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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DONNA JONES, Plaintiff and Appellant, v. STANLEY FELDSOTT et al., Defendants and Respondents.	G053974 (Super. Ct. No. 30-2014-00758872) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Law Offices of Mark B. Plummer and Mark Brennan Plummer for Plaintiff and Appellant.

Feldsott Lee Pagano & Canfield, Martin L. Lee and Stanley Feldsott for Defendants and Respondents.

INTRODUCTION

Donna Jones appeals from a judgment in favor of the law firm of Feldsott & Lee (Feldsott) and Stanley Feldsott. Feldsott represented Jones and another owner in an arbitration against the homeowners' association (HOA) of their condominium complex, after the HOA levied an emergency special assessment against their units. Feldsott persuaded the arbitrator the assessments were improper. After the arbitrator made an interim decision in the homeowners' favor, but before he ruled on their entitlement to attorney fees and costs, the parties agreed to a universal settlement of $50,000.

Jones then got into a dispute with Feldsott about how much of the $50,000 was coming to her. She ultimately claimed the fees of the experts used at the arbitration should be paid out of the settlement. Feldsott's position was that she was entitled to be reimbursed for her court costs (which did *not* include the experts' fees) and for the $6,000 she had paid to retain the firm. This sum amounted to about $16,000. The remaining $34,000, per the retainer agreement, would be the firm's attorney fees. Feldsott had not hired the experts and did not feel responsible for paying their fees.

When this dispute could not be resolved, Feldsott filed an interpleader action, naming Jones and the other homeowner, and deposited the amount equal to the costs and the retainer with the Los Angeles Superior Court. This case was heard and appealed, and the reviewing court has issued its opinion.

Jones sued Feldsott and Stanley Feldsott individually in Orange County Superior Court for professional negligence, breach of fiduciary duty, and conversion, the conversion claim stemming from filing the interpleader. After a six-day court trial, the court held in favor of the defendants, finding that Jones had not proved her case. In particular, the court held Feldsott did not have a conflict of interest disqualifying it from obtaining its fees and it had not represented to Jones that she could collect expert fees out of any award or settlement.

Jones' formulation of the issues on appeal has made review extremely difficult, so we have relied on the causes of action as pleaded in her complaint in organizing the following opinion. Substantial evidence supports the trial court's conclusion that Jones did not carry her burden of proof with respect to negligence or breach of fiduciary duty. Both the litigation privilege and res judicata prevent us from reopening any issue relating to the interpleader. Therefore we therefore affirm the judgment.

FACTS

Jones owns two condominiums in a complex located in Long Beach. In early 2012, she received a notice from the HOA informing all owners of an emergency special assessment. Plaster had fallen off one condo's balcony, and the HOA decided all the balconies had to be demolished and rebuilt on an emergency basis. The special assessment in total was $500,100; Jones' original share totaled $16,000 for her two units, payable in the summer of 2012.

Jones believed the demolition on an emergency basis was unnecessary, and she enlisted the help of a contractor of her acquaintance, Carl Modugno, to check out it out.[1] Modugno in turn asked a civil engineer, Mark Rieser, to assist him. The two visited the complex on several occasions between February and September 2012, during which time they observed the demolition and reconstruction of the balconies. Both Modugno and Rieser were of the opinion there was no emergency.[2]

In October 2012, Jones sought out Feldsott to represent her against the HOA in an effort to get her assessment canceled. She signed a retainer agreement with

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[1] According to a trial exhibit, the City of Long Beach did not notify the HOA that it would have to do something about the balconies until March 1, 2012. The HOA then noticed an owners meeting for March 19, 2012, to discuss paying for the repairs. Modugno recorded two visits to the site in February 2012 and one visit on March 19 on a bill he subsequently submitted for his services.

[2] Modugno testified that at this point there was no firm agreement about whether or how he and Rieser would be paid for their work. If they were hired as experts, they would submit invoices. If they were not, they and Jones would "reach[] an equitable settlement."

the firm. As relevant here, the retainer agreement provided she would pay a flat fee of $6,000. Any recovery of attorney fees above that amount would go to the firm.[3]

Jones asked Stanley Feldsott if other condominium owners could join in the litigation. He told her they could, and the fee would not be increased because it made no difference whether the firm represented one owner or multiple owners. The work would be the same.

