock transfer papers among the 40+ estate planning documents they calculate that Fritzi signed. (See, e.g., AA 12 [The Benesches "worked steadily with their trust and estates lawyer . . . to pass a substantial portion of [their] wealth on to their [family], while lawfully minimizing the potentially crushing effect of federal estate taxes. They accomplished this primarily through gifts of stock, including a large gift in 1992, and a substantial sale of stock in 1998. [¶] *This estate planning work* necessarily depleted Fritzi's and Ernie's personal stock holdings . . ."]; 15 ["Fritzi implemented this strategy by signing more than 40 estate planning documents"].)

7/ Defendants' separate statement included at least six additional references to the estate plan as the subject matter of the representation. (See AA 33-41.)

you went to see Mr. Hoisington? . . . Yeah, what was *the estate plan?*" (AA 705, emphasis added.)[8]

• When deposed in connection with the documents produced in discovery, the Orrick firm's person most knowledgeable testified that the Orrick firm copied *"[t]he entire Fritzi Benesch estate planning file"* and, when asked how she distinguished between that and other files pertaining to Benesch family members, she explained, "There is a file set that is recorded in our records department that has Fritzi and Ernest Benesch's name on it. *And it is indicated with the title Estate Planning."* (AA 889, emphasis added.)

In now arguing, as a matter of law, that they were not involved in forming, modifying and effectuating a single, cohesive family estate plan over the 22-year period they represented Fritzi, defendants do not cite or address a single one of these characterizations – taken from their own mouths.

Defendants' repeated characterizations below directly support Fritzi's assertion that defendants' representation of her estate planning interests was far broader than defendants now assert.[9] Defendants have

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8/ Although page 705 does not expressly identify which side is asking these questions, that it was counsel for defendants is clear both from the context and from an objection interposed by Fritzi's counsel a few pages later. (See AA 709.)

9/ Defendants urge that the estate plan cannot be the specific subject matter of their representation because "that description indiscriminately encompasses the *entire* attorney-client relationship that existed in this case[.]" (RB 29.) But this makes no sense. Just as representation in a particular lawsuit can constitute a "specific subject matter" even though it encompasses the entirety of the attorney-client relationship, may last over many years and may include disparate assignments, so too can representation of a family estate plan.

never proven to the contrary, as they must do in order to prevail on summary judgment.

D. Defendants' Recitation Of The Purpose Of The Continuous Representation Tolling Provision Ignores A Key Goal Of That Provision.

Defendants insist that Fritzi's interpretation of the term "specific subject matter" contravenes the purpose of continuous representation tolling. (RB 3-4, 27-35.) The argument is disingenuous. In making the argument, defendants point only to one recognized purpose of the statute (the one that defendants believe favors them), while ignoring a second, equally important, recognized purpose of the statute – one that *refutes* their position and supports affording Fritzi the benefit of tolling here.

Defendants incorrectly say *the* purpose of continuous representation tolling "is 'to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to *correct or minimize an apparent error*. . . ."'" (RB 4, quoting *Laird v. Blacker* (1992) 2 Cal.4th 606, 618, emphasis added in Respondents' Brief.)[10] Defendants' use of ellipsis is

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10/ From that premise, defendants argue that Fritzi should not be afforded the benefit of continuous representation tolling, because even if their attorney-client relationship with her lasted into August 1999, the time had long expired since they could have corrected the malpractice she alleges occurred in the 1992 and 1998 inter vivos transfers. (See, e.g., RB 24-27.)

Even if (contrary to fact) the tolling provision had been enacted *only* with a solitary purpose in mind, defendants' argument still would not help them, as it would not negate the entirety of Fritzi's lawsuit. While allegations concerning inter vivos transfers certainly form a part of the lawsuit, Fritzi also alleges, among other things, that the lawyers injured her by simultaneously representing conflicting interests – her interests and those of her daughter and son-in-law, Valli and Bob Tandler (beneficiaries of

(continued...)

revealing. What defendants omitted is a second purpose that *Laird* also acknowledges.[11] Here is the *complete* sentence from *Laird*, with the italicized portion reflecting what defendants omitted:

> This "continuous representation" rule was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, *and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired."*

(*Laird v. Blacker*, *supra*, 2 Cal.4th at p. 618, quoting Sen. Com. on Judiciary, 2d reading analysis of Assem. Bill No. 298 (1977-1978 Reg. Sess.), emphasis added.)

It is the omitted language that governs here. Continuously over the course of two-plus decades, Fritzi and Ernest retained and consulted defendants to craft, implement and service their family estate plan as necessary. Defendants were the professionals and Fritzi reposed confidence in their ability and good faith. While defendants represented Fritzi, she did not have to be on guard against her own lawyers; she could not be expected to question and assess their handling of the family estate plan at the same time she was relying on them to do their professional best for her, nor would she be expected to question whether their conduct was loyal solely to her or perhaps was directed to serving the interests of their other clients,

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10/(...continued)
Fritzi's transfers) – without disclosing the inherent conflict or obtaining Fritzi's knowing and intelligent waiver of it. (See, e.g., AA 344 [amended complaint], 601 [points and authorities in opposition to attorneys' summary judgment motion].) Thus, defendants are mistaken in saying that Fritzi's lawsuit has "nothing to do" (RB 28) with anything but the inter vivos transfers.

11/ Later on (RB 24), defendants do recite both purposes, but they address only one in their analysis.

Valli and Bob Tandler, who stood to gain from the transfers implemented in Fritzi's estate plan. (See footnote 10, *supra*.)

