2d Civil No. B182561

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

RICHARD J. PERRILLO,
Plaintiff and Respondent,

vs.

PICCO & PRESLEY, Greg PICCO,
Margaret PRESLEY, Joseph J. IACOPINO,
Defendants and Appellants.

Appeal from Los Angeles Superior Court, No. SC063100
Honorable Cesar Sarmiento

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Can a physician who provided Workers' Compensation services (plaintiff Richard Perrillo) circumvent the Workers' Compensation system by contracting with the workers directly for payment from any recovery the workers obtain in a civil action against third parties?

He cannot. The Workers' Compensation Appeals Board ("Board") has exclusive jurisdiction to determine the physician's payment for Workers' Compensation-related medical services. Perrillo undisputably provided such services to the workers here; thus, his payment had to come exclusively through the Workers' Compensation system. Instead, Perrillo tried to use the Workers' Compensation system as "backup," guaranteeing his payment if he could not first obtain it from the workers' pockets. He cannot lawfully do that. The workers have the constitutional right to have the employer—not the worker—pay for their Workers' Compensation-related services.

But even if this were not so, Perrillo's lien contracts did not allow Perrillo to seek payment solely from any civil recovery. The undisputed evidence is that Perrillo also had the workers sign consents for Workers' Compensation liens. The civil lien contracts (necessarily construed in favor of the nearly illiterate workers who signed them, while suffering from brain injuries and without the assistance of counsel) must be interpreted as requiring Perrillo to first collect from Workers' Compensation, which he has refused to do.

And even if Perrillo had valid lien contracts with his patients, those contracts cannot be a basis for imposing any contract or tort liability on the

workers' lawyers (the only defendants in this action) for not paying Perrillo out of their clients' funds. Defendants did not sign the lien contracts nor see them until well after Perrillo had performed his services. The law imposes no fiduciary duty on lawyers to protect a lienholder's claimed interest, when, as here, the lawyers did not agree to be the lienholder's collections agent. Acting as their clients' agents, defendants cannot be liable for interfering with their clients' contracts. And since Perrillo's interest in the settlement fund was equitable and subject to offsets not determinable in this action, defendants cannot be liable for conversion.

At minimum, (1) the attorney fee award must be stricken, because there is no evidence defendants agreed to any fee-shifting provision, and (2) the judgment must be reduced to eliminate indisputably excessive damages and interest awards.

STATEMENT OF FACTS

Although defendants testified to a very different version of events and vigorously disputed Perrillo's version, we state the facts in the light most favorable to Perrillo, as required by the standard of review for a judgment on a jury verdict. (See 9 Witkin, Cal. Procedure (4th ed. 1996) Appeal, § 359, pp. 408-410 [collecting cases].)

A. Defendants Represent Individuals Exposed To Toxic Chemicals.

Margaret Presley and Gregory Picco are the partners of Picco & Presley. With attorneys Joseph Iacopino and Michael Goch, they represented a group of workers and their wives who were injured from exposure to toxic chemicals at the Elk Hills Naval Reserve ("Elk Hills plaintiffs"). (RT 4:907, 6:1595-1596, 11:3005-3006; Exh. 10.) Iacopino, Picco, and Goch handled the civil litigation against Bechtel and others ("Bechtel"). (RT 4:910, 8:2118-2119, 11:3007.) Presley handled the Workers' Compensation cases. (RT 7:1980, 11:3007.)

B. A Picco & Presley Attorney Asks Richard Perrillo To Examine Their Clients And Explains That There May Be A Workers' Compensation Component.

Plaintiff Richard Perrillo is a neuropsychologist. (RT 11:3104, 3106-3107.) In Spring 1998, Perrillo's office director, Keith Whiteman, received a call from Eileen McGruder, an attorney at Picco & Presley. (RT 4:905-906, 10:2727.) She explained that her office had a number of clients who had been exposed to chemicals while cleaning oil wells in

Bakersfield, and some of their wives had "secondary exposure issues." (RT 10:2728.)

McGruder mentioned "there might be a Workers' Comp component to the cases," and Whiteman responded that the office "didn't take Workers' Comp cases." (RT 10:2728.) Perrillo had had a bad experience collecting from Workers' Compensation in a case against Lockheed. (RT 10:2729.) "But," Whiteman assured her, "we'd be happy to help" McGruder "prepare the paperwork" on behalf of the patients so they "could benefit in case there was a Workers' Comp component." (RT 10:2728-2730, 2853.)

Whiteman recognized it would be difficult for the plaintiffs or law firm to pay Perrillo up front, so he told McGruder that he "would have to talk to Dr. Perrillo about whether he wanted to take the cases on a lien or not." (RT 10:2731, 2733.)

C. Perrillo Agrees To Evaluate The Elk Hills Plaintiffs And Take Both Civil And Workers' Compensation Liens.

Whiteman told Perrillo about the new "civil case." (RT 10:2876.) Perrillo called McGruder. (RT 11:3178, 14:3925.) He was told that there was a civil case involving toxic exposure, and "there may be a Workers' Comp component." (RT 11:3178.) Perrillo reiterated that "we don't do Workers' Comp"; it was an "office policy." (RT 11:3178, 12:3304, 14:3914, 3925.) He told McGruder he would not examine the plaintiffs "if they were simply Workers' Compensation claimants." (RT 14:3925.) He was assured the claimants also had civil cases, and he was "not to worry"

because he would "get paid out of the civil cases." (RT 14:3926; see also RT 12:3306, 14:3914.)

Perrillo agreed to do a neuropyschological profile on all the men, but just a psychological profile on the women, whose secondary exposure claims were weaker. (RT 11:3172-3173, 3178, 12:3303.) Perrillo advised McGruder that he "needed to do an epidemiological study," which was "very important in toxic cases to develop a pattern." (RT 11:3180; see also RT 12:3303.) Perrillo proposed a uniform battery of tests, whose results could be used in a comparison study against the normal population. (RT 11:3169-3170, 11:3180-3181, 14:3950.) The test data could be used in a civil trial to establish causation. (RT 13:3610-3611, 3620-3621.) McGruder thought that was "a good idea," and said, "[L]et's go ahead and do it." (RT 11:3180-3181.) Perrillo never in fact did an epidemiological study. (RT 10:2856-2857, 13:3683.)

McGruder insisted that Perrillo prepare a report for everyone he examined, although she told him "there may be a Workers' Comp. limit" to some of them. (RT 12:3303.) Perrillo agreed to write all reports in the Workers' Compensation format, so they could be used in either the civil or Workers' Compensation cases. (RT 12:3303-3304, 13:3688.) Although he had refused to do Workers' Compensation, Perrillo felt he couldn't "leave the patient hanging dry," because "the patient can collect in both forums." (RT 11:3176-3177.) Perrillo agreed to "do whatever is necessary to protect the patient[s]" so that "they could go into the Workers' Comp. forum and receive any benefit that they would be entitled to." (RT 13:3688.) This

"wasn't a favor"; Perrillo felt it was his "responsibility to the patients." (RT 13:3690; see also RT 16:4810.)

McGruder told Perrillo she "needed Workers' Compensation liens." (RT 13:3673.) He considered the liens to be "part of [the] formalities" of filing a report, along with submitting a bill for payment in Workers' Compensation. (RT 12:3305.) He prepared this package for all the Elk Hills plaintiffs regardless whether they had Workers' Compensation claims (e.g., the wives did not). (*Ibid.*) He retained his Workers' Compensation assistant, Katherine Greve, to help prepare the paperwork. (RT 13:3673, 12:3304.)

Perrillo estimated that the men's evaluation would cost around $5,000-$7,000 per person, and the women's around $3,000. (RT 11:3178, 12:3303.) Perrillo asked to be paid up front; McGruder didn't know and said she would check it out. (RT 11:3178, 12:3304.) Perrillo replied, "Okay, if you can't, then I will take a civil lien and will do what is necessary in the Workers' Comp forum to protect these patients so I will also be taking a Workers' Comp lien," which "also protects my office, too." (RT 11:3178-3179; see also RT 12:3304-3305 [he wanted to make sure he "was protected all of the way around"].) Perrillo "clearly told her" that he would "do both liens and that we will not do Workers' Comp. We only do it and incur the expense to protect the patient." (RT 11:3179.)

McGruder said "fine," and that she "need[ed] to check it out" with the other attorneys, but it "seemed" to Perrillo "like she was agreeing to this." (RT 11:3179.) Perrillo's understanding of the agreement was that he was hired for the civil case. (RT 14:3915.) There was "absolutely no

question" that the attorneys "were going to pay me out of the settlement," as they knew he was a "civil expert." (RT 12:3304.) They "were going to have civil liens and Worker's Comp. bills." (RT 16:4810.) The bills "would have been a backup, possibly" but "based on the agreement" Perrillo had with McGruder, he "didn't have expectation of getting paid at Workers' Comp." (RT 16:4810.) Had the civil case failed, however, Perrillo would have taken any money offered through Workers' Compensation. (RT 16:4810-4811; see also RT 9:2425, 2463, 2467, 12:3400.)

D. Defendants Tell Perrillo To Start Evaluating The Plaintiffs.

McGruder emailed Iacopino:

> "I spoke w/ Dr. Perrillo today - he is very anxious to get started. When I told him that part of our concern was his ability to work on a lien basis - he agreed to do it on a lien. He wants both a PI and a WC lien, and if at all possible would like to get some $$ up front or at some time, particularly if we want him to do an epidemiological type study. He feels that would be very valuable to our case. Wants to start seeing people (2-3 per day) the first week of May - in order to have time to see them all . . . ." (Exh. 14.)

Iacopino's notes reflect that in subsequent conversation with Perrillo, they talked about neuropsychological testing; Perrillo's experience; and his fees. (Exh. 15.) The notes also reflect that the next day Goch and Picco

"agree[d] to go for it"; and that McGruder was to begin scheduling patients. (RT 5:1306-1307; Exh. 15.)

E. Without Obtaining The Lawyers' Review Or Consent, Perrillo Has Each Elk Hills Plaintiff Sign A Notice Of Doctor's Lien, And He Also Has Each Sign A Request For Allowance Of Workers' Compensation Lien.

Perrillo examined and evaluated 61 men and women. (Exh. 1; RT 12:3307-3308.) Greve thought they "weren't that bright" and "didn't know how to read and write very well." (RT 9:2435-2436.) Perrillo ultimately concluded that everyone he examined suffered injury from toxic chemicals. (RT 12:3402-3403.)

