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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOYCE LEAMON, Plaintiff, Cross-defendant and Appellant, KAREN HERRERA, Plaintiff, Cross-defendant and Respondent, v. LEONARD KRAJKIEWCZ et al., Defendants, Cross-complainants and Appellants.	F038025 (Super. Ct. No. 250958) **OPINION**

APPEAL from a judgment and an order of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Law Offices of Michael Abbott and Michael Abbott for Plaintiffs, Cross-defendants and Appellant.

Griffith & Farrace and Robert F. Farrace for Defendants, Cross-complainants and Appellants.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I through IV.

This appeal concerns the enforceability of a contract for the sale of real estate. A homeowner and her daughter filed a quiet title action against the potential buyers claiming their written contract was not valid. The buyers filed a cross-complaint for breach of contract, specific performance and other causes of action and claimed attorney fees pursuant to a clause in the contract. The jury found the contract was not valid and judgment was entered for the plaintiffs. The trial court subsequently denied the homeowner's request for attorney fees as the prevailing party under Civil Code section 1717.

The buyers appeal, claiming numerous errors. The homeowner appeals claiming that, even though she asserted the contract was not valid and did not fulfill the contractual condition precedent of seeking mediation before filing suit, she is entitled to attorney fees under the contract because she would have been liable for attorney fees had the buyers prevailed.

In the unpublished portion of our opinion, we hold substantial evidence supports the jury's special verdict and find no merit in buyers' claims of prejudicial error.

In the published portion of our opinion, we hold the cross-appeal is without merit because the homeowner did not satisfy the contractual condition precedent of seeking mediation before commencing her quiet title action and, as a result, is not entitled to recover attorney fees.

The judgment is affirmed. The order taxing attorney fees also is affirmed.

FACTS AND PROCEDURAL HISTORY

Plaintiff Joyce Leamon (Leamon) owned a single-family residence located on Lydia Lane in Modesto, California (the Property). In 1996 or 1997 she listed the Property for sale with a realtor named Joe Randy. After the listing expired, her next door neighbors, Leonard and Corrie Krajkiewcz (collectively, the Krajkiewczes), expressed an interested in purchasing the Property. With the help of Rick Denison (Denison), a real estate agent and friend of Leonard Krajkiewcz, a sale contract was drawn up and the

Krajkiewczes put down a deposit. However, the transaction was not completed because the Krajkiewczes were not able to come up with the money.

In late July or early August of 1999, the Krajkiewczes again expressed an interest in buying the Property. Leamon told them she wanted to clear $65,000 on the sale. The Krajkiewczes agreed and asked if Denison could represent both sides. Leamon agreed to this request. As a result, Denison first contacted Leamon about the proposed transaction a week or two before September 22, 1999. Denison told Leamon he would do the paperwork and get everything started.

On September 20, 1999, Leamon had a conversation with her daughter, Karen Herrera (Herrera), and told Herrera that she was selling the Property. In that conversation, Herrera told Leamon that she wanted the Property. Leamon told Herrera that, as her daughter, she came first. Herrera told her mother she would come by to discuss it.

By coincidence, on September 21, 1999, Joe Randy contacted Leamon to ask her if she was interested in selling the Property. Randy testified that Leamon told him that she wanted to give or sell the Property to her daughter. Also on September 21, 1999, Denison telephoned Leamon to make an appointment to come to her home to have the contract signed. Leamon told Denison that her daughter wanted the Property, she did not intend to sell to the Krajkiewczes, and she would not make an appointment.

On September 22, 1999, at around 9:30 to 10:00 a.m., Denison and the Krajkiewczes came to Leamon's door. Leamon told them she did not have an appointment with them. Denison then told Leamon that a verbal agreement was the same as a written one and if she did not go through with the sale[1] he would lose thousands of

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[1] In her two descriptions of Denison's statement, Leamon testified Denison said "that if I didn't go through with *this sale* to them that I would end up in court" and "that

dollars and would take her to court. At that point, Leamon invited them inside and they went to her kitchen table. Also present in the kitchen was Leamon's husband, Shawnda Webber and Gloria Vierra.