This is precisely the sort of scenario in which application of continuous representation tolling is necessary and appropriate in order to fulfill the tolling provision's second purpose – to protect a client from attorneys who might otherwise wait out the statute of limitations, i.e., by stringing out the attorney-client retention long enough so that it has become too late for the client to complain about various services they performed along the way.

Selectively acknowledging only one of two distinct statutory purposes is not defendants' only departure from straightforward advocacy. It emerges again in defendants' effort to refute our discussion of three cases in the opening brief. (RB 31-34; see AOB 36-40.) Defendants say that *Crouse v. Brobeck, Phleger & Harrison*, *supra*, 67 Cal.App.4th 1509, *Worthington v. Rusconi*, *supra*, 29 Cal.App.4th 1488, and *O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, each applied the tolling provision correctly because doing so promoted the statutory purpose on which they rely. But this is untrue.

Not one of these decisions says this. Rather, all identify *both* statutory purposes. All give the client the benefit of tolling. All read "specific subject matter" language broadly. And all hold, on review of a summary judgment, that the moving party (an attorney in each case) *failed* to establish as a matter of law an absence of triable issues of fact as to when specific subject matter representation ended. In all three cases, the summary judgment was *reversed*.[12]

12/ See *Worthington v. Rusconi*, *supra*, 29 Cal.App.4th at pp. 1494-1495 ["The sole issue on appeal is whether Rusconi *established as a matter of*

(continued...)

The three decisions we cited support our position and a recent decision, *Gold v. Weissman* (Jan. 12, 2004) __ Cal.App.4th __ [2004 Cal.App. Lexis 29], lends further support. *Gold* (like the other decisions, citing *both* purposes of the tolling provision; *id.* at pp. *6-7) holds that "specific subject matter" must be read broadly. (*Id.* at pp. *7-10.)

In *Gold*, plaintiff Gold hired attorney Weissman to sue her doctor for malpractice. On October 23, 1998, Weissman confessed he had blown the statute of limitations. In January 1999, Weissman recommended Gold file an administrative BMQA complaint against her doctor. On January 25, 1999, Weissman sent Gold a draft of the BMQA complaint and the next day he confirmed he was willing to file the complaint. (*Id.* at pp. *1-2.) The BMQA complaint was never filed, and Gold filed her legal malpractice action "[o]ne-year-minus-one-day" later, on January 25, 2000. (*Id.* at p. *2.)

The trial court granted Weissman summary judgment on limitations grounds, holding that Gold had one year from October 23, 1998 – when he confessed his failure to timely file the medical malpractice action – to sue Weissman for legal malpractice. (*Id.* at pp. *2-3.) The Court of Appeal reversed. It held that Weissman's undertaking to prepare the BMQA complaint constituted continuous representation that tolled the statute of limitations. Rejecting Weissman's contention that the BMQA complaint

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12/(...continued)
law that his representation of plaintiff ceased more than a year before she filed suit"; held, summary judgment reversed (emphasis added)]; *Crouse v. Brobeck, Phleger & Harrison*, *supra*, 67 Cal.App.4th at p. 1531 ["We conclude *that a material issue of fact exists* whether Boatwright was the attorney responsible for the loss of the note while at BPH"; held, summary judgment reversed (emphasis added)]; *O'Neill v. Tichy*, *supra*, 19 Cal.App.4th at p. 121 ["In light of this *conflicting evidence on a material fact* affecting the statute of limitations' bar, summary judgment cannot be sustained" (emphasis added)].

involved a subject matter different from Gold's unfiled lawsuit, the Court reasoned:

> Both appellant's unfiled lawsuit and BMQA complaint thus arose from the same event: her doctor's malpractice. Moreover, the lawsuit and BMQA complaint *shared a common purpose*: to permit appellant some measure of redress for her injuries and thus some relief – psychic from the BMQA complaint, financial from the lawsuit – and possible closure. *The distinctions Weissman tries to draw between the lawsuit and the BMQA complaint – different forums and types of relief – do not change the fact that the same medical malpractice gave birth to both proceedings, each designed, in its own way, to salve appellant's one set of injuries.* Thus, Weissman's work for appellant after she discovered his malpractice arose out of, and related to, the same general set of facts as the matter he negligently handled.

(*Gold v. Weissman*, *supra*, 2004 Cal.App. Lexis at pp. *9-10, emphasis added.)

This rationale applies here. Defendants' longtime representation of Fritzi involved a singular purpose – to implement and effectuate Fritzi's family estate plan. Fulfilling that plan involved both inter vivos and testamentary transfers. Each of the transactions defendants handled was designed to promote and refine the estate plan – to the end that the plan would achieve Fritzi's desired wealth transfer and tax objectives. Just as in *Gold* and the other cases discussed, Fritzi is entitled to application of continuous representation tolling, thus defeating defendants' limitations defense, at least on summary judgment.[13]

13/ Defendants' reliance on *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 229 (see RB 30) is misplaced. That case does not favor a narrow construction of "specific subject matter." There, as discussed (AOB 39, fn. 18), undisputed facts showed that the attorney acted in two completely different capacities – first as counsel in a real estate transaction, and later, after the client had retained new counsel, as an expert witness and consultant in related litigation.

(continued...)