At the beginning of each examination, Perrillo presented each with a "Notice of Doctor's Lien" ("Notice") and asked him or her to read it and ask any questions.[1] (RT 12:3306-3308, 16:4890; Exh. 1.) He "usually" told each the rough cost. (RT 12:3307, 16:4890.)

The Notices authorized Perrillo to furnish the Elk Hills plaintiff's lawyers with a report of his examination and continued:

> "I hereby authorize and direct you, my attorney, to pay directly to said doctor such sums as may be due and owing Richard J. Perrillo, Ph.D. for medical/psychological services rendered me by reason of this accident/injury and by reason of any other bills that are due Richard J. Perrillo's office and to

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[1] At trial, a number of plaintiffs testified they did not recall reading the document; that it was not explained to them; that they didn't understand it; or that they assumed their lawyers had approved it. (RT 7:1899-1900, 1917, 9:2536, 12:3484, 14:4052-4053, 4065, 4069-4070, 4085-4087, 4107-4108, 4124-4125, 15:4215-4216, 4254, 4281-4282, 4294-4295.)

withhold such sums from any settlement, judgment or verdict as may be necessary to adequately protect said doctor. And I hereby further give a lien on my case to said doctor against any and all proceeds of any settlement, judgment, or verdict which may be paid to you, my attorney, or myself as the result for the injuries for which I have been treated or injuries in connection therewith.

I further understand that I will be held responsible for all collection costs, arbitrations, and/or legal fees used to recover Said doctor's bills. In addition, I understand that it is my responsibility to be aware of the of the cost of [*sic*] the services prior to any evaluation and/or treatment and raise any objection or concern prior to the rendering of the doctor's services.

I fully understand that I am directly and fully responsible to Said doctor for all medical bills submitted by the office of Richard J. Perrillo, Ph.D. for services rendered me and that this agreement is made solely for said doctor's additional protection and in consideration of Richard J. Perrillo, Ph.D., awaiting payment. And I further understand that such payment is not contingent on any settlement, judgment or verdict by which I may eventually recover said fee." (Exh. 1.)

After the patient's signature line was an "Acknowledgment of Attorney," providing: "The undersigned being attorney of record for the

above patient does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement, judgment or verdict as may be necessary to adequately protect Richard J. Perrillo, Ph.D." (*Ibid.*)

Perrillo did not ask the lawyers to review or approve this notice, nor did he ever ask them to sign the Acknowledgment. (RT 5:1211, 1265, 11:3100-3101, 14:3987.)

On the same visit, Perrillo had each plaintiff sign a Notice and Request for Allowance of Workers' Compensation Lien ("Request"): "I consent to the requested allowance of a lien against my compensation." (Exh. 204.)

F. Perrillo Submits Workers' Compensation Requests For Liens And Reports For Each Worker And Accepts Some Payments Through Workers' Compensation.

Before Perrillo saw any of the Elk Hills plaintiffs, he filled out and signed a Workers' Compensation "Doctor's First Report of Occupational Injury or Illness." (E.g., Exhs. 222, 223; RT 9:2432-2437.)

After his examinations, Perrillo prepared detailed medical-legal reports."[2] (E.g., Exh. 218, 231.) Such reports are unique to Workers' Compensation proceedings; they are submitted when there is a dispute over the compensability of a work-related injury. (Lab. Code, § 4060.) Most workers' claims of toxic tort injury are initially disputed by the employer, requiring a hearing to resolve the issue. (RT 5:1234, 7:1993-1994.)

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[2] Perrillo noted on his reports that they qualified for the highest-compensable Workers' Compensation designation because they were "comprehensive medical-legal evaluation[s] involving extraordinary circumstances performed by me." (Exh. 231; RT 15:4552-4553; see Cal. Code Regs., tit. 8, § 9795.)

A medical-legal report explains the individual's disability and work restrictions, provides the basis for the worker's disability rating, and serves as evidence in the Workers' Compensation proceeding. (RT 4:1004, 5:1253-1255, 11:3039; see also Exh. 70.) Perrillo's reports were "instrumental in determining the value of the case in Workers' Comp." (RT 9:2463.) But a medical-legal report does not purport to establish causation to a reasonable degree of medical certainty; that is unnecessary in Workers' Compensations proceedings, where the burden of proof is lower. (RT 5:1237-1238, 11:3039-3041, 15:4536-4537.) For that reason, these reports are different from physician reports prepared for civil trials, and Perrillo's reports were never filed in the civil case. (RT 5:1236-1237, 11:3039-3042.)

Once Perrillo completed his reports, he entered the amount of his bills on the Requests and served them, along with his reports, on the insurance carriers, Board, and defendants for everyone with a Workers' Compensation case. (RT 5:1212-1215, 1219-1223, 6:1677, 7:1981-1982, 8:2272-2273, 2295-2296, 9:2456-2457, 12:3403, 13:3688, 3690-3691, 14:3919; Exhs. 7D, 200, 202, 204.) He received offers to settle from the carriers and accepted some payments. (RT 6:1674, 7:1982, 9:2475, 10:2784-2785, 2843-2844, 12:3369-3370, 14:3919, 3970-3971; Exhs. 4, 4B, 224, 234, 257, 261, 262, 264.)

G. Perrillo Sends Defendants His Records, Including The Notices Of Doctor's Lien, In March 2000 As Defendants Attempt To Negotiate A Global Settlement.

By spring of 2000, the civil litigation had experienced a series of setbacks, and the defendants were trying to reach a global settlement of the civil and Workers' Compensation cases. (RT 4:1081-1086, 6:1605-1608, 1610-1611, 1692-1693, 11:3007-3009.)

Throughout the civil suit, defendants had purposely not identified Perrillo as a someone they contended could support the Elk Hills plaintiffs' claims of injury. (RT 4:1010-1011, 1027-1028, 1033, 5:1232-1233, 1350, 6:1513-1514; Exhs. 36 [22], 63.) Bechtel, however, knew of Perrillo's involvement in the Workers' Compensation cases, in which it was also a defendant. (RT 4:1080-1082, 9:2479-2480.) Bechtel subpoenaed Perrillo's records in the civil lawsuit. (Exhs. 37, 42, 47; RT 9:2479-2480, 10:2741-2746, 12:3325-3328.) Presley directed Perrillo to send her his records to review—"all of the bills, all of the reports, and all of the liens." (RT 12:3327-3328.) After she received the box (around March 17, 2000), she called to ask for civil liens that were missing for some patients, and Whiteman sent them. (RT 10:2752-2753, 2758-2759, 2879-2882.)

In this same time frame, Presley and Greve met at the Board for hearings on different Workers' Compensation matters and Presley told another attorney, in front of Greve, that Perrillo's reports were "driving home the civil matters," and they were "very expectant of having a global settlement on the cases, meaning Workers' Comp and civil happening all at once." (RT 8:2239-2240; see also RT 8:2247-2248, 9:2456.) Still, the

undisputed testimony of Kevin McNaughton, liaison counsel for Bechtel, was that defendants never tried to leverage "a single nickel" based on Perrillo's reports or any of his findings. (RT 9:2504-2506, 2512.) Rather, Iacopino told him Perrillo was never intended to be part of the civil case, and McNaughton believed Perrillo was being paid through Workers' Compensation. (RT 9:2489-2492.) McNaughton was never told that defendants anticipated presenting any epidemiological study. (RT 9:2507-2508.) McNaughton offered a nuisance-value settlement, because he believed defendants were not liable and would prevail on their pending summary judgment motions. (RT 9:2499-2506.) In fact, the only plaintiff who didn't settle was dismissed shortly after on summary judgment. (RT 9:2488, 2499.)

H. The Civil Litigation Settles With The Parties Disputing Perrillo's Right To Payment.

To pressure the Workers' Compensation carriers into settling, Picco & Presley began reviewing Perrillo's reports, rating them, and sending out demand letters to the insurance carriers. (RT 4:1072-1076; Exhs. 69, 70-72.) Ultimately, however, the carriers refused to participate in a global settlement; under pressure to settle the civil suit, defendants accepted Bechtel's $1,500,000 offer. (RT 5:1364-1375.) Presley asked Perrillo to "'give up [his] liens'" since they were not getting as much as they hoped. (RT 12:3333.) She told him, "'[Y]ou will get paid in Workers' Comp.,'" but Perrillo protested vehemently. (RT 12:3333-3334.)

Just before the case settled, defendants and Perrillo discussed resolving their dispute by defendants paying him $53,000 for the work he

did on behalf of the wives and one worker who did not have a Workers' Compensation case (Phil Cranfill). (RT 8:2152-2153, 2157; Exh. 112.) Defendants also offered to guarantee Perrillo 75% of his billed medical-legal fees should he be awarded less through Workers' Compensation or should the proceedings be unresolved in a year. (RT 12:3339; Exh.112.) Perrillo insisted defendants sign the proposal so he could take it to his lawyer. (12:3339-3341, 3354-3355.) Meanwhile, Bechtel paid the settlement money, and defendants sent settlement checks to the Elk Hills plaintiffs, reserving $53,000 in the client trust account for Perrillo—money that remains there today. (RT 8:2194, 2206; Exh. 120.) Perrillo's lawyer subsequently wrote defendants notifying them that Perrillo "desires to enforce his liens and receive full payment at this time." (Exh. 113.)

Whiteman and Perrillo called some of the people he examined to "let them know that their bills had not been paid." (RT 10:2794, 12:3363.) They hung up because defendants had told their clients not to talk to Perrillo. (RT 10:2795, 2885, 2894, 12:3363; Exh.119.)

I. Perrillo Withdraws All Requests For Allowance Of Workers' Compensation Liens.

Perrillo litigated one of his Workers' Compensation liens and settled for 87% of his bill. (See note 12, below.) When defendants took the position that he was thereafter barred from seeking the balance directly from the worker, Perrillo withdrew all his Worker's Compensation liens in spring or summer 2003—about when he retained new counsel. (RT 6:1671-1672, 1675-1676, 8:2271-2272, 12:3369-3370, 14:3923; CT 1:19.) In August 2003, Perrillo attended a settlement conference with a number of

carriers, but they offered him nothing, citing the civil settlement. (RT 12:3371-3372, 3376-3377, 13:3768, 14:3971-3972.)