During the conversation in the kitchen, the Krajkiewczes told Leamon more than once that they wanted her to sell them the Property, the reasons why they wanted the Property, and why she should sell it to them. Leamon also testified that during the conversation Denison threaten her with litigation several times. During the conversation, Leamon told them she wanted to wait for her daughter and tried to reach her daughter by telephone. Denison responded that he could not wait because he had a doctor's appointment in Stockton concerning his cancer.

Denison had brought with him documents including a standard form "California Association of Realtors' Residential Purchase Agreement and Receipt for Deposit" for use with single family residential property (the Agreement), as well as a disclosure form regarding a real estate agent's representing both seller and buyer. Just before she signed the Agreement and other papers, Leamon left the kitchen because she was crying. Her eyes were full of tears and she could not see. She washed her face in the bathroom in an effort to calm down.

When Leamon returned to the kitchen, Denison showed her where to sign the documents. Denison and the Krajkiewczes left immediately after the documents were signed.

At trial, Leamon was asked if "but for the threats of Mr. Denison that you would be sued would you have signed those documents?" She responded, "No. Definitely not." Leamon also testified that she believed Denison when he told her that she was obligated

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if I didn't go through with *the contract to sell the property* to them that he would take me to court." (Italics added.)

to sign the documents because she had an oral agreement to convey the Property to the Krajkiewczes.

On September 23, 1999, after speaking with her daughter and son-in-law, Leamon telephoned her attorney. Subsequently, her attorney sent a letter dated September 23, 1999, to Denison and the Krajkiewczes stating that "you are hereby notified that Mrs. Leamon has decided to cancel the sale of her home." The letter mentioned the threats of litigation made to Leamon and stated her signature on the Agreement was procured under duress.

On December 2, 1999, the Krajkiewczes filed a small claims action for breach of contract claiming that Leamon owed them $5,000 in damages. On December 22, 1999, Leamon filed a complaint against the Krajkiewczes and Denison to quiet title in the Property and for infliction of emotional distress. Leamon also moved to consolidate the small claims action with the quiet title action. The cases were not consolidated because the small claims action was dismissed without prejudice.

On February 25, 2000, counsel for the Krajkiewczes sent counsel for Leamon a letter requesting mediation of the dispute in accordance with paragraph 21A of the Agreement. Leamon did not comply with this request.

In April 2000, Leamon and Herrera filed a verified second amended complaint to quiet title and to obtain a judicial declaration that the Agreement was void and of no effect. The relief requested in the second amended complaint did not include a request for attorney fees.

In June 2000, the Krajkiewczes filed an answer to the seconded amended complaint and filed a cross-complaint against Leamon and Herrera alleging causes of action for breach of contract, specific performance, fraudulent conveyance and intentional inference with economic relationship. The answer by the Krajkiewczes requested attorney fees pursuant to contract or statute. In addition, the relief requested in

the cross-complaint by the Krajkiewczes included a request for attorney fees with respect to the causes of action for breach of contract and specific performance.

In July 2000, Leamon and Herrera filed an answer to the cross-complaint denying the Krajkiewczes were entitled to relief and requested a judgment that would include "attorneys' fees incurred in defending this matter."

A jury trial was held from Monday, December 4, 2000, through Friday, December 8, 2000. At the start of trial, the Krajkiewczes filed a number of papers, including their motion in limine No. one, which sought to exclude certain documents based on the statute of frauds. The trial court granted this unopposed motion in limine. On December 8, 2000, the jury heard closing arguments, received instructions from the trial court, and retired for deliberations at 3:44 p.m. At 4:32 p.m. they returned into court with a verdict. In response to question No. 1 of the special verdict, which asked if they found there was a valid contract between the Krajkiewczes and Leamon, the jury answered, "No." Judgment in favor of Leamon and Herrera was entered on January 17, 2001.