These principles, firmly established in California law, are likewise followed in New York, where the New York high court has similarly stressed that the continuous representation doctrine "'recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered.'"[14]

13/(...continued)

Gold v. Weissman, *supra*, 2004 Cal.App. Lexis at pp. *10-11, distinguished *Foxborough* on this precise basis: "There, the Court of Appeal held that when the attorney's role changed from acting as legal counsel to a retained consultant and expert witness hired by the client's new law firm, he no longer represented the client in the same specific subject matter in which the malpractice occurred. Here, in contrast, Weissman's status did not morph; he was acting as appellant's lawyer for both the civil suit and the potential BMQA proceedings." In our case, unlike *Foxborough*, defendants' role as Fritzi's estate planning counsel remained continuously the same; at all times, defendants were responsible for effectuating Fritzi's estate planning interests and to do so without conflict of interest.

14/ In inviting this Court to examine out-of-state authorities, defendants urge that South Dakota should serve as the model. (RB 30-31.) But, as California courts recognize, our statute has a closer kinship with New York law. (See, e.g., *Gurkewitz v. Haberman* (1982) 137 Cal.App.3d 328, 333 [noting that Section 340.6's continuous representation provision is "substantially similar" to a rule fashioned by New York courts]; *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1171 [same]; *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 847-848 [same].)

In any event, the South Dakota case that defendants tout, *Greene v. Morgan, Theeler, Cogley & Petersen* (S.D. 1998) 575 N.W.2d 457, is distinguishable. That case involved distinct, disjunctive services. The attorney first prepared an antenuptial agreement and later provided estate planning services. When the antenuptial agreement later proved unenforceable, the client tried to beat the statute of limitations by invoking continuous representation tolling, lumping together all the attorney's services as "estate planning and asset protection advice." The South Dakota Supreme Court saw that the case did not involve "the same or related services," and in that context remarked that "[a]lmost any work performed

(continued...)

The New York law specifically recognizes that it is the *agreement* between the parties that defines the "specific subject matter" question, recognizing that "'continuous representation' in the context of a legal malpractice action does not automatically come to an end where . . . an attorney and client both explicitly anticipate continued representation." (*Shumsky v. Eisenstein* (2001) 96 N.Y.2d 164, 167, 170 [726 N.Y.S.2d 365, 368, 370].)

In sum, defendants represented Fritzi in estate planning matters for over two decades, doing nothing (or, at least, nothing they have shown) to discourage her from placing her complete trust in them or from continuing to rely on them for effectuation of her estate plan. Defendants understood the estate plan was the subject matter of their continuous representation. Once the relationship ended, Fritzi took a close look at defendants' work and uncovered the acts and omissions that form the basis of her legal malpractice claims. The tolling provision gave her a year from that point to initiate this lawsuit. Her suit was filed within that deadline.

14/(...continued)
by an attorney could arguably be classified as asset protection or estate planning in some fashion or another[.]" (*Id.* at pp. 460-461.) Here, as defendants' own statements demonstrate (see Section I(C), *supra*), the representation undeniably focused on the family estate plan from start to finish, making *Greene* inapposite.

E. Continuous Representation By Hoisington And By The Orrick Firm As To The Specific Subject Matter At Issue In This Lawsuit – The Family Estate Plan – Ended Within A Year Of Fritzi's Lawsuit.

Defendants contend their representation ended, at the latest, on March 31, 1999, which they say is when Hoisington retired from the Orrick firm. (RB 13, 36-41.) This is defendants' view of the evidence, but their view is immaterial on summary judgment.

What defendants ignore, once again, is their fundamental summary judgment burden, namely, to prove an absence of triable issues of fact and to view the evidence and draw all reasonable inferences in Fritzi's favor. Defendants have not carried that burden; they have not dealt with the evidence and inferences that favor Fritzi.

Hoisington. Defendants concede Hoisington drafted a codicil to Fritzi's will in August 1999. (RB 26, 36-37; see discussion at AOB 8-9, 21-22.)[15]

Since the "specific subject matter" of Hoisington's representation of Fritzi was – and always had been – the family estate plan, and since the codicil was unquestionably part of the estate plan, August 17, 1999, was the earliest point when continuous representation tolling ended as to Hoisington. And since Fritzi filed her lawsuit less than a year later, on August 8, 2000 (AA 320), her lawsuit was timely filed against Hoisington.

15/ That occurred around August 17, 1999, after Hoisington met with Fritzi on August 14 and told her he could no longer represent her. (See AA 817-818; ["Q: 'And did you prepare it (the codicil) in the week of August 17, 1999?' A: 'Well, I prepared it about that time, yeah'"]; see AA 1236 ["Hoisington does not dispute that he told Fritzi in mid-August, 1999 that he would no longer represent Fritzi or Ernie"].)

The Orrick Firm. The lawsuit was also timely filed against the Orrick firm. Fritzi had been Hoisington's and the Orrick firm's client for 22 years, and defendants' summary judgment motion failed to offer a single fact to establish conclusively or otherwise that the firm stopped representing Fritzi in regard to her estate plan more than one year before she filed her lawsuit.

Nowhere does Orrick demonstrate that its view is the only view. Rather, Orrick simply asks this Court to *assume* that its representation of Fritzi's estate plan interests necessarily ended when Hoisington retired and that a lapse in its active work for Fritzi necessarily ended the representation. (See, e.g., RB 36-41.)[16] The factual hole in the Orrick firm's position is that it presupposes that the terms of the retention agreement with Fritzi called for the firm's representation to terminate when the responsible partner retired. But, as discussed above, the Orrick firm never offered *proof* of the

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16/ Defendants claim we misstated the record in stating that Fritzi didn't even learn of Hoisington's retirement until about a month after the August 14, 1999, meeting at which he told her he could no longer represent her. (RB 20.) Although the difference between August and September 1999 has no bearing on the outcome of Fritzi's tolling argument, we want to clear things up.