By the time of this trial, 32 of the 41 Workers' Compensation cases had ended in settlement resulting in payments to the workers and orders to the carriers to resolve all doctors' liens, including Perrillo's. (RT 8:2106-2107, 2110, 15:4504; e.g., Exhs. 260-262, 264.) The remaining nine cases were pending. (RT 15:4505.)

PROCEDURAL HISTORY

A. Perrillo Files A Complaint Alleging Torts, Adding A Breach Of Contract Claim On The Eve Of Trial.

Perrillo filed a complaint against defendants—not their clients—on September 14, 2000 "for equitable enforcement of medical lien and/or damages." (CT 1:50.) Perrillo twice amended the complaint, expanding it to include nine causes action, only four of which are relevant to this appeal (conversion, intentional interference with contractual relations, intentional breach of fiduciary duty, negligent breach of fiduciary duty). (CT 7:1311, 11:2353-2356.)

During jury selection, Perrillo orally moved for leave to add an eleventh cause of action for breach of contract, and the trial court granted that motion on the penultimate day of trial testimony. (CT 11:2264, 15:3095; RT 15:4580-4581.)

B. The Trial Court Determines That The Workers' Compensation Exclusivity Defense Raises Issues Of Fact For The Jury.

Picco & Presley twice moved for summary adjudication on the ground that the Board had exclusive jurisdiction over Perrillo's claims for payment as to the Elk Hills plaintiffs who had Workers' Compensation claims, but both times the motions were denied because the court found triable issues. (CT 4:780-781, 5:955-956, 10:1952; see also CT 4:699-706, 9:1825-1831; RT 2:B-46-B-54, 3:23.) Following defendants' motion for nonsuit, the court stated that "the real issue in this case" was "whether or not Doctor Perrillo was hired for the civil case or not." (RT 16:4852.) If he

was, then "the jurors have to determine what work he did on the civil case, and determine if he's entitled compensation." (RT 16:4853.) If not, that is, "if they find the lien is not valid," then "the only recourse is through the Workers' Compensation avenue." (RT 16:4853.)

C. The Jury Trial.

The parties' theories of their cases were summarized in the jury instructions:

1. Perrillo's theories.

a. Tort claims.

- Perrillo "claims that commencing in July 1998, the Elk Hills patients entered into valid lien contracts with [him] at the time they came to his office for evaluation." (CT 11:2295.)
- "The lien contracts provided that [Perrillo] was to be compensated for his work from the proceeds of the settlement of the civil lawsuit, and that the patients would be personally responsible to pay for the value of [Perrillo's] services if he was not paid from the proceeds of the civil settlement." (*Ibid.*)
- Perrillo "claims that he was not paid from the proceeds of the civil settlement in August 2000, and that the Elk Hills patients did not pay him for his services." (*Ibid.*)
- The existence of a valid lien contract is a predicate for Perrillo's claims for conversion, breach of fiduciary duty, and intentional interference with contractual relations. (CT 11:2315-2316, 2318.)

b. Breach of contract.

- "Perrillo claims that in May, 1998, he and [defendants] entered into a contract whereby Dr. Perrillo was to evaluate and prepare reports for the Elk Hills patients who were then clients of [defendants]." (CT 11:2294.) He "further claims that he and [defendants] agreed that he would be compensated for his work from the proceeds of the settlement of the civil lawsuit pursuant to the civil liens that [Perrillo] obtained from the patients he evaluated." (*Ibid.*)
- Perrillo "also claims that to the extent no contract was made in May 1998, a contract was formed in March 2000 by the actions and conduct of the parties." (*Ibid.*) "Specifically, [Perrillo] claims that Picco & Presley received the box containing the civil liens, bills, reports and other testing data on the Elk Hills patients in March, 2000 and thereafter used that work product to their benefit. [He] claims that by accepting the benefit of his workproduct, [defendants] were contractually obligated to pay him for his work from the proceeds of the settlement of the civil lawsuit pursuant to the civil liens signed by the patients that were included in the box." (*Ibid.*)
- Perrillo "claims that [defendants] breached this contract by failing to pay him in accordance with the terms of the civil liens after the civil lawsuit settled." (*Ibid.*)

2. Defendants' theories.

a. Tort claims.

- Defendants claim that "the civil liens are not valid"; the patients "did not understand the meaning and purpose of the civil liens"; the contracts "did not contain material terms"; "the patients were unsophisticated and legally incapable of understanding the [contract's] meaning and purpose"; the contracts were "unclear as to the terms, and that the contract itself indicated that the patients attorneys' would have the opportunity to acknowledge its terms on their behalf." (CT 11:2295.)
- Defendants claim Perrillo entered into a superseding agreement to accept $53,000 and their guarantee of 75% of his billed fees after pursuing recovery through Workers' Compensation. (CT 11:2310.)

b. Breach of contract.

- Defendants claim "that they were referring patients for workers' compensation evaluations and never agreed to the creation of civil liens." (CT 11:2295.)

D. The Jury Finds That Defendants Breached A Contract With Perrillo And Are Liable In Tort For Failing To Honor Valid Liens.

The jury returned a verdict for Perrillo, finding that the Elk Hills patients entered into "a valid lien contract" with Perrillo, and on that basis found defendants liable for all the tort claims. (CT 11:2349, 2353-2356.) The jury also found that defendants breached a contract with Perrillo for

payment "from the civil settlement of the Elk Hills litigation according to the terms of the civil liens signed by the Elk Hills patients." (CT 11:2352-2353.)

The jury rejected Perrillo's claims for noneconomic and punitive damages. (CT 11:2356.) It found defendants liable for $307,146.59—the exact amount Perrillo had requested as outstanding payment for his bills, plus $837.49 in photocopying charges. (*Ibid.*; RT 17:5469-5470; Exhs. 4, 53.) The verdict was reduced by $50,000 to reflect a pre-trial settlement with Goch. (CT 13:2586.)

E. The Court Denies Perrillo's Equitable Claims And Awards Attorney Fees.

After trial, the court dismissed Perrillo's equitable causes of action. Since the jury awarded Perrillo nearly all of the $312,875 he had originally sought, he was "fairly compensate[d]" in law and needed no equitable relief. (CT 12:2439; see also CT 13:2586.)

The judgment awarded $257,146.59 plus prejudgment interest at 7% in the amount of $80,802.36, for a total judgment of $337,948.95. (CT 13:2586.) Finally, the trial court awarded Perrillo $557,182.50 in attorney fees. (CT 19:3862-3863.)

F. This Appeal Is Timely.

This appeal is from a final judgment. (Cal. Rules of Court, rule 14(a)(2)(B).)

Perrillo served notice of entry of the judgment on January 10, 2005. (CT 13:2588-2593.) On January 25, 2005, Picco & Presley, Picco, and Presley timely filed (a) a notice of intention to move for new trial

(CT 15:2603) and (b) motions to vacate judgment and for judgment notwithstanding the verdict (CT 13:2606, 2642). (Code Civ. Proc., §§ 629, 659, 663a.)

On March 10, 2005, the trial court timely denied (b) (CT 18:3715), and denied the new trial motions the next day (CT 18:3756-3757). Appellants timely filed their notice of appeal on April 8, 2005. (CT 19:3852; Cal. Rules of Court, rule 3.)

The court awarded attorney's fees and costs on April 21, 2005. (CT 19:3861-3866.) Appellants filed their notice of appeal therefrom on May 4, 2005. (CT 19:3874.)

ARGUMENT

I.

$236,284.10 OF THE JUDGMENT MUST BE STRICKEN BECAUSE IT WAS AWARDED FOR SERVICES COMPENSABLE EXCLUSIVELY THROUGH WORKERS' COMPENSATION.

Perrillo's suit should have been doomed from the start. Why? The 38 men with Workers' Compensation cases never owed Perrillo a dime. Every penny Perrillo claims these men owed him was billed by him as a Workers' Compensation expense, and the bills served on the workers' employers and the Board.[3] (RT 5:1212-1215, 1219-1223, 7:1992-1993, 8:2296; Exhs. 4, 200, 204.) By law, the employer—not the worker—is liable for the reasonable cost of Perrillo's services. (Lab. Code, §§ 4064, subd. (a), 4550, 4600, subd. (a), 4621, subd. (a).[4]) The Board—not a jury—has exclusive jurisdiction to determine reasonableness and award fees. Perrillo could not circumvent the system by having the workers agree to a lien on any civil recovery. Since the workers were not liable for paying Perrillo any part of their bills, defendants were not either. Thus, $236,284.10 must be stricken from the judgment.[5]

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[3] Throughout this section, "employer" includes the employer's insurance carrier.

[4] Although the Workers' Compensation statutes were amended at various points between 1998 and 2006, these amendments, for the most part, do not affect the specific Code sections cited in this section. We have noted the date of a statute where a particular version is relevant.

[5] We calculate this figure by adding up the adjusted invoice figures (continued...)

A. Workers Have The Statutory Right To Have Their Medical Expenses Paid By Their Employer, And Physicians Are Limited To What They Are Awarded Through Workers' Compensation.

The California Constitution (Art. XIV, § 4) "envisions a 'complete system of workmen's compensation,' a purpose which the Legislature has sought to implement through appropriate legislation." (*Workmen's Comp. Appeals Bd. v. Small Claims Court* (1973) 35 Cal.App.3d 643, 646, citing Lab. Code, § 3201.) It is settled "beyond any dispute" that "one of the fundamental principles of the Workers' Compensation Act is that it is the *employer's* responsibility to provide all medical treatment reasonably required to effect the proper care and speedy recovery of injured employees." (*Bell v. Samaritan Medical Clinic, Inc.* (1976) 60 Cal.App.3d 486, 489, emphasis in original.)

When a worker is injured and the employer contests liability, an essential benefit is the employer's payment of all medical-legal evaluations and reports needed to establish the worker's claim. (Lab. Code, §§ 4064, subd. (a), 4621, subd. (a); *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins.*

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[5] (...continued)
on the Exhibit 4 summary sheet for the 38 men with Workers' Compensation cases (J.Baker, J.Barnachia, K.Cranfill, Cranford, Dahna, J.Dodson, T.Edwards, Fanska, Ferrier, L.Garner, R.Gentry, George, T.Green, B.Johnson, R.Johnson, J.Jones, Junyor, A.Kellogg, H.Kight, Langwell, Lopez, Marquez, E.McAllister, Montgomery, Moore, B.Rodgers, Rutledge, Saldivar, Stene, Valek, Walchuck, J.T.Williams, R.Willingham, C.Willingham Sr., C.Willingham Jr., B.Wise, Wood, Yingst). We then subtract the credits indicated on the summary for Johnson, Kight, Rodgers, and Yingst. And we factor in the adjustments discussed at trial. (RT 17:5469.)