On March 7, 2001, the Krajkiewczes filed a motion for new trial asserting (1) Denison's threats of litigation related to his commission agreement and were not evidence of duress affecting the Agreement, (2) counsel for Leamon and Herrera acted improperly by arguing the jury should end its deliberation for reasons outside the evidence, (3) the jury acted improperly by rendering a verdict without deliberation, (4) the trial court erred by reversing its ruling on motion in limine No. one, changing the special verdict form and asking only the foreperson about perceived irregularities in the deliberations. On March 20, 2001, the motion for new trial was heard and denied by the trial court. The Krajkiewczes filed a notice of appeal from the judgment.

After the entry of judgment, Leamon and Herrera filed a memorandum of costs that included a request for attorney fees in the amount of $27,612 and supported that request by filing a motion to fix attorney fees. The Krajkiewczes filed a motion to tax

costs that asserted, among other things, that (1) Leamon and Herrera never offered mediation prior to filing their complaint and therefore failed to comply with the requirements of the Agreement for an award of attorney fees, and (2) Herrera was not sued as a cross-defendant on the breach of contract cause of action and therefore was not a prevailing party entitled to attorney fees.

The trial court ruled on the motion to tax costs and disallowed the entire request for attorney fees. Leamon brought a motion to reconsider and that motion was denied. Leamon filed a notice of appeal challenging the taxing of attorney fees as costs and the denial of the motion to reconsider.[2]

DISCUSSION

The Krajkiewczes argue that this matter should be remanded for a new trial because (1) Leamon failed to offer any evidence of duress in the formation of the Agreement, (2) the reporter's transcript of the trial is unreliable and deprives them of their right to appeal, (3) the special verdict is tainted with attorney and juror misconduct, and (4) the trial court committed reversible error by admitting a letter in evidence that purported to cancel the Agreement. All of these arguments fail.

I.* Substantial Evidence Supports the Special Verdict and Implied Finding of Lack of Mutual Consent.

In his opening statement, Leamon's counsel asserted Leamon's signature on the Agreement was procured by coercion and misrepresentations and therefore her consent

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[2] Although Leamon's motion for attorney fees and corresponding notice of appeal included Herrera and the caption of Leamon's "Cross-Appellants' [*sic*] Reply Brief" is stated in the plural, page six of that reply brief specifically states Leamon is the only party cross-appellant, Herrera is not seeking attorney fees and Herrera is only a party to the appeal as a respondent; the reply brief also apologizes for the confusion created.

* See footnote at page 1.

was not freely given. Consistent with this theory of the case, the jury was instructed that (1) a valid contract requires mutual consent, (2) each party's consent must be freely given, and (3) "[c]onsent is not freely given if it is obtained by duress, fraud, undue influence or mistake." The jury also received instructions on duress (physical compulsion), coercion (economic compulsion) and mistake of law, as well as two instructions concerning agency.

The instruction concerning a mistake of law stated that it arises only from "[a] misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or … [a] misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify."

In its written order denying the motion for new trial by the Krajkiewczes, the trial court "[found] that there was sufficient evidence to support the verdict of the jury in this matter." At the hearing on the motion, the trial court stated there was sufficient evidence of duress because of the threat to sue Leamon even though the threat was made by Denison. The trial court said the jury could have found, under the law of agent and principal, that Denison's threat was a threat by the Krajkiewczes.

The Krajkiewczes present two arguments as to why there was not sufficient evidence to support a finding that the Agreement was signed under duress. First, the Krajkiewczes argue "[t]here is a disjunction between the evidence and the jury's finding" because there is no tie between any alleged duress and the formation of the Agreement. Specifically, the Krajkiewczes assert, there is no "evidence of duress in the formation of the Agreement as opposed to duress alleged in the contract between [Leamon] and [Denison] for a real estate commission." We reject this argument because evidence in the record connects the threats made by Denison to Leamon's decision to sign the Agreement. Leamon testified Denison's threats related to the "contract to sell the

property." (See footnote 1, *ante*; see also, Rest.2d Contracts, § 175, subd. (2), pp. 475-476.[3])