Defendants point to an excerpt from Fritzi's deposition that appears to indicate she learned of Hoisington's retirement in August 1999. (AA 761 [deposition page 1053].) What defendants do not disclose is that a couple of pages later, Fritzi was less definite, making clear only that she did not find out about the retirement *before* the August 14 meeting. (See AA 198 [deposition page 1055].)

In her declaration submitted in opposition to summary judgment, Fritzi elaborated on her recollection: "I was not informed that Mr. Hoisington had left Orrick until after I met with him in August, 1999. After the meeting I called Orrick's office, I think it was sometime in September, 1999, to talk to Mr. Hoisington and the receptionist told me that he had moved to Lafayette, and she gave me his phone number. Until then, I thought that he was still at Orrick." (AA 670.)

Contrary to defendants' depiction (see RB 22), Fritzi's declaration does not contradict her deposition testimony. It clarifies it.

retention terms in its motion. Moreover, Orrick's position defies common sense.[17]

The Orrick firm never established the terms of the retainer agreement and never offered an iota of evidence that the retention agreement contemplated that the Orrick firm's 22-year continuous relationship with Fritzi would automatically end after some undefined lapse in activity or on Hoisington's retirement. Just as with the "specific subject matter" issue already discussed, the Orrick firm's failure to establish any facts about the terms of the firm's engagement is fatal on summary judgment. (See Section I(B), *supra*.)

Aside from failing to carry their summary judgment burden, defendants' position is contrary to the fundamental realities of estate-planning practice. In the estate planning field, there frequently are periods of inactivity in the need to do work for a client. That does not mean the firm is no longer responsible for and engaged in the client's estate planning matters.[18]

17/ It would be counterintuitive to believe that a law firm would want to encourage a 22-year client like Fritzi to take her long-term estate planning business elsewhere.

18/ The Orrick firm claims we have ignored its human resources administrator's declaration explaining the distinction that the *firm* draws between an Orrick partner's last work day with the firm ("retirement") and the date when the attorney's capital account is released ("termination"). (E.g., RB 38-39.) At most, the declaration establishes that Hoisington retired on March 31, 1999, as the *firm* defines "retirement." But the declaration is meaningless in the summary judgment context. What the Orrick firm might privately define as retirement does not mean that *Fritzi* knew of the retirement or had any inkling that the firm might now say, in retrospect, that it privately viewed its relationship with Fritzi as having concluded without her knowledge because its relationship with Hoisington may have changed.

If anything, the Orrick administrator's declaration supports Fritzi's

(continued...)

The Orrick firm misses the point in its citation to authorities stating that continuous representation for tolling purposes *can* come to an end even if the client never formally terminates the lawyer and even if the lawyer never formally withdraws from the representation. (RB 39-40.) There is a big difference between *can* and *must*. The result depends on the evidence, including the agreed-upon terms of the representation.[19] On summary judgment, defendants were required to prove an absence of triable issues of fact on that question. They never did.

This is a classic case of disputed material issues of fact. The firm has failed to establish that the representation ended at any point before Fritzi retained a new estate planning attorney in August 1999. Consequently, the issue of when the representation ended cannot be decided in the Orrick firm's favor as a matter of law. The Orrick firm, accordingly, like Hoisington, is not entitled to summary judgment. The judgment must be reversed.

18/(...continued)
view. It reflects that Hoisington's financial stake in the firm persisted past his retirement date, continuing into 2000, exactly as the opening brief stated. (AOB 24.)

19/ E.g., *Worthington v. Rusconi*, *supra*, 29 Cal.App.4th at pp. 1498-1499 [summary judgment for attorney reversed, because there was evidence supporting conclusion that representation had not ended]; *Taub v. First State Ins. Co.* (1995) 44 Cal.App.4th 811, 821 ["In the present case, the record unequivocally established that the Taub-Moore attorney-client relationship ended in 1973"]; *Panattoni v. Superior Court* (1988) 203 Cal.App.3d 1092, 1096 [writ issued to compel entry of summary judgment because scope and duration of representation were undisputed: "It is agreed that defendants undertook to obtain whatever social security and workers' compensation benefits to which plaintiff was entitled by virtue of the accident"]; *Shapero v. Fliegel*, *supra*, 191 Cal.App.3d at pp. 845, 848 [evidence conclusively established that attorney affirmatively terminated representation in October 1978, so action filed in March 1985 was untimely].

F. Since Defendants Failed To Conclusively Negate Continuous Representation Tolling, Any Issue As To What Fritzi Purportedly Knew Or Should Have Known Is Irrelevant; At Most, It Would Present Another Jury Question.

Below, defendants argued that Fritzi's lawsuit, filed on August 8, 2000 (AA 320), was time-barred because Fritzi supposedly discovered or reasonably should have discovered the facts supporting her legal malpractice claims years earlier. (See AA 551-580.) The trial court agreed. Although it awarded summary judgment on the basis of defendants' tolling argument, it additionally concluded that Fritzi should have discovered her lawyers' negligence as early as 1992. (See generally AA 1371-1383 [order].)

But this doesn't matter. As demonstrated in the opening brief, knowledge is irrelevant because Fritzi's lawsuit is timely under continuous representation tolling. Moreover, the trial court reached its conclusion by ignoring the summary judgment rule requiring that it view facts and draw inferences in the light most favorable to Fritzi. (See AOB 41-43.)