Fund (2001) 24 Cal.4th 800, 810.) Absent fraud, "[s]uch expenses are generally payable by the employer/carrier, whether the claim is proved or not." (*American Psychometric Consultants, Inc. v. Workers' Comp Appeals Bd.* (1995) 36 Cal.App.4th 1626, 1631, fn. 1; see also *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 789, 802 ["A finding of industrial injury is not necessary for an award of medical-legal costs"].) The "clear purpose" of this benefit "is to enable an applicant to secure expert professional services to establish the validity of a disputed claim and to ensure payment for such services—irrespective of the risks of the litigation or the financial condition of the applicant." (*Public Employees' Retirement System v. Workers' Comp. Appeals Bd.* (1978) 87 Cal.App.3d 215, 223.) This benefit "ensures equal access for all without regard to ability to pay to the forum." (*Ibid.*)

A physician may not charge more than a reasonable fee for his services, as determined by the Board. (Lab. Code, §§ 4906, subd. (a), 5307.1, subd. (a) (2002), 5307.27 (2004), 5307.6, subd. (a), (d)(1).) The Board is "given jurisdiction" to determine the reasonableness of fees "for the protection of claimants before it." (*Coviello v. State Bar* (1953) 41 Cal.2d 273, 277.) "No charge, claim, or agreement" for payment for these services "is enforceable, valid, or binding in excess of a reasonable amount." (Lab. Code, § 4906, subd. (a); see also *id.* at § 4903, subd. (b).) A physician may not accept any compensation "from any source for medical-legal expenses if such compensation is in addition to the fees authorized" by the schedules. (Lab. Code, § 5307.6, subd. (d)(1); see also Cal. Code Regs., tit. 8, § 9794 (f) ["A physician may not charge, nor be

paid, any fees for services in violation of . . . subdivision (d) of Section 5307.6 of the Labor Code"].) A physician who violates Labor Code section 5307.6, subdivision (d) is subject to discipline.[6]

A physician dissatisfied with the amount awarded may petition the Board for reconsideration (Lab. Code, § 5900) and may thereafter seek review (Lab. Code, § 5950). (*Workers Comp. Appeals Bd. v. Small Claims Court*, *supra*, 35 Cal.App.3d at p. 647.) "Finally, if his quarrel is with the concept of the fee schedule per se, the appropriate forum would be the Legislature itself." (*Bell*, *supra*, 60 Cal.App.3d at p. 491.)

B. Physicians May Not Contract Around The Exclusive Jurisdiction Of The Board.

What the physician may not do is what Perrillo did here—attempt to contract with the workers directly for payment of his services above and beyond what he would be allowed in Workers' Compensation. In *Bell*, *supra*, 60 Cal.App.3d 486, the physicians tried that and failed. They had their industrially injured patients sign a contract obligating them to pay the difference between the physicians' bills and the amount recovered through Workers' Compensation. The contracts were invalid. "[T]he purpose of section 4906 is to protect [claimants before the board] from the exaction of excessive fees." (60 Cal.App.3d at p. 491, citing *Workmen's Comp. Appeals Bd. v. Small Claims Court*, *supra*, 35 Cal.App.3d at p. 646.) When the *Bell* physicians undertook to treat industrially injured workers, to submit

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[6] A physician is thus like the worker's attorney: An attorney who attempts to secure medical-legal fees in excess of those allowed by the Board is guilty of professional misconduct. (Lab. Code, § 4906, subd. (b); see *Coviello*, *supra*, 41 Cal.2d at pp. 276-277.)

reports and billing statements to the insurance carrier, and to accept payment from the carriers at least as a credit against the worker's "personal account," the Board's jurisdiction attached.[7] (*Id.* at p. 492.[8]) "The Legislature has decreed that no agreement for either legal or medical services in excess of a reasonable amount as determined by the Board is valid." (*Ibid.*)

Similarly, in *Workmen's Comp. Appeals Bd. v. Small Claims Court*, *supra*, 35 Cal.App.3d 643, a physician, dissatisfied with his $250 medical-witness fee award received in Workers' Compensation proceedings, sued the worker's attorney in small claims court for additional "consultation and hearing-appearance service." (*Id.* at p. 645.) The lawyer filed a separate, protective small-claims action against the worker. (*Ibid.*) The Board's writ of prohibition to stop the court proceedings was granted. The Court of Appeal concluded "that both parties [were] pressing their claims in the wrong forum." (*Ibid.*) "The Legislature, by statute, has vested the [Board] with the exclusive jurisdiction to fix the fees of medical witnesses and of attorneys representing the claimants in matters before the board." (*Id.* at

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[7] See also *Vacanti*, *supra*, 24 Cal.4th at p. 815 ("claims seeking compensation for services rendered to an employee in connection with his or her workers' compensation claim fall under the exclusive jurisdiction of the WCAB"); *American Psychometric Consultants*, *supra*, 36 Cal.App.4th at p. 1639; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (1995) 34 Cal.App.4th 1204, 1212 (Board "has exclusive jurisdiction over medical liens").

[8] In *Bell*, the jurisdictional statute was Labor Code section 5304. Here it is either 5304 (medical treatment disputes) or 5300, subdivision (a) (medical-legal disputes, i.e., claims for "recovery of compensation, or concerning any right or liability arising out of or incidental thereto"). (See *Adams v. Workers' Comp Appeals Bd.* (1976) 18 Cal.3d 226, 231 ("compensation" includes medical-legal expenses).

p. 646.) Dissatisfied physicians can petition the Board for reconsideration, but they may not "circumvent the remedy provided by statute by filing actions in the small claims court." (*Id.* at p. 647.) "Because the subject matter of the actions filed in respondent small claims court is within the exclusive jurisdiction of the [Board], respondent small claims court has no jurisdiction to hear or determine the claims." (*Ibid.*)

C. Perrillo's Claims Against Defendants Are Barred; His Exclusive Remedy Is Through Workers' Compensation.

Perrillo's claim, simply stated, is that the workers (through their lawyers) have not paid him for services he himself identified as Workers' Compensation-related. But since his injury is "collateral to or derivative of" the workers' compensable injuries, the Board has exclusive jurisdiction to determine whether and how much he should be paid. (*Vacanti*, *supra*, 24 Cal.4th at p. 811.)

Perrillo submitted to the Board's jurisdiction and payment restrictions when he submitted Doctor's First Reports of Occupational Injury or Illness, Requests for Allowance of Workers' Compensation liens, medical-legal reports, and bills to employers for his medical services, including diagnostic tests incidental to the production of his reports. (Lab. Code, § 4620, subd. (a); Exh. 4.) By doing so, he triggered the workers' right to have his services paid for by their employers, a right essential to the compensation bargain that underlies the Workers' Compensation system. (*Vacanti*, *supra*, 24 Cal.App.4th at pp. 810-812.)

D. Perrillo's Counter-Arguments Are Meritless.

1. Perrillo's status as a civil expert does not change the fact that his Workers' Compensation-related services are compensable exclusively through Workers' Compensation.

Perrillo contended below that he is nevertheless entitled to payment because he was hired as a civil expert, and he designed his tests to produce data for an epidemiological study that could have helped establish causation in the civil action. (Statement of Facts, § C.) As a threshold matter, Perrillo never performed such a study; Bechtel's counsel never knew about any such study; and such a study never factored into the civil settlement discussions. (Statement of Facts, §§ C, G.)

But more importantly, whatever value Perrillo's work may have had on the civil side, it is uncontroverted that the entire amount of economic damages Perrillo sought in this trial with respect to the 38 workers was based on bills he submitted to the employers and the Board. (Exh. 4; RT 5:1213, 8:2296, 17:5468-5470.) The workers Perrillo examined had the constitutional right to have their employers pay for Perrillo's self-described Workers' Compensation-related services. If Perrillo is dissatisfied with the Workers' Compensation fee schedules, he can seek reconsideration, or he can petition the Legislature. But he cannot circumvent the system and seek payment from the workers'—or their lawyers'—pockets.[9]

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[9] Dr. Scott's example illustrates. He was the primary treating physician in the civil and Workers' Compensation cases. (RT 5:1263.) He filed requests for allowance of Workers' Compensation liens for the male

(continued...)

2. Defendants have not abused the Workers' Compensation system by insisting on their clients' Constitutional rights.

Below, Perrillo accused defendants of abusing the Workers' Compensation system by making it fund the civil litigation. Nonsense. Perrillo's billed work was "a necessary service rendered toward the realization of fundamental objectives of the Workers' Compensation Act," for which the employers were required to pay. (*Bell, supra*, 60 Cal.App.3d at p. 492.)

To avoid a worker's double recovery, an employer can assert subrogation rights, to the extent the law allows. (Lab. Code, §§ 3850-3865.) For example, an employer can apply for a judgment lien in the worker's civil action against negligent third parties to recover compensation paid (Lab. Code, § 3856, subd. (b)), or, if the case is over, it can apply for a credit in the Workers' Compensation proceedings (Lab. Code, § 3861).[10]

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[9] (...continued)
workers. (RT 5:1264, 7:1986.) He prepared "Medical Services Liens" for the wives only, since they had no Workers' Compensation claims. (RT 5:1263-1264, 15:4516-4517, 4540; Exh. 7B.)

Scott's work exclusively for the benefit of the civil suit included: preparing/filing civil declarations concluding, to a reasonable medical probability, that plaintiffs suffered toxic-exposure injuries; meeting with trial counsel; attending depositions; examining the wives. (RT 5:1263, 15:4514-4516, 4526-4527, 4535-4539; Exh. 20.) Scott was paid $48,000 out of the civil settlement proceeds for that work only; payment specifically excluded "services for which [he] ha[d] filed Workers' compensation liens." (Exh. 114; RT 15:4520, 4539-4540.) Scott was paid through Worker's Compensation on his Workers' Compensation liens. (RT 7:1986.)

[10] An employer's concurrent negligence, however, will bar the (continued...)