Second, the Krajkiewczes claim there was a legal impediment because the threat of a lawsuit does not constitute duress even if the foundation for the lawsuit rests on a mistaken belief. To support their view of the law, the Krajkiewczes cite *London Homes, Inc. v. Korn* (1965) 234 Cal.App.2d 233 (*London Homes*), which states:

> "It is not duress, however, to take a different view of contract rights, even though mistaken, from that of the other contracting party, and it is not duress to refuse, in good faith, to proceed with a contract, even though such a refusal might later be found to be wrong.
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> "In 17 California Jurisprudence, Second Edition, Duress, etc., section 7, pages 78-79, it is said: 'A mere threat to withhold a legal right for the enforcement of which a person has an adequate remedy is not duress. And since the definitions of duress and menace embrace elements of unlawfulness, it is not duress or menace to threaten nonperformance of a contract, to institute litigation, or otherwise do what one has a legal right to do.…'" (*London Homes*, *supra*, 234 Cal.App.2d at p. 240.)

The interpretation of *London Homes* adopted by the Krajkiewczes understates the role of threatened litigation in the law of duress. Impermissible threats that may create duress include the threat to use civil process, if the threat is made in bad faith. (Rest.2d Contracts, § 176, subd. (1)(c); *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 176.)

If Denison acted in bad faith when representing to Leamon that an oral contract to sell real estate was as binding as a written contract, then his threat of litigation is

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[3] Subdivision (2) of section 175 of Restatement Second of Contracts states: "If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction." (*Id*. at pp. 475-476.)

sufficient to support the finding that the Agreement was not a valid contract because the jury could have impliedly found duress. On the other hand, if Denison was genuinely mistaken about the enforceability of an oral contract for the sale of land and therefore acted in good faith, the special verdict is still supported by substantial evidence. The jury could have found the Agreement was entered into based upon a mistake of law because of a misapprehension of the law by all parties. The jury could have found the Krajkiewczes also supposed Leamon was legally required to sign the Agreement because they were present when Denison made the representations about the binding effect of an oral agreement.

Accordingly, substantial evidence supports the special verdict, given the different scenarios the jury could reasonably have determined from the evidence.

II. Any Error in the Reporter's Transcript Is Waived*

The Krajkiewczes argue the reporter's transcript is unreliable and cannot be the record upon which the judgment stands. The Krajkiewczes point to a dispute that arose at the hearing on their motion for new trial and the trial court's statements that indicate there were inaccuracies in the transcript. The Krajkiewczes conclude their argument by stating, "The record is unreliable and untrustworthy. A judgment founded upon such a record is similarly flawed and a new trial should be granted."

In their appellants' opening brief, the Krajkiewczes devote a page and two-thirds to their contention about the reporter's transcript. However, they do not cite a single statute, rule of court, case or treatise setting forth the rules of law that a party must follow when raising the issue of inaccuracies in a reporter's transcript. Nor does the appellate reply brief of the Krajkiewczes cite any authority supporting their contention that a new trial is the appropriate remedy. (Cf. Code Civ. Proc., §§ 657.1, 914 [circumstances when

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* See footnote on page 1, *ante*.

loss or destruction of reporter's notes may warrant new trial].) Furthermore, the appellate record does not show the Krajkiewczes took any steps to correct the claimed inaccuracies in the reporter's transcript. (See Cal. Rules of Court, rule 12(c) [correcting the appellate record].)

"[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's [contentions] as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448; see *Harding v. Harding* (2002) 99 Cal.App.4th 626, 635; Cal. Rules of Court, rule 14(a)(1)(B).) Accordingly, we hold the Krajkiewczes waived the contention that the appropriate remedy for any inaccuracies in the reporter's transcript is a new trial.

III. Purported Attorney and Juror Misconduct Do Not Warrant Reversal*

The Krajkiewczes claim the trial court committed reversible error by not granting a new trial because of attorney and juror misconduct. In denying the motion of the Krajkiewczes for a new trial, the trial court found there was no attorney misconduct on the part of counsel for Leamon and that there was no evidence of jury misconduct. On appeal, the Krajkiewczes challenge both of these findings.