Defendants now contend that Fritzi's argument is waived because the opening brief failed to cite authority to support it and that Fritzi is precluded from claiming delayed discovery because she signed various estate plan documents and therefore must concede constructive knowledge of their content. (RB 42-46.) Defendants' arguments fail.

First, Fritzi's knowledge or lack of knowledge is beside the point when continuous tolling applies. (E.g., *O'Neill v. Tichy*, *supra*, 19 Cal.App.4th at pp. 120-121 ["the client's awareness of the attorney's

negligence does not interrupt the tolling of the limitations period as long as the client permits the attorney to continue representing the client regarding the specific subject matter in which the alleged negligence occurred"].)

Second, nothing is waived. Our argument demonstrating there are material factual disputes concerning Fritzi's alleged knowledge is amply supported by reference to authority addressing the parties' respective burdens on summary judgment (see AOB 17-20 [AOB's burden of proof and standard of review discussion]), as well as cases exposing the trial court's misconceptions in concluding that the statute of limitations could commence to run while the attorney-client relationship remained ongoing (see AOB 41-43).

Third, defendants' constructive knowledge argument doesn't hold up. Defendants insist that Fritzi's constructive knowledge is established *as a matter of law* because Fritzi signed some 40 documents over the course of the representation and this gives her presumptive knowledge of the contents of legal documents she signed. (RB 42-46.) But this argument ignores the law.

It is true that a person can be charged with presumptive knowledge of the contents of documents that he or she signs – *unless* there is reason to hold otherwise. Defendants forget the "unless" part.

Under the law, there *is* reason to hold otherwise if there is evidence of fraud, coercion, or excusable neglect, or if the circumstances of the transaction show there is reason to conclude the person did not really assent to what was signed. (E.g., *Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366-1367, emphasis added ["The general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, *in the absence of fraud and imposition*, bound by its contents . . . but it is also a general rule that the assent of a party to a contract is

necessary in order that it be binding upon him, and that, *if the circumstances of a transaction are such that he is not estopped from setting up his want of assent, he can be relieved from the effect of his signature if it can be made to appear that he did not in reality assent to it*"]; *Bolanos v. Khalatian* (1991) 231 Cal.App.3d 1586, 1590 ["When a person with the capacity of reading and understanding an instrument signs it, he may not, *in the absence of fraud, coercion or excusable neglect*, avoid its terms on the ground he failed to read it before signing it"].)

Here, Fritzi presented evidence that there is an "unless" – that there is reason to hold otherwise. Specifically, Fritzi presented argument and evidence that irrespective of having signed the documents, she simply did what her longtime attorneys directed, relying on them unquestioningly.[20] She supplied evidence that she did not understand the extent to which various asset transfers were diminishing her resources, or eliminating her control over the business she started, or transferring her interests to her

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20/ See, e.g., AA 588-589 [trial court brief], 608-636 [response to separate statement in support of defendants' summary judgment motion], 652-659 [statement of disputed and undisputed facts in opposition to all defendants' summary judgment motions], 661-670 [Fritzi's declaration in opposition to summary judgment], 684 ["whatever needed to be signed, I signed"], 688 ["was involved in every aspect of the business except that – nothing finance, figures I did not know, and this is I guess where my lack of education came in"], 689 [Fritzi proofread documents for errors, not for content], 693 ["All I can tell you is this; many times my husband brought papers home and said 'Sign it'"], 700 ["I had hardly any conversations with Mr. Hoisington"], 712 ["I really didn't have anything to do with it. This was all worked out by the attorneys and the other people"], 720 ["If I would have understood then what I understand now, I would not have signed"], 736 ["Mr. Hoisington never talked to me about anything . . . . I didn't know what I was signing . . . No, it was just 'sign'"], 749-750 [Hoisington never explained things to her the way he should have done, just gave her documents to sign], 972-980 [interrogatory responses].

business over to her daughter and son-in-law.[21] Moreover, Fritzi introduced evidence that she did not know that Hoisington and the Orrick firm were in a conflict of interest when the transfers occurred in that they were simultaneously representing the recipients of the transfers without her knowledge or consent. (E.g., AA 669.)

Defendants' reliance on *Skrbina v. Fleming Companies*, *supra*, 45 Cal.App.4th 1353 and *N.A.M.E.S. v. Singer* (1979) 90 Cal.App.3d 653, is misplaced. (RB 43-44.) Both cases involved materially different scenarios from what is presented here. In *Skrbina*, the plaintiff offered no evidence to rebut the presumption that he understood what he had signed. (45 Cal.App.4th at p. 1367.)[22] *N.A.M.E.S.* involved a dispute over an arm's length contract, where both sides had ample opportunity to advise themselves as to whether it served their interests to enter into the agreement; here, however, defendants were Fritzi's lawyers and she had every right to rely on them to protect her interests.[23]

21/ See, e.g., AA 696 ["My husband and I should have had control, and that's what I had planned and nothing else"], 707 ["I'm shocked when I found out in 1999 that my husband and I only own 17 percent of the business. I had no idea"], 945 ["It was shocking to her to find out they only owned collectively 17.781 percent of the whole"], 972-980 [interrogatory responses].