But there is no similar provision allowing a physician to assert any rights against a worker's recovery in a civil action. Indeed, allowing such a lien would interfere with the employer's subrogation rights. Whether and how a physician's interests should be prioritized over the employer's is the type of policy determination the Legislature, not the courts, must make. (See *Sun Bank/South Florida, N.A. v. Baker* (Fla.App. 1994) 632 So.2d 669, 672 [refusing to recognize medical provider's lien on third-party settlement for similar reasons].)

3. Perrillo has failed to exhaust administrative remedies.

Perrillo is correct that a physician-lienholder can proceed directly against the worker in one narrow instance: Where the employer has obtained a credit against a civil settlement, *and* the Board has allowed the lien, *and* the worker has elected not to seek further Workers' Compensation benefits. (*Trustees' Collection Service v. Workers' Comp Appeals Bd.* (1997) 62 Cal.Comp.Cases 997.) That has not happened here. And as *Trustees' Collection Service* illustrates, even in that situation, a physician may not avoid the Workers' Compensation system altogether. Rather, the physician's bills must first be adjusted in Workers' Compensation, because the Board "has exclusive jurisdiction to determine compensation even where a third party action is brought before jurisdiction of the [Board] has

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[10] (...continued)
employer from recovering compensation payments from the third-party tortfeasor. (*Witt v. Jackson* (1961) 57 Cal.2d 57, 71.) To avoid double recovery by the injured worker, his damages are reduced by the amount of compensation benefits received. (*Id.* at p. 73.)

been invoked." (*Castro v. Fowler Equipment Co.* (1965) 233 Cal.App.2d 416, 421 [third-party tortfeasor could not obtain setoff by proving what future benefits worker would have received; "[i]t would have been improper for the jury to have heard testimony and made a finding of fact as to what the [Board] might award the [worker] in the event of a hearing"]; accord *Slayton v. Wright* (1969) 271 Cal.App.2d 219, 231, 233; see also *Hughes v. Argonaut Ins. Co.* (2001) 88 Cal.App.4th 517, 525-526 [dismissing civil suit by third-party tortfeasor over proper allocation of attorney's fees to be deducted from prior-obtained civil settlement—a determination that could only be made by the Board].) Perrillo's refusal to obtain that determination here should have barred his suit.[11]

Perrillo argued below that he was not required to pursue Workers' Compensation once the insurance carriers stopped offering to settle in 2003. (RT 12:3371.) But what carriers offer, and what they are ultimately ordered to pay by a Workers' Compensation judge, are very different things.[12] Had Perrillo sought a Workers' Compensation judge's determination, there is

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[11] Cf. *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73-78 (counties failed to pursue administrative procedure for reimbursement for state-mandated costs before seeking to judicially invalidate bills containing mandates); *County of Los Angeles v. McMahon* (1995) 39 Cal.App.4th 1432, 1444-1445 (county challenging validity of state regulation limiting reimbursement for emergency shelter costs failed to seek administrative review of audits denying reimbursement).

[12] For example, Shane Irvin was one of the Elk Hills plaintiffs who also had a Workers' Compensation case. The employer disputed liability and claimed that Perrillo had overcharged, initially offering to settle for $1,900, which Perrillo refused. (Exh. 234; RT 10:2844-2845.) At the Workers' Compensation hearing, Presley aggressively urged the judge to allow Perrillo's lien, with the result that Perrillo agreed to accept $5,500 (87%) of his $6,350 bill. (RT 5:1294-1295, RT 6:1669-1671, 7:1982-1983, 9:2458-2460; Exh. 203.)

every reason to believe he would have obtained fair compensation for his services.[13]

Finally, Perrillo's withdrawing his liens in 2003 could not change the exclusivity analysis. Indeed, the medical-legal services providers in *Vacanti* tried a similar tactic of foregoing recovery on their individual lien claims and suing in civil court for damages—and failed. (*Vacanti*, *supra*, 24 Cal.4th at pp. 809, 816.) Their actions could "not insulate their claims from the exclusivity provision." (*Id.* at p. 816.) So too, here.

4. No other provision of the Labor Code authorizes Perrillo's action.

Perrillo argued below that he was entitled to seek payment directly from the workers under Labor Code section 3751, because the employers had all "denied" his claims. (E.g., CT 2:306.) The argument is meritless.

Section 3751 bars a physician "with actual knowledge that a [Workers' Compensation] claim is pending," from "collect[ing] money directly from the employee for services to cure or relieve the effects of the injury for which the claim form was filed, unless the medical provider has received written notice that liability for the injury has been rejected by the employer and the medical provider has provided a copy of this notice to the employee." (Lab. Code, § 3751, subd. (b).) It does not authorize Perrillo's claims against defendants because:

- Perrillo is not trying to "collect money directly from the employee."

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[13] Every other physician in the Workers' Compensation cases that were resolved before this trial received payment through Workers' Compensation. (RT 7:1994.)

- Perrillo's services were largely, if not entirely, for preparing medical-legal services to resolve disputed claims (services compensable whether the claim is denied or not), not "cur[ing] or reliev[ing] the effects of" injury. (RT 15:4552-4553, 17:5481; CT 16:3288 [identifying himself as a "medical-legal consultant"]; see, e.g., Exh. 231 [report is a "comprehensive medical-legal evaluation"].)
- Perrillo provided no evidence he gave the workers a copy of any denials—a prerequisite for seeking payment directly from them.
- Perrillo has not had the reasonableness of his fees determined by the Board—another prerequisite to seeking payment from the workers. (See § D.3, above.)

Perrillo also relied on Labor Code section 4605, which gives an employee the right "to provide, at his own expense, a consulting physician or any attending physicians whom he desires." But as *Bell* explained,

> "That section simply recognizes that any injured employee is free to seek medical treatment and/or consultation in addition to, or independent of, that for which his employer is responsible. In such case, the employee is personally responsible for that expense; and it is a matter which is not within the jurisdiction of the Board." (60 Cal.App.3d at p. 490.)

Here, the workers did not seek—nor did Perrillo provide—medical-legal services additional to or independent of what their employers were statutorily obligated to pay for. Indeed, McGruder insisted, and Perrillo

agreed, that he would file Requests for Allowance of Lien precisely so that the workers would be protected and receive the benefits to which they were entitled. (Statement of Facts, § C). Section 4605 has no application here.

* * * * *

Because Perrillo had no right to demand payment of his self-identified Workers' Compensation bills from the 38 workers, defendants were absolutely correct in refusing to pay him out of their clients' settlement money. The $236,284.10 portion of the judgment compensating Perrillo for the medical-legal bills of the 38 workers must be deducted, as must the prejudgment interest awarded on that sum.

II.

THE JUDGMENT MUST BE REVERSED ENTIRELY BECAUSE THERE WAS NO CONTRACT BETWEEN PERRILLO AND THE WORKERS TO BE PAID EXCLUSIVELY OUT OF THEIR CIVIL RECOVERY, AND THERE IS NO BREACH AS TO THE WIVES.

Not only must the judgment be reversed to eliminate the portion compensating Perrillo for his Workers' Compensation-related services, it must be reversed entirely because, as a matter of law, there was no contract between Perrillo and the workers to be paid exclusively out of any civil recovery. This is so because the undisputed evidence fails to establish that the workers and Perrillo made such a contract. And as for the wives without Workers' Compensation claims, there was no breach.

When the workers appeared at Perrillo's office for their evaluations, he gave them both a Notice of Doctor's Lien and a Request for Allowance of Lien to sign. (Statement of Facts, § E.) Neither document references the other. The Notice gives Perrillo a lien on any civil recovery and directs the workers' attorneys to "withhold such sums from any settlement, judgment or verdict as may be necessary to adequately protect said doctor." (Exh. 1.) The Request gives the worker's consent to Perrillo's request for an allowance of lien on the worker's Workers' Compensation recovery. (Exh. 204.)

These two documents must be viewed together to understand the parties' agreement. (Civ. Code, § 1642; see 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 747, pp. 835-836.) The problem is, on

their faces, the two documents do not suggest how the two liens should be reconciled. The language of the Notice is ambiguous. In it, the workers direct their lawyers to pay Perrillo out of the civil settlement only an amount "necessary to adequately protect" Perrillo. (Exh. 1.) How much is that? The full amount of Perrillo's bills? Or just what was noncompensable in Workers' Compensation?

There is no substantial evidence Perrillo and the workers discussed how to resolve the two lien documents. The only evidence is the language of the documents themselves. Everything else is either Perrillo's uncommunicated subjective intent (e.g., his belief that Workers' Compensation was merely a "backup") or evidence of discussions between Perrillo and the workers' lawyers. (Statement of Facts, § C.) Subjective intent is irrelevant to contract interpretation. (See 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 744, pp. 831-833.) And since Perrillo opted to deal with the workers as unrepresented parties (by not allowing the lawyers to review the Notice beforehand), his discussions with the workers' lawyers cannot be used to interpret the agreement between Perrillo and the workers.[14]

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[14] Workers Yingst and George testified that they objected to the Notice, which Perrillo explained meant that they would be responsible if his bill wasn't paid. (RT 7:1886, 1891, 12:3443-3444.) But paid by whom? The workers assumed payment would come from the civil settlement (because they didn't understand/remember the Workers' Compensation liens they signed, RT 7:1889-1890, 1898, 1902-1904, 12:3476-3477, 3479, 3493-3494), but their subjective assumptions are irrelevant. Worker Saldivar testified that Iacopino told a group of Elk Hills plaintiffs that the doctors would be paid out of the civil settlement (RT 7:1920), but he also testified that by signing Workers' Compensation liens, he expected the doctors to be paid through Workers' Compensation. (RT 7:1930, 1932,

(continued...)

Ambiguity in the agreement between Perrillo and the workers must be resolved in favor of the workers, since the Notice was drafted by Perrillo. (Civ. Code, § 1654 ["In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist"].) This is especially so since the Notice was an adhesion contract. (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 695 [rule "applies with peculiar force in the case of the contract of adhesion"].) The Notice was presented to the workers without their lawyers' review or acknowledgment, even though these people were being examined for (and ultimately diagnosed as having) injury from toxic chemical exposure. (RT 12:3402-3403.) These people were (in Perrillo's agent's words) "so not bright that they didn't know how to read and write very well and they had people reading and writing for them." (RT 9:2435-2436.)