A. Attorney Misconduct Objection Is Waived

Counsel for Leamon, contend the Krajkiewczes, invited the jurors to a local bar and restaurant if they decided the first question on the special verdict in Leamon's favor and otherwise appealed to their self-interest to decide the case quickly and avoid returning for deliberations the following Monday. Leamon contends that any claim of attorney misconduct was waived by the failure of the Krajkiewczes to timely object to the purportedly improper statements made during closing arguments.

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* See footnote on page 1, *ante*.

"Misconduct by opposing counsel is not assertable on appeal unless the record shows that appellant made *a timely and proper objection* and *a request that the jury be admonished* (unless the misconduct was so prejudicial that it could not have been cured by a cautionary instruction to the jury). [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2001) ¶ 8:269, p. 8-125.)

The record does not show that counsel for the Krajkiewczes made a timely objection during closing argument to any of the three purportedly improper statements that counsel for Leamon may have made. Therefore, the purported misconduct of counsel for Leamon is not assertable on appeal. Accordingly, we need not address (1) what statements actually were made by counsel and (2) whether the trial court abused its discretion by rejecting this claim as a basis for a new trial.

B. Juror Misconduct Is Not Established by Evidence

The Krajkiewczes assert that the jury did not properly deliberate but instead answered "No" to the first question of the special verdict so that they could finish deliberating that Friday afternoon and avoid returning on Monday. The clerk's minutes show that the jury retired for deliberations at 3:44 p.m. and returned into open court with a verdict at 4:32 p.m. The trial court polled the jurors and all 12 answered affirmatively when asked if the verdict was their verdict. According to the reporter's transcript, the trial court twice inquired about whether the jury had enough time to deliberate the case. Both times the foreperson indicated the jury had enough time.

Although the accuracy of the transcript concerning this exchange between the judge and foreperson is disputed by the Krajkiewczes, in denying the motion for new trial, the trial judge found there was no juror misconduct. Furthermore, except for the amount of time taken by the jury to deliberate and the statements of counsel for Leamon that their deliberations would be finished if they answered "No" to special verdict No. 1, the Krajkiewczes have not presented any evidence from which juror misconduct could be inferred.

Jurors ordinarily are presumed to have followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; *Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1308.) Unless a party presents evidence to the contrary, the presumption that the jury adhered to the instructions will control. (*Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1131.)

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. '"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 524.) In this case, the inference of misconduct from the evidence presented by the Krajkiewczes is contradicted by the responses of the foreperson to the trial court's questions about the deliberations.[4] In weighing the evidence and deciding between conflicting inferences, the trial court's finding that there was no juror misconduct was not the result of an unmistakable abuse of discretion, especially given the presumption that the jury adhered to the instructions. Accordingly, the trial court did not err in rejecting the claim of juror misconduct as a basis for denying the Krajkiewczes a new trial.

IV. Admission of the September 23, 1999 Letter Is Not Prejudicial Error[*]

The Krajkiewczes claim that the trial court committed prejudicial error by admitting evidence of a letter dated September 23, 1999, from counsel for Leamon to the Krajkiewczes and Denison advising them that Leamon decide to "cancel the sale" of the

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[4] The trial court did not consider two declarations from jurors presented by Leamon because it found the declarations were inadmissible pursuant to Evidence Code section 1150, subdivision (a).

[*] See footnote on page 1, *ante*.