22/ *Skrbina* was a wrongful discharge action. The plaintiff had signed a release of all claims against his employer and sought to be relieved from it on the ground that he never meant to abandon his harassment and discrimination claims, having signed simply in order to get severance pay. (*Id.* at p. 1367.) He conceded having read the release and, unlike our case, he offered no evidence that he didn't understand it. (*Ibid.*)

23/ *N.A.M.E.S.* reinstated a petition to confirm an arbitration award that had been dismissed because the respondent, despite having signed an arbitration agreement, was unaware of its terms. The appellate court found that respondent had ample opportunity to advise himself. (*Ibid.*) Here, in distinct contrast, Fritzi showed there was reason to relieve her of the effect

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Relying on *United States v. Olbres* (1st Cir. 1995) 61 F.3d 967, 971, defendants stress that Fritzi signed a federal gift tax return, thus (they say) creating a presumption under federal law that she knew its contents whether or not she read it. (RB 43.) *Olbres* does not support defendants; it supports Fritzi. What *Olbres really* said is that the signature's significance *is a jury question*: "A *jury* may permissibly infer that a taxpayer read his return and knew its contents from the bare fact that he signed it." (*United States v. Olbres*, *supra*, 61 F.3d at p. 971, emphasis added.)[24]

Here, too, what Fritzi knew or reasonably should have known cannot change the impact of continuous representation tolling. But even if it could, the issue is a jury question. Defendants – the moving parties on summary judgment – failed to carry *their* burden to eliminate all triable issues of fact on the limitations point. The judgment in their favor must be reversed.

23/(...continued)
of her signature; she testified that she relied completely on her lawyers, that she was not comfortable with or well versed in financial issues and that she did not understand the implications of what she was asked to sign. (See footnote 20, *supra*.) Thus, here, in contrast to the arm's length scenario in *N.A.M.E.S.*, one of the issues in dispute is *whether* Fritzi's advisors gave her any reasonable opportunity to learn the salient facts.

24/ *Olbres* reflects that the jury can believe or disbelieve the taxpayer's story as to why the signature should be disregarded (61 F.3d at p. 971, citing *United States v. Romanow* (1st Cir. 1974) 505 F.2d 813, 814), and it reinforces the point with repeated reference to *the jury's* entitlement to decide what inferences to draw from conflicting evidence. (E.g., 61 F.3d at pp. 972-973 ["Of course, the defendants' counter-argument – that the evidence indicates nothing more than . . . slipshod . . . business practices – is also plausible. Withal, the option to choose between these inferences belonged to the jury, not the judge (citation) and the jury had a perfect right to reject the defendants' counter-argument and draw the inference urged by the government. . . . After all, 'if the evidence can be construed in various reasonable alternatives, the jury is entitled to freely choose from among them.'" (Citation)].)

II.

NONE OF DEFENDANTS' OTHER ARGUMENTS SALVAGES THE SUMMARY JUDGMENT.

Determined to divert attention from the issues that matter, defendants raise an assortment of hyper-technical arguments, all of which are immaterial diversions at best. Defendants' arguments lack merit. Not one of them overcomes the glaring deficiency in defendants' case – the failure to establish an absence of triable factual issues on the question of tolling.

A. Contrary To Defendants' Assertion, The Opening Brief Consistently Cites To The Record And Fairly Construes The Evidence Consistent With The Governing Law.

Defendants criticize the opening brief's use of and citation to the record. (E.g., RB 19-22.) Their criticisms are immaterial. They do not affect the outcome of any issue on appeal. In any event, the criticisms are unfounded.

1. Defendants are wrong in claiming that the opening brief invents facts.

Defendants cite seven facts they say are pure invention. Defendants are wrong. We address the supposed "invented facts" in the order they appear in the Respondents' Brief (RB 20, fn. 62):

- Our brief: "The Orrick firm didn't even nail down the date of Hoisington's retirement." (AOB 23.) We stand by this. There is evidence that Hoisington had at least a continuing

financial interest in the firm into 2000. (See more detailed discussion in footnote 18, *supra*.)

- Our brief: "[T]he Orrick firm claimed it sent its clients notice of Hoisington's retirement by letter dated March 18, 1999." (AOB 24, citing AA 590-591.) The letter is in the record. (See AA 1068-1069.) But it doesn't matter whether Orrick gave notice of Hoisington's retirement because there is nothing to establish that Hoisington's retirement necessarily terminated Orrick's long-term relationship with Fritzi, and it is *undisputed* that Orrick never gave Fritzi notice that *it* was terminating *its relationship* with her. (AA 1238 [Defendants' response to Fritzi's statement of disputed and undisputed facts, ¶ 36]; see *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4 ["where the separate statement . . . indicates that a fact is undisputed, a citation to that page of the separate statement is of valuable assistance"].)

- Our brief: Fritzi "contacted Hoisington, whom she believed still to be with the Orrick firm." (AOB 8, citing AA 765-766.) Fritzi so declared. (See AA 670.) We mistakenly cited Fritzi's deposition (AA 765-766) rather than her declaration (AA 670), but the evidence is there and the Orrick firm does not claim it suffered prejudice by reason of the mistaken citation.

- Our brief: When Fritzi contacted Hoisington in August 1999, she reached him by telephoning the Orrick firm's number.

(AOB 24, citing AA 589.) Fritzi testified that she thought Hoisington was still at Orrick in August 1999 and that she had his number in her telephone book, but that Valli actually placed the call to arrange the meeting that took place on August 14. (AA 761.) It would have been more accurate if we said that Fritzi assumed that Valli telephoned him at Orrick, but again, defendants do not claim they suffered prejudice from any overstatement of this detail.

- Our brief: Hoisington did not disclose his retirement to Fritzi at the August 14, 1999, meeting. (AOB 24, citing AA 589.) Again, Fritzi so declared. The page cited (AA 589) in turn cites Fritzi's declaration, which directly supports the brief's statement (AA 670).