Where, as here, the evidence is undisputed, contract interpretation is a question of law that this court reviews de novo. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) It is "solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence," and "'[a]n appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation].'" (*Ibid.*)

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[14] (...continued)
1945.)

The only possible interpretation of the agreement is that the workers agreed to pay Perrillo for services that were not compensable through Workers' Compensation. Under that agreement, there is no breach. Perrillo withdrew his Requests for Workers' Compensation liens, so Perrillo has not established that he is owed anything as to most of the workers.[15] And defendants have offered him $53,000 for the wives and one man without a Workers' Compensation claim (Phil Cranfill) and are holding that amount in the client trust account.[16]

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[15] Assuming Workers' Compensation exclusivity did not bar Perrillo from balance billing (it does, see § I.B), the most Perrillo established was $19,509.20, the difference between the amount he received from Workers' Compensation carriers for Johnson, Kight, Rodgers, and Yingst ($6,865.80), and the amount he billed for their services ($26,375). (Exh. 4 [summary].)

[16] The bills for the individuals without Workers' Compensation claims totaled $70,025, but as we explain in Section V.A below, that number must be reduced because four of these plaintiffs (Ong, D.Gentry, T.Willingham, and D.Dodson, totaling $11,100) never received any settlement funds. The amount in the client trust account is therefore deficient by only $5,925.

III.

EVEN IF THE ELK HILLS PLAINTIFFS AND PERRILLO HAD A VALID LIEN CONTRACT, DEFENDANTS DID NOT SIGN THOSE CONTRACTS AND HAD NO OBLIGATIONS UNDER THEM AS A MATTER OF LAW.

Even assuming the Elk Hills plaintiffs entered into "valid lien contracts" for full payment of Perrillo's bills out of their civil recovery, that at most would have given Perrillo a cause of action against them for breach of contract. Such breach would not automatically establish defendants' liability in either tort or contract. But the record supports no other basis for the jury's tort and breach of contract determinations; thus, the entire judgment must be reversed.

A. There Is No Substantial Evidence That Defendants Made Or Breached Any Contract With Perrillo To Pay Him According To The Terms Of The Notices Of Doctor's Lien.

From day one, this case was not about any contract between defendants and Perrillo, but about liens contracts signed by the Elk Hills plaintiffs. Perrillo's theory was that these plaintiffs signed civil liens; that he notified defendants of these liens before settlement; and that defendants ignored them. (CT 1:53-55.) His first and second amended complaints added additional causes of action, but they all involved the same general allegations. (CT 2:235-241, 7:1312-1320.)

At the eleventh hour—in the middle of jury selection and nearly four years after filing the original complaint—Perrillo made an oral motion to amend the complaint to add a cause of action for breach of contract, which the court granted on the last day of testimony. (CT 11:2264; RT 15:4580-4581, 16:4853-4857.) The undisputed evidence at trial, however, failed to support any breach of contract claim.

1. Defendants never entered into any contract to pay Perrillo according to the terms of the civil liens signed by the Elk Hills plaintiffs.

The jury found that Perrillo "enter[ed] into a valid contract with defendants whereby he was to evaluate and prepare reports for the Elk Hills patients referred to him by the defendants in the civil case and, in exchange, he would be paid for his services from the civil settlements of the Elk Hills litigation according to the terms of the civil liens signed by the Elk Hills patients." (CT 11:2352.) The jury had been instructed that the contract was created in either 1998 or 2000. (CT 11:2294.) But there is no evidence defendants entered into such a contract at either date, or at any other time.

The 1998 negotiations. The 1998 conversations between Whiteman, McGruder, Iacopino, and Perrillo could not have created a contract between defendants and Perrillo to pay for his services "according to the terms of the civil liens signed by the Elk Hills patients"—as the jury found. The reason: Defendants never saw, let alone approved, the Notice of Doctor's Lien in 1998; they didn't see it until Perrillo sent him his box of records in 2000. (Statement of Facts, § G.) That Notice, drafted by Perrillo, was purportedly authorized under "Insurance Code 10133"—an inapplicable statute—and

contained a one-sided attorney's fees/collection costs provision that was never discussed. The Notice was silent as to how it related to the Workers' Compensation liens Perrillo had (in his words) "clearly" agreed to, or how it related to the Workers' Compensation limits McGruder had advised him of. (Statement of Facts, § C.)[17] There was no evidence defendants agreed in 1998 to pay Perrillo "according to the terms" of this unseen, unnegotiated Notice. (See also § IV, below.) Moreover, any arguable agreement in 1998 was oral and therefore time-barred.[18] (Code Civ. Proc., § 339 [2-year statute of limitations for oral contracts]; CT 15:3095 [Perrillo first alleged breach of contract cause of action in June 2004—nearly four years after defendants supposedly breached contract].)

Defendants' 2000 conduct. Perrillo alternatively contended that when Picco & Presley received the box containing Perrillo's medical liens, including the civil liens, in March 2000, "and thereafter used that work product to their benefit," defendants became "contractually obligated to pay [Perrillo] for his work from the proceeds of the settlement of the civil

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[17] Perrillo's conduct is in stark contrast to that of Dr. Scott, who provided McGruder with his Doctor's Liens, and she reviewed them with the wives before Scott examined them. (RT 5:1264-1265, 15:4532-1433; Exh. 7B.)

[18] The trial court erroneously rejected defendants' statute-of-limitations defense, finding that the new cause of action related back to the time of the original complaint. (RT 18:6606.) But that complaint was based on allegations that defendants failed to honor Perrillo's written lien contracts with the Elk Hills patients after receiving notice in 2000. (CT 1:50-55.) His new cause of action was based on entirely different allegations, i.e., that defendants breached a contract directly between him and defendants, arising from different conversations and at different times than the lien contracts. (See *Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160, 168-169; *Coronet Manufacturing Co. v. Superior Court* (1979) 90 Cal.App.3d 342, 347.)

lawsuit pursuant to the civil liens signed by the patients that were included in the box." (CT 11:2294; see also RT 17:5424-5425.) But this theory also fails. Defendants never signed the Notices, which, with different terms than discussed (i.e., attorney-fee provision; omission of Workers' Compensation limits), constituted nothing more than an unaccepted counter-offer. (*Amer. Aero. Corp. v. Grand Cen. Aircraft Co.* (1957) 155 Cal.App.2d 69, 80.) Any assumption of the obligations in the Notices would have required new consideration. (*Andrews v. Robertson* (1918) 177 Cal. 434, 440.) There was none. Long before defendants received the Notices, the Elk Hills plaintiffs had (unadvisedly) bought Perrillo's services for a promise to pay him out of any civil recovery.[19] Perrillo had already provided plaintiffs (through counsel) with his reports and served them on the carriers. (Statement of Facts, § F; see also RT 13:3684-3685.) Any promise on defendants' part to pay Perrillo for what he had already done and delivered would have been purely gratuitous and unenforceable.

At trial, Perrillo succeeded in roping defendants into a contract he wishes he had made in 1998, but didn't. In 1998, he could have presented defendants with his Notices of Doctor's Lien, negotiated its terms (i.e., the one-sided attorney's fees/collection costs provision; the interplay with Workers' Compensation), and requested their signature. (See RT 5:1211.) He intentionally didn't do that. This "Gotcha!" theory of contract-formation is not the law.

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[19] Of course, plaintiffs never made such a contract (§ II), and, even if they had, it would have been invalid because of Workers' Compensation exclusivity (§ I).

2. Perrillo failed to mitigate his damages.

But even assuming a valid contract between Perrillo and defendants, Perrillo forfeited any claim to damages when he withdrew his Requests for Workers' Compensation liens in 2003. Every dollar received through Workers' Compensation would have offset defendants' damages. "The plaintiff *cannot recover* for harm that he or she could have foreseen and avoided by reasonable effort and without undue expense." (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 915, p. 1012, emphasis in original; e.g., *Spurgeon v. Drumheller* (1985) 174 Cal.App.3d 659, 665 [plaintiffs' decision to take house off market after sale fell through failed to satisfy their "duty to mitigate" "as a matter of law"; judgment reversed]; *Henrici v. South Feather Land & Water Co.* (1918) 177 Cal. 442, 450 [plaintiff could not hold the defendant responsible for ruin caused by allowing his trees to go without water for years, when "he might, at slight cost, have secured the water and reduced his damage to almost nominal proportions"; judgment reversed].)

B. Defendants Could Not Interfere With Perrillo's Contractual Relations With Their Clients As A Matter Of Law.

The jury found that defendants knew of and interfered with the lien contracts between the Elk Hills plaintiffs and Perrillo. (CT 11:2354.) But defendants, as plaintiffs' lawyers, were plaintiffs' agents. Plaintiffs had numerous legitimate grounds for resisting Perrillo's attempt to collect from their civil recovery. Aside from their Workers' Compensation exclusivity and contract defenses, plaintiffs had mistake/undue influence/fraud

defenses[20]; a novation defense[21]; as well as a defense that Perrillo's bills were inflated.[22] By refusing to turn over their clients' settlement funds until these disputes were resolved, defendants were protecting their clients' interests. Such conduct is not tortious. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 512, fn. 4 [agents/employees acting for or on behalf of the corporation not liable for inducing breach of corporation's contract]; *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 576 [same]; *Aalgaard v. Merchants Nat. Bank, Inc.* (1990) 224 Cal.App.3d 674, 684-686 [someone in a confidential relationship with a party to a contract may lawfully induce breach of the contract when acting in party's interests].)

Moreover, where the attorney pays funds to his client rather than the lienholder, courts "fail to see how this can be construed as an act designed to induce breach or disruption of a contractual relationship." (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 458.) "The attorney has essentially facilitated compliance with the contract by providing the client with the funds necessary for performance." (*Ibid.*)

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[20] For example, a number of plaintiffs did not understand the contract; denied anyone had explained it to them; or assumed their lawyers had approved it. (See note 1, above.)

[21] Defendants contended Perrillo had agreed to their offer of $53,000, plus a 75% guarantee of his billed medical-legal fees. (Exh. 112; CT 11:2310; e.g., RT 8:2193-2194, 2199, 9:2600-2603; Statement of Facts, § H.)

[22] In some cases, Perrillo bills reflect more than 24 hours of work in a day, and hundreds of dollars for a few minutes of testing. (E.g., RT 10:2825-2826, 2833-2836.)