Property. The trial court granted motion in limine No. one of the Krajkiewczes concerning the exclusion of any document purporting to cancel the Agreement if it was not signed by the Krajkiewczes. That motion was based on the statute of frauds set forth in Civil Code section 1624, subdivision (a)(3).[5]

When counsel for Leamon referred to the September 23, 1999, letter as a notice of cancellation in his opening argument, counsel for the Krajkiewczes objected based on the trial court's ruling on the motion in limine. In arguing about the admissibility of the letter outside the presence of the jury, counsel for Leamon stated the letter was offered to show that Leamon made an immediate effort to call off the sale transaction and that the letter was not offered to show the parties mutually agreed to modify the Agreement by canceling it. In response, counsel for the Krajkiewczes argued that a notice of cancellation could not have any effect unless it was an agreement to cancel and, under the applicable statute of frauds, such an agreement required the signature of the party sought to be bound. The trial court ruled by stating that he was reconsidering motion in limine No. 1 and, upon reconsideration, was denying that motion. As a result, the letter was admitted in evidence.

First, was the letter relevant to a theory being presented to the jury by Leamon? Leamon asserted that the Agreement was not a valid contract because there was no mutual consent because her consent was not freely given. In particular, the jury was instructed that "[c]onsent is not freely given if it is obtained by duress, fraud, undue

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[5] Civil Code section 1624, subdivision (a), provides in part: "The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: [¶] … [¶] (3) An agreement … for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged."

influence or mistake." When a party claims mistake, that "party must act promptly on discovery of the mistake. Acquiescence in error may deprive a party of the right to object." (1 Miller & Starr, Cal. Real Estate (3d ed. 2000) Contracts, § 1.123, p. 386, fn. omitted; see Civ. Code § 3516.) In view of the foregoing principle, the letter was relevant to show that Leamon acted promptly after discovering she made her decision to sign the Agreement based upon a mistake of law, namely, that an oral contract for the sale of real estate is as enforceable as a written contract.

Second, despite its relevance, was the letter's probative value outweighed by the probability that its admission in evidence would create a substantial danger of confusing the issues or of misleading the jury? (Evid. Code § 352; see Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 1999) ¶ 8:3236, p. 8F-10 (rev. #1 2002).) Where a trial court has determined not to exclude evidence under Evidence Code section 352, an appellate court may not interfere with that determination, "unless the trial court's determination was beyond the bounds of reason and resulted in a manifest miscarriage of justice. [Citations]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 596.)

The danger that the Krajkiewczes appear to argue here is that the jury could have been confused or misled into thinking that the Agreement was no longer valid because (1) Leamon had the right to unilaterally cancel the Agreement or (2) the letter reflected the mutual consent of the parties to cancel the Agreement. We conclude the trial court did not abuse its discretion by admitting the letter because there was no substantial danger of confusing the issues or misleading the jury. The letter was offered for the limited purpose to show Leamon acted promptly to stop a transaction that she thought was not valid and her counsel did not argue that the legal effect of the letter was to terminate the Agreement by mutual consent.

V. Attorney Fees Under the Agreement

An appellate court reviews a determination of the legal basis for an award of attorney fees independently as a question of law. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.)

"[W]hen a party litigant prevails in an action on a contract by establishing that the contract is invalid, … [Civil Code] section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed. [Citations]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 611.) Leamon, seeking a literal application of the above quoted language to the facts of this case, argues she is entitled to attorney fees because the Krajkiewczes would have been entitled to attorney fees if they had prevailed. Accordingly, Leamon asserts the trial court's ruling taxing attorney fees in the amount of $27, 612 from her memorandum of costs should be reversed.

In response, the Krajkiewczes contend the trial court properly taxed the attorney fees because Leamon failed to seek mediation of the dispute and thus failed to satisfy a contractual condition precedent for the recovery of attorney fees. The trial court relied upon *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, which involved the same standard form residential purchase agreement as was used in this case.

The Agreement contains two paragraphs relevant to the issues raised concerning attorney fees. Paragraph 25 provides: "ATTORNEY'S FEES: In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney's fees and costs from the non-prevailing Buyer or Seller, except as provided in Paragraph 21A."

Paragraph 21A, provides: "MEDIATION: Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action, subject to paragraphs 21 C and D below. Mediation fees, if any, shall be divided equally among the parties involved. If any party

commences an action based on a dispute or claim to which this paragraph applies, without first attempting to resolve the matter through mediation, then that party shall not be entitled to recover attorney's fees, even if they would otherwise be available to that party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED."