- Our brief: "After the [August 1999] meeting, Hoisington drafted a codicil to Fritzi's will, as requested by Fritzi long beforehand, in 1998." (AOB 8-9, citing AA 211-214, 595, 726, 765-767, 809-811.) The statement is accurate. Hoisington testified, referring to the week of August 17, 1999, that he prepared the codicil "about that time." (AA 817-818; see footnote 15, *supra*.) No matter how much defendants nitpick, there is no dispute that the meeting between Fritzi and Hoisington took place on August 14 and the Orrick firm sent the codicil to Fritzi's new lawyer three days later, on August 17. (E.g., AA 1236-1237 [defendants' response to Fritzi's statement of disputed and undisputed facts]; see also AA 214 [Hoisington recalled that Fritzi

requested the codicil "quite a while earlier" than he drafted it].)

- Our brief: "Fritzi knew nothing of [the proposed 1998 transaction] until Hoisington delivered a memo to her at 11 p.m. the night before obtaining her signature on the necessary documents." (AOB 11, citing AA 592, 617, 618, 654, 666, 714.) The only dispute here is whether Hoisington himself delivered his own memo at 11 p.m. on March 17, 1998, or whether that was when Ernie showed Hoisington's memo to Fritzi. Either way, Hoisington's memo was dated March 17, 1998; Fritzi received a communication drafted by him at 11 p.m. that evening; and the meeting to complete the transaction took place the next day, March 18. (See AA 1232 [undisputed that Fritzi received the March 17 memo at 11 p.m. and that the meeting was the next day].) The point remains that Fritzi had precious little time to consider it.

Not one of defendants' nitpicking points alters the fact that defendants failed to carry their summary judgment burden of proof and failed to address the evidence in light of the governing standard of review – namely, viewed in Fritzi's favor. We respectfully submit that those glaring deficiencies far outweigh defendants' hyper-technical complaints.

2. Contrary to defendants' contention, the opening brief cites directly to the record, and in those instances when it supports factual references with citation to trial court briefs, those briefs, in turn, identify the supporting evidence that is in the record.

Defendants point to two facts that, they claim, are supported only by Fritzi's trial court briefs and separate statement, not by evidence. The two facts are: (1) that Fritzi was not told the dollar value of the 1992 stock gifts; and (2) that Fritzi did not understand that the 1994 stock bonuses involved granting another 100,000 shares (worth at least $6 million) to Valli and Bob. (RB 21, fn. 63, citing AOB 10, 11.)[25]

First, neither fact pertains to the dispositive limitations issue, which is the only issue presented on appeal.

Second, our opening brief *did* cite to the record as to each fact. (AOB 10, citing AA 592, 653; AOB 11, citing AA 592.) True, those cites are to pages in Fritzi's trial court briefs and separate statement. What defendants fail to disclose, however, is that the cited record pages refer directly to the supporting evidence, which evidence is also in the record. (See AA 592 and 653 [citing Fritzi's declaration]; AA 661-670

25/ Defendants also claim that some facts are supported only by citation to "Fritzi's Separate Statement of Disputed and Undisputed Facts In Opposition To All Defendants' Motions for Summary Judgment" (AA 638-650), which defendants assert "the trial court struck for failure to comply with California Rule of Court 342(f)[.]" (RB 21-22.) Not only do defendants fail to identify which facts they claim fall into this category, they are wrong about the trial court granting their motion to strike. In fact, the trial court did not even rule on their motion to strike. (See Section II(B), *infra*.)

[declaration].) In short, the cites identify the supporting evidence, albeit indirectly, while at the same time placing it before this Court in the same context that it was presented to the trial court. In light of *Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th 171, 178, fn. 4, it would have been preferable to cite both to the briefs or separate statement and to the supporting evidence in each instance, but defendants' accusation that we failed to support statements with citation to *the record* is unfounded. Moreover, defendants could not possibly have been misled as to our points or injured by the two-step process our citations on the two facts required them to take.[26]

3. The Opening Brief Appropriately Supported Its Recitation Of Certain Facts With Citations To Fritzi's Declaration.

Defendants claim the opening brief supports certain factual references by citing to a part of Fritzi's declaration that improperly contradicted her deposition testimony. (RB 22.) This is untrue.

Fritzi's declaration was consistent with Fritzi's deposition testimony. (See discussion in footnote 16, *supra*.) Her deposition established that she

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26/ To the extent defendants contend that citing the trial court briefs is *verboten* (i.e., even when the evidence is also cited), they are wrong. (See RB 21, fn. 63.) *Jackson* itself, on which they rely, acknowledges that citation to the briefs and separate statement can be helpful.

Defendants quote *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205, as saying that inadequate citation is an "especially acute" problem on appeal from a summary judgment. (RB 21.) What *Bernard* decried was the use of block page references ("e.g., C.T. pp. 1-20"). (*Id.* at p. 1205.) The opening brief here did not use block page citations. In each instance, defendants knew exactly what portions of the record contained each of the facts to which we referred.

was not sure when she learned of Hoisington's retirement, except that it was no earlier than August 14, 1999, and her declaration explained she believes she actually found out about it a few weeks later. Either way, it matters not – for purposes of deciding this appeal – whether Fritzi learned of Hoisington's retirement on August 14, 1999, or shortly thereafter, since Fritzi filed this lawsuit less than one year after the earliest date. This was less than a year after defendants ceased to represent her in estate planning matters.