C. Defendants Owed No Fiduciary Duty To Perrillo.

Agents are not normally liable for breach of duties owed by their principals to third parties. (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44-45.) An attorney "is not obligated to pay, for example, the client's dry-cleaning bill or credit card debts even if on notice thereof." (*Zerin, supra*, 53 Cal.App.4th at p. 459.) "It is only when the creditor has [a] some property interest in the fund or [b] a trust relationship exists that such an obligation might arise." (*Ibid.*) We now show why there was no trust relationship between Perrillo and defendants. In the next section, we show why Perrillo had no property interest in the civil settlement.

Perrillo's breach of fiduciary claim was that: "By virtue of [Perrillo's] notice to defendants of his civil medical liens, defendants owed and continue to owe a fiduciary duty to [Perrillo] to pay to [him], from the settlement proceeds, those amounts to which [Perrillo] is entitled pursuant to those liens." (CT 7:1316-1317.) Notice of a lien does not create a fiduciary duty. Perrillo's expert, opining to the contrary, was wrong on the law, and the court prejudicially erred in overruling defendants' repeated objections.[23] (RT 13:3774-3778, 14:4025-4026, 4037, 4045-4046.)

A fiduciary relationship is "any relation existing between parties to a transaction wherein one of the parties is . . . duty bound to act with the utmost good faith for the benefit of the other party." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29, internal quotations omitted.) Such a relation "ordinarily arises where a confidence is reposed by one person in

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[23] With that wrongly-admitted testimony, the jury's verdict was a foregone conclusion. But there is no need for retrial, because there was no fiduciary relationship as a matter of law, as we show below.

the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent." (*Ibid.*)

Notifying a lawyer of a lien on his client's recovery does not establish that the lawyer "voluntarily accepts or assumes" any responsibility to the lienholder and creates no fiduciary duty. (*Brian v. Christensen* (1973) 35 Cal.App.3d 377, 382 [lawyer, knowing of state's Medi-Cal lien, distributed settlement proceeds to others; held: lawyer had no fiduciary duty to state: "Any fiduciary relationship . . . is only between [the lawyer] and his client"]; see also *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336 [plaintiff lawyer with lien on clients' settlement proceeds sued lawyer for lender that made loan to clients because defendant lawyer created a superior security interest in order to interfere with plaintiff's known lien rights; held: defendant not plaintiff's fiduciary].)

Nor does a fiduciary relationship arise when someone trusts another to account for and pay contingent compensation in the control of the other. (*Wolf, supra*, 107 Cal.App.4th at p. 31.) If that were true, virtually every commission or deferred-payment contract would give rise to fiduciary duties; that is not the law. (*Id.* at pp. 30-31; see generally *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1159-1162.)

With respect to handling "proceeds which are the result of the litigation instituted on behalf of the client, the attorney's duty is to turn over those proceeds to the client." (*Farmers Ins. Exchange v. Smith* (1999) 71 Cal.App.4th 660, 670.) "Indeed, attorneys usually get into trouble if they

don't pay over the balance to their clients." (*Id.* at p. 671, emphasis in original.)

In the rare cases where our Supreme Court concluded a lawyer breached a fiduciary duty to a non-client with respect to handling funds, the lawyer expressly agreed to assume the position of a trustee or escrow holder and violated those duties. For example, in *Crooks v. State Bar* (1970) 3 Cal.3d 346, the lawyer was retained by his client, a broker, "to act as escrow holder" in connection with the sale of a bar. (*Id.* at p. 348.) In that position, the attorney misused deposited funds, contrary to his escrow instructions, and did not return that deposit when the escrow failed and thereby breached his fiduciary duty as trustee of the fund. (*Id.* at pp. 355-358.) And in *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, the lawyer for the husband in a divorce action (Guzzetta) expressly agreed with the wife and her lawyer to hold funds from the sale of a community property restaurant on behalf of husband and wife and distribute them according to the court's order or the parties' stipulation. (*Id.* at pp. 971-972.) Instead, Guzzetta misappropriated the funds for his own use, made unauthorized payments, and failed to obey a court order for an accounting—violating his duties to the wife, his "client," to properly account for funds "held in trust" for her. (*Id.* at p. 979; see also *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 154-157 [lawyer representing injured worker entered into stipulation with Workers' Compensation insurer to pay it out of personal-injury settlement funds in exchange for insurer's agreement to accept less money, but later reneged without cause; discipline affirmed for "mishandl[ing] certain funds received and held by him in trust"]; *Hamilton v. State Bar* (1979) 23 Cal.3d

868, 876-879 [lawyer agreed to serve as escrow officer for investing group].)

The undisputed evidence here showed no such trustor/trustee or attorney/client relationship between defendants and Perrillo.[24] At best, Perrillo had a contract for a lien on the plaintiffs' settlement proceeds, which defendants first saw in 2000. But defendants never signed the Notice of Doctor's Lien, and as we showed in Section A above, they never assumed its terms. "Since the lawyer has executed no lien with the doctor, the lawyer has acquired no fiduciary duty to the doctor to withhold funds from the settlement." (Cal. Forms of Pleading & Practice (2005) § 7-72.) Instead, "the lawyer's fiduciary duty is to pay the client the proceeds of the settlement demanded by the client, including any funds that the client owes the doctor." (*Ibid.*; see also Vapnek, et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2006) 9:319, p. 9-40.7 ["No known reported case has imposed discipline on an attorney for failing to

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[24] Perrillo mistakenly relied below on a local bar opinion (Los Angeles County Bar Association, Professional Responsibility and Ethics Committee, Formal Opinion No. 478 (July 18, 1994)) and State Bar Court opinion (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal.State Bar Ct. Rptr. 622). These opinions misread the *Crooks* line of cases and hold that a lawyer with notice of a lien automatically assumes a fiduciary duty to the lienholder. The Supreme Court has not condoned such involuntary, far-reaching attorney liability.

Perrillo also mistakenly relied below on a hodgepodge of decisions that never considered whether the lawyer owed a *fiduciary* duty to a lienholder, and thus are all inapposite. (*In the Matter of Michael J. Moriarty* (Cal. Bar Ct. 1999) 1999 WL 424882; *Conway v. State Bar* (1989) 47 Cal.3d 1107, 1124; *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302, disapproved on other grounds in *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775-776, fn. 6; *Miller v. Rau* (1963) 216 Cal.App.2d 68.)

honor a two-party lien (i.e., where attorney did not sign lien or otherwise agree to be bound by it)"].)[25]

Unlike the lawyers in the *Crooks* line of cases, defendants did or said nothing that rose to the level of expressly agreeing to assume a fiduciary responsibility for Perrillo.[26] Defendants did not disburse the settlement funds to Perrillo because, as explained in the previous section, their clients had legitimate defenses to the validity and amount of the lien contract. Defendants' sole fiduciary duty was to their clients, to zealously protect their interests—which they have done. "Courts must not forget that the attorney's duty is to his or her client—that, after all, is the nature of their relationship." (*Farmers Ins. Exchange v. Smith*, *supra*, 71 Cal.App.4th at p. 670.)

D. Defendants Did Not Convert Any Property Interest Of Perrillo's.

Conversion is the wrongful exercise of dominion over another's property. (5 Witkin, Summary of Cal. Law, *supra*, Torts, § 699, p. 1023.)

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[25] Thus, Perrillo's reliance below on *In the Matter of Riley* (Cal.Bar Ct. 1994) 1994 WL 413173, *7-8, 10, 17-19 was misplaced. There the attorney signed express contractual liens and failed to honor them. The same is true for California State Bar Formal Opinion No. 1988-101 (Cal. St. Bar Comm. Prof. Resp. 1988). There the attorney "by executing the lien document, acknowledged a duty to the third party regarding the funds."

[26] At most, McGruder told Perrillo in their first phone conversation not to worry, since he would be paid out of the civil cases, but she made this assurance in the same conversation where she also insisted Perrillo file requests for Workers' Compensation liens, which Perrillo agreed to do and did. (Statement of Facts, §§ C, F.) In context, her assurance does not suggest she or defendants accepted a fiduciary responsibility to see that Perrillo be paid exclusively out of their clients' civil recovery.

To prove conversion, Perrillo had to establish a property interest in the plaintiffs' settlement fund. Perrillo didn't do that.

At most, Perrillo established a lien contract between himself and the Elk Hills plaintiffs. In the eyes of the law, he was thereby "regarded as an equitable assignee of the judgment or settlement to the extent of fees and costs which [were] due him for services." (*Siciliano v. Fireman's Fund Ins. Co.* (1976) 62 Cal.App.3d 745, 752.) As an equitable assignee, however, Perrillo's rights were subject to equitable considerations and limitations.

Here, those considerations and limitations involve the fact that plaintiffs would never have been liable for the full amount of Perrillo's bills. Some—if not all—of the bills would have been paid by their employers, as Shane Irvin's bill was. (See note 12, above.) Whatever equitable claim Perrillo had to a portion of the settlement fund must therefore be offset by amounts he obtained or could have obtained through Workers' Compensation.[27] But since Perrillo abandoned Workers' Compensation, no one—especially the jury—had any way of knowing what his equitable interest in the settlement funds was. Money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved. (*Zerin*, *supra*, 53 Cal.App.4th at p. 452.)

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[27] See, e.g., *Faxon v. All Persons* (1913) 166 Cal. 707, 720-721 (when statute of limitations ran on mortgage, mortgagor cannot maintain equitable quiet title action unless mortgagor offers to pay the outlawed mortgage debt); *Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 837 (debtor-trustor cannot set aside voidable sale under trust deed without offering to pay the debt).

IV.

THERE IS NO LEGAL BASIS FOR THE $557,182.50 ATTORNEY FEE AWARD.

A. The Attorney Fee Award Must Be Reversed Because There Is No Evidence Defendants Ever Agreed To The Fee-Shifting Clause In The Notice Of Doctor's Lien.

In Section III.A, we showed there was no breach of contract as a matter of law or fact; thus, there is no basis for attorney fees. But even if there were a contract, there is still no basis.[28] The $557,182.50 attorney-fee award must therefore be reversed.