In *Johnson v. Siegel*, *supra*, 84 Cal.App.4th at pages 1100-1101, the Sixth District interpreted paragraph 21A of the standard form residential purchase agreement to mean that a purchaser who commenced litigation without seeking mediation was liable for the seller's attorney fees after the seller prevailed in the litigation. In analyzing the purchaser's claim to attorney fees, the Sixth District stated that the purchaser forfeited his right to recover attorney fees by filing the action without seeking mediation. (*Id*. at p. 1101.) Based on this statement, which is obiter dictum, the Krajkiewczes contend Leamon is precluded from recovering attorney fees.

We have not found, nor have the parties cited, any published decision that addresses whether or not contractual conditions precedent to an award of attorney fees apply to a litigant who prevails by establishing the contract is invalid. Thus, as recognized by the trial judge, the question presented is one of first impression.[6]

To resolve this issue, we must consider whether or not there is a conflict between the concept of mutuality of remedy embodied in the provisions of Civil Code section

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[6] Paragraph 21A precludes a "party" who "commences an action" from recovering attorney fees if that party did not attempt to mediate the dispute. Leamon's appellate briefs did not raise, nor do we address, the issue of whether paragraph 21A should be interpreted to allow Leamon to recover attorney fees in her capacity as a prevailing *cross-defendant* because, in that capacity, she did not commence an action but only defended one. Nor do we express any view on whether paragraph 21A permits attorney fees to be awarded to a prevailing *defendant* who refused a plaintiff's request to mediate because only the party *commencing* an action is required to seek mediation.

1717 regarding attorney fee claims under contractual attorney fee provisions (see *Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 610) and the provision in the Agreement that allows a party who commences an action to recover attorney fees only if that party first sought to resolve the dispute through mediation.

We conclude that the enforcement of the condition precedent to the recovery of attorney fees does not conflict with the concept of mutuality of remedy under the facts of this case.

First, mutuality of remedy exists because the Krajkiewczes could not have commenced their action in superior court[7] and recovered attorney fees without first seeking mediation. In that sense, the imposition of a condition precedent on the recovery of attorney fees is mutual and reciprocal. To hold otherwise would violate the concept of mutuality of remedy by requiring the party who argues the contract is valid to comply with conditions not imposed on the party who asserts the contract is invalid.

Second, requiring a party to mediate the question of the validity of contract does not necessarily mean that party concedes the contract is not voidable. A request for mediation can clearly state the party's position that the contract is voidable or invalid and that mediation is sought to preserve a claim for attorney fees.[8]

In addition, the public policy of promoting mediation as a preferable alternative to judicial proceedings is served by requiring the party commencing litigation to seek mediation as a condition precedent to the recovery of attorney fees. In this case, had the

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[7] Paragraph 21C(d) of the Agreement excluded small claims actions from the mediation requirement. Thus, either party could commence a small claims action without seeking mediation first. (See Code Civ. Proc. § 116.530 [limits on attorney participation in small claims actions].)

[8] The parties did not argue and therefore we do not consider whether a different rule should apply to contracts that are void as opposed to those that are voidable.

parties resorted to mediation, their dispute may have been resolved in a much less expensive and time-consuming manner. Instead, in a dispute that entered the court system as a small claims action for $5,000 in damages for breach of contract, Leamon spent over $27,000 in attorney fees and, as a result of her victory, avoided an order for specific performance that would have required her to accept $82,000 in exchange for the Property. The economic inefficiency of this result may have been avoided if, prior to judicial proceedings, a disinterested mediator had explained to Leamon and the Krajkiewczes the costs of litigating the dispute through to a judgment or a final resolution by an appellate court.

Accordingly, we determine the trial court did not err in taxing all of the attorney fees requested by Leamon as costs.

DISPOSITION

Judgment in favor of Leamon and Herrera is affirmed. The order taxing attorney fees as costs is affirmed. Because each party partially prevails, no costs are awarded on the instant appeals.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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LEVY, J.

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CORNELL, J.