B. Contrary To Defendants' Assertion, There Was Never A Ruling On Any Of Their Evidentiary Objections.

Defendants complain that some of Fritzi's facts are supported by citations to Fritzi's Separate Statement of Disputed and Undisputed Facts, which they assert the trial court struck for failure to comply with rule 342(f), California Rules of Court. (RB 21-22.) Defendants are wrong. In fact, defendants moved to strike, but they never obtained a ruling. Therefore, Fritzi is entitled to rely on that document, and the evidence it incorporates.[27]

To support their contention that the trial court granted their motion to strike, defendants cite: (1) the trial court's *tentative* ruling, and (2) a snippet from the first of several hearings on the parties' summary judgment motions, in which the trial court, responding to Fritzi's counsel's request

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27/ Fritzi likewise is entitled to rely on her declaration, which defendants assert contradicts her deposition testimony in certain respects. (RB 12, 22.) Defendants' complaints about the declaration also constitute evidentiary objections to which they never obtained a ruling. In any event, as we have explained, the supposed contradiction between the declaration and the deposition is illusory.

that it rule on evidentiary issues, remarked, "That, by the way, I have done." (See RB 22, fn. 65; AA 1345, 1351 [tentative rulings for 11/13/02 hearing]; 9/17/02 RT 18.)[28]

But there is no *order*, no actual ruling, in the record. At most, there is a *tentative* ruling which, by its terms, is only preliminary.[29]

Where the trial judge fails to rule on objections to evidence presented at a summary judgment motion, the objections are deemed waived on appeal, and, in reviewing the trial court's ruling, the appellate court considers all evidence presented by the parties. (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1, disapproved on other grounds by *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854, fn. 19; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1; *Swat-Fame, Inc. v. Goldstein*, *supra*, 101 Cal.App.4th at pp. 623-624; *City of Long Beach v. Farmers & Merchants Bank*, *supra*, 81 Cal.App.4th at pp. 782-784.) That is precisely the situation here.

28/ Defendants try to give the impression that the trial court's remark ("That I have done") reflected that the court was making the tentative ruling final. (RB 22, fn. 65.) The impression is false. The remark *preceded* the tentative ruling by two months and, thus, it could not possibly have referred to a tentative ruling that did not yet exist.

29/ Although the California Judges Benchbook, Civil Proceedings – Before Trial (Cal. CJER 1995), § 13.42, p. 681, said that a judge could handle evidentiary objections at the hearing or in a tentative decision, the 2003 update to that text states that numerous appellate decisions have discredited that procedure, and "have instead held that a judge has a duty to rule on evidentiary objections." (California Judges Benchbook: Civil Proceedings – Before Trial (Cal. CJER Update 2003) ["Benchbook"], § 13.42, p. 420, citing *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 623; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 238; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784, and see generally Benchbook at § 13.42, pp. 419-421.) The Respondents' Brief acknowledges that objections not ruled upon are waived. (See RB 38-39, fn. 87.)

On appeal, Fritzi is entitled to rely on all the evidence she cited.

C. Even If There Had Been Any Validity To Defendant's Challenges To Our Record Citations, None Would Properly Affect The Outcome Of This Appeal.

As we have shown, defendants' criticisms of our citations to the record and reliance on evidence are unfounded. But even if there had been anything to them, they would have no influence on how this appeal should be resolved.

There is simply no real dispute that Fritzi and her husband retained the Orrick firm and Hoisington in 1977 to develop and manage their family estate plan; that these defendants continuously represented Fritzi on estate planning matters for some 22 years; that on August 14, 1999, Hoisington told Fritzi he could no longer represent her due to conflicts of interest; that three days later the Orrick firm sent Fritzi's new lawyer the codicil Hoisington had completed on Fritzi's behalf; that the Orrick firm itself never notified Fritzi, formally or otherwise, that its representation of her estate planning matters had ever terminated; and that Fritzi filed this lawsuit on August 8, 2000, within one year after defendants' continuous representation ended.

These facts, untainted by controversy as to proper citation, yield a clear conclusion. Defendants never carried their burden on summary judgment to establish that Fritzi's lawsuit was barred by limitations.

The lawyers are the parties who sought summary judgment on limitations grounds. The burden was on *them* to establish, beyond material factual dispute, that the "specific subject matter" of their retainer agreement was something other than the estate plan and that their continuous

representation as to that subject matter ended more than a year before Fritzi filed this lawsuit. This, defendants failed to do.

CONCLUSION

For all the reasons expressed above and in the opening brief, the superior court erred in entering summary judgment in favor of defendants William Hoisington and Orrick, Herrington & Sutcliffe. The judgment must be reversed.

Dated: February 5, 2004

Respectfully submitted,

SHARON GREEN, LAWYER
GREINES, MARTIN, STEIN & RICHLAND LLP
IRVING H. GREINES
FERIS M. GREENBERGER

Attorneys for Plaintiff and Appellant
Fritzi Benesch

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1), California Rules of Court, I certify that the attached Appellant's Reply Brief in *Benesch v. Hoisington, et al.*, 1st Civil No. A102296, contains 10,224 words, as counted by Corel WordPerfect, version 9.0, the software program within which the brief was generated.

DATED: February 5, 2004

SHARON GREEN, LAWYER
GREINES, MARTIN, STEIN & RICHLAND LLP
IRVING H. GREINES
FERIS M. GREENBERGER

By_____
Feris M. Greenberger

Attorneys for Plaintiff and Appellant Fritzi Benesch