The trial court based its decision to award Perrillo attorney fees on the jury's finding "that [Perrillo] and defendants entered into a contract whereby Perrillo would be paid pursuant to the terms of the lien agreements." (CT 19:3861.) Since those agreements "contained a provision for attorneys' fees," the court concluded that defendants were liable for Perrillo's fees. (*Ibid.*) The court's attempted syllogism fails because a promise made with reference to a third-party's agreement is not the same as a promise to assume all the responsibilities and liabilities of that third party agreement. (See, e.g., *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541 [broker's agreement to fee-shifting provision in commission part of buy-sell agreement was not an agreement to separate fee

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[28] The determination of whether there exists a legal basis for an award of attorney fees is a question of law that is reviewed de novo where the facts are undisputed. (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 59.)

provision covering buyer/seller].) And there is not a shred of evidence that defendants agreed to the latter.

1. There is no evidence that defendants agreed to any attorney-fee obligation.

Whatever else Perrillo and defendants agreed to in 1998, it was not to an attorney fee clause. There is no evidence Perrillo mentioned such a provision when he was discussing with McGruder and Iacopino the conditions of his hiring. (Exhs. 14, 15; RT 18:6905.) Instead, Perrillo inserted the fee provision—a unilateral one, purporting only to benefit himself—in his Notices of Doctor's Liens without showing that document to defendants or obtaining their signature.[29] "As a matter of contract law, a party is entitled to the benefit of only those provisions to which the contracting parties agreed, not the ones to which they might have subsequently agreed." (*Khajavi, supra*, 84 Cal.App.4th at p. 60.) Here, as in *Khajavi*, "there was no mutual consent as to an attorney fees provision"; "[t]he parties had never discussed it, let alone agreed to it." (*Ibid.*; see also *Amer. Aero. Corp., supra*, 155 Cal.App.2d at pp. 82-83 [reversing fee award where oral agreement contained no fees provision and losing plaintiff had refused to execute written agreement].)

Defendants first saw the Notices of Doctor's Lien in 2000, but the Notice could not enlarge whatever earlier agreement had been reached in 1998. (*Khajavi, supra*, 84 Cal.App.4th at p. 60.) The new attorney's-fees provision "was nothing more than a proposal to contract according to its

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[29] Tellingly, this provision is not found in Perrillo's Notices in previous cases. (Exh. 138.)

terms in lieu of the oral agreement." (*Amer. Aero. Corp.*, *supra*, 155 Cal.App.2d at p. 79.) Defendants did not sign that proposal or deliver the Notice back to Perrillo. They could not be bound to it. (*Id.* at pp. 78-83.)

2. Perrillo's counter-arguments are meritless.

Perrillo argued below that defendants assumed the terms of the Notice—including the attorney fee provision—when they used his reports to negotiate a global settlement. As we explained in Section III.A above, that argument fails, because there was no consideration for any such assumption. Moreover, nothing in defendants' conduct suggests defendants specifically assumed the attorney's-fees clause; at most, it shows that defendants acted in accordance with whatever understanding was reached in 1998—an understanding that did not include fees. (See *Amer. Aero. Corp.*, *supra*, 155 Cal.App.2d at p. 79 ["The most the evidence shows is that American acted on the oral agreement and received the benefits of Grand Central's performance thereunder and that American told Grand Central the document would be signed and sent over"; "[f]ailure to sign under the facts of this case is not the equivalent of assent to the terms of the proposed written contract"].)

Perrillo next threw out a jumble of cases holding nonsignatories liable for attorney fees. (CT 17:3596-3599, 3623.) None applies. Nonsignatories are liable for fees only in specific, limited situations. (See *Wilson's Heating & Air Conditioning v. Wells Fargo Bank* (1988) 202 Cal.App.3d 1326, 1331-1334 [discussing categories].) This is not one of them.

This was not an action to prevent foreclosure for nonpayment of a loan. (Cf. *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309, 314; see also *Glynn v. Marquette* (1984) 152 Cal.App.3d 277, 282, fn. 6 [limiting *Saucedo* to its "unique circumstances of note and trust deed practice"].) Defendants were not sued as alter egos. (Cf. *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.) Nor were defendants suing as third-party beneficiaries. (Cf. *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382-383.) Defendants had no part in preparing or offering the Notice. (Cf. *Pacific Preferred Properties, Inc. v. Moss* (1999) 71 Cal.App.4th 1456, 1463.) Although defendants attempted to invalidate the Notices as part of their defense, that did not make them parties to the Notices. (*Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295, 1304-1307 [plaintiff not a signatory to contracts she sought to have declared void not liable for attorney fees].) Finally, defendants were not sued as guarantors (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485)—and if they had been, Perrillo's action would have been barred under the statute of frauds, since there is no written guarantee agreement. (Civ. Code, § 1624, subd. (a)(2).)

B. The Fee Award Must Be Reduced To Reflect Perrillo's Limited Success.

The trial court awarded Perrillo fees for virtually every hour billed by Cassinat's office preparing the case for trial. (CT 15:3002 [requesting $483,011.33 in fees], 18:3832, 3836 [additional $13,000 in fees], 19:3862 [awarded $465,283.50].) The fee award was excessive because it failed to

eliminate hours that were spent preparing for and litigating Perrillo's completely unsuccessful claims for emotional and punitive damages.[30]

This trial would have been considerably shorter—and perhaps would have settled—had it just been prosecuted for what it was: a simple billing dispute. The trial court abused its discretion in not reducing the fee award to reflect Perrillo's overreaching and his limited success. (Cf. *Boquilon v. Beckwith* (1996) 49 Cal.App.4th 1697, 1723 [no abuse of discretion halving fees when plaintiffs' counsel's time was unreasonably spent "in an effort to portray [defendant] as a bad actor"].)

V.

THE COMPENSATORY DAMAGE AWARD AND PRE- AND POST-JUDGMENT INTEREST AWARDS ARE EXCESSIVE AS A MATTER OF LAW.

A. $41,350 Of The Judgment Must Be Stricken, Because It Reflects Damages For Nine Plaintiffs Who Received No Civil Recovery.

The "Notice of Doctor's Lien"—to the extent it creates a valid lien—creates one only on "all proceeds of any settlement, judgment, or verdict." (Exh. 1.) Nine plaintiffs undisputably never received any "settlement, judgment, or verdict," because they were dismissed before

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[30] Perrillo asked the jury to award $3,600,000 in noneconomic damages (RT 17:5477), and the jury unanimously awarded zero (RT 17:6337-6338). He threatened to seek 15% of each defendants' net worth as punitive damages (CT 17:3448), but the jury (10-2) found no punitive liability (RT 17:6338-6339). All he obtained was $307,146.59 in economic damages. (CT 11:2356.)

settlement or opted out of the settlement and were later dismissed.[31] They received nothing, so there was nothing to which any lien could attach. Even Perrillo's expert conceded that. (RT 14:4046-4048.) The judgment must be reduced by $41,350, the amount Perrillo received for these individuals.[32] (Exh. 4 [summary].)

B. Prejudgment Interest Was Improper.

The trial court awarded prejudgment interest from September 14, 2000, the date the complaint was filed, and "[t]he date upon which the amount of money at issue in this case was certain or was capable of being made certain by calculation." (CT 12:2565; see also CT 12:2440.) It purported to award interest under both subsections (a) and (b) of Civil Code section 3287. (*Ibid.*) Either was error.

Subsection (b) only authorizes prejudgment interest on damages "based upon a cause of action in contract." As shown in Section III.A above, Perrillo's breach of contract claim fails.

Subsection (a), which applies to tort or contract actions, only authorizes prejudgment interest on "damages certain, or capable of being

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[31] Dahna, Moore, Ong, Rutledge, D.Gentry, C.Willingham, Sr., T.Willingham, and D.Dodson. (See RT 9:2594-2595.) John Lopez did not participate in the settlement, but opted out; his case was dismissed on summary judgment. (RT 9:2499, 2595.)

[32] Since the jury awarded Perrillo every penny he asked for (compare RT 17:5470 with CT 11:2356), an exact reduction can be made for the dismissed plaintiffs based on Perrillo's bills (Exh. 4), subject to a $1,375 adjustment for Lopez (RT 17:5469).

made certain by calculation," except "during such time as the debtor is prevented by law" from paying the debt.[33]

Defendants were prevented by law from paying any debt owed Perrillo. Defendants could not have paid Perrillo's bills out of plaintiffs' settlement fund while the plaintiffs—their clients—had valid grounds for disputing the validity of their contracts and the amount of payments. (See § III.B., above.) Even Perrillo's expert recognized that defendants had conflicting duties that prevented them from simply paying him out of their clients' settlement; she faulted them only for not filing an interpleader action. (RT 14:4027-4028.)

Any damages owed by defendants were uncertain pending resolution of the Workers' Compensation proceedings. At the time Perrillo filed his original complaint, the amount defendants owed him was in flux pending the Board's resolution of his Workers' Compensation liens—an avenue he actively pursued until at least August 2003 (and which defendants maintain he is still required to pursue). (RT 14:3971-3972.) Defendants did not know (and still do not know, because Perrillo withdrew his liens) what part of Perrillo's bills was compensable, partly or exclusively, through Workers' Compensation. (*Iverson v. Spang Industries, Inc.* (1975) 45 Cal.App.3d 303, 311 [no prejudgment interest where tenant, sued for repair costs, could not tell what portion of costs was for repairing reasonable wear-and-tear]; see also *Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149

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[33] Where, as here, the facts are not in dispute, this Court "independently review[s] whether and when buyer's damages were certain or capable of being made certain by calculation." (*KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 390-391.)

Cal.App.3d 901, 907, 913-914 [no prejudgment interest where landlord sought difference between lease amount and amount obtained through reletting—amounts not capable of simple calculation].)

C. Postjudgment Interest Was Erroneously Allowed From A Date Prior To Entry Of Judgment.

The trial court erred in awarding postjudgment interest from September 29, 2004. (CT 13:2586.) Judgment was entered on January 3, 2005. (CT 13:2585.) Postjudgment interest therefore starts to accrue no earlier than January 3, 2005. (Code Civ. Proc., § 685.020, subd. (a) ["interest commences to accrue on a money judgment on the date of entry of the judgment"].)

CONCLUSION

The judgment must be reversed. At every turn, Perrillo's claims are barred by the simple fact that he has refused to seek payment from those responsible for his Workers' Compensation bills—the employers. Whether Workers' Compensation is his exclusive remedy, or simply the means of mitigating his damages, it is obligatory. By rejecting Workers' Compensation, Perrillo has no right to civil relief.

Date: April 18, 2006

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