Jones attempted to get other condominium owners to join with her, but only Christine Frau ultimately agreed to do so. Frau paid Jones $3,000 as her share of the flat fee, and, following Jones' instruction, she wrote a letter to Feldsott asking to have her name added to the proceedings.

The dispute went to arbitration with JAMS, and Jones and Frau prevailed. The assessment was reversed as to them, and the arbitrator invited them to apply for attorney fees and costs. Feldsott submitted a memorandum of costs for $12,358, which included the usual items for service of process and photocopies. It also included approximately $10,000 for JAMS fees and $800 for court reporters for the arbitration hearing itself. The cost bill did *not* include any amounts for expert witness fees. Feldsott also planned to put in for approximately $64,000 in attorney fees.

Before the arbitrator ruled on the fees and costs, the parties entered into settlement negotiations, with Jones kept completely in the loop. The HOA at first offered $42,000 – $12,000 for costs and $30,000 for attorney fees. With Jones' and Frau's approval, Feldsott rejected the fee portion offer, deciding to allow the arbitrator to set its fees.[4] The HOA then raised the offer to $50,000, which was accepted. After some

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[3] The condominium's covenants, conditions, and restrictions (CC&R's) provided that a prevailing party in a dispute with the HOA would be entitled to attorney fees and "costs of court."

[4] In order not to prejudice Jones and Frau, Feldsott agreed to refund the initial $6,000 flat fee regardless of the arbitrator's ruling on the fees. Thus the clients would not be at risk if Feldsott failed to secure a fee award greater than $30,000.

changes insisted on by Jones, she signed the settlement agreement on November 25, 2013.

Feldsott then undertook to refund the initial $6,000 fee and pay out the amounts from the cost bill. The rest it kept as its attorney fees.

At this point, things went south. Jones demanded the return of all fees and costs she had paid (leaving nothing for Frau) and stated that "the experts must be paid for services rendered." In addition, Jones began dunning Frau for half of the expert fees, which totaled about $8,000. Jones told Frau she would apply the $3,000 refund Frau was due to the amount owing, leaving Frau with an additional $1,175 to pay. She also told Frau that she expected Frau to pay half of the interest on the amounts Jones had fronted for the litigation.

Frau then emailed Feldsott in some distress, explaining she had been under the impression that $3,000 was all she had to pay. Jones had never told her she could be liable for additional amounts to pay experts or anything else. Frau offered to walk away from the $3,000 reimbursement if Jones would release her from any obligation to pay more money. Jones refused.

Perceiving a dispute had developed between its two clients, Feldsott informed them that it could not get involved. It gave Jones and Frau the choice between sending it joint directions as to how to divide up the settlement money owing to them or telling it to hold the amount in its trust account until they decided how to divide it. If they could not agree to one of these options, Feldsott would interplead the net amount of the cost recovery and the $6,000.

Jones would not agree to release Frau, so Feldsott filed a complaint in interpleader in Orange County Superior Court, an action Jones had transferred to Los Angeles Superior Court. The amount interpleaded was $16,637, which broke down to Jones' initial fee payment of $6,000 and $12,358 recovered from the arbitration as costs, minus $1,721 in costs Feldsott had advanced. The Los Angeles Superior Court granted

Feldsott's motion to be discharged in interpleader, dismissing the firm and granting it attorney fees of $9,655. The Second District Court of Appeal affirmed the order.[5]

Jones originally filed a cross-complaint in the Los Angeles interpleader case, but, faced with Feldsott's demurrer, motion to strike, and motion for sanctions, she dismissed the cross-complaint and filed this suit in Orange County, essentially duplicating her Los Angeles cross-complaint. Her first amended complaint contained causes of action for professional negligence, breach of fiduciary duty, and conversion. The case was tried to the court over six days in May 2016, during which time Jones, Stanley Feldsott, Modugno, and Frau testified. Jones also had an expert, John Adams, who testified as to the standard of care.

The court issued its ruling on July 6, 2016. It first dealt with the issues in terms of Jones' damages.[6] The court identified 10 categories of damages: expert fees and costs from the arbitration, together with interest; Feldsott's attorney fees from the arbitration; fees and costs relating to the interpleader and its appeal, including the value of Jones' time ($75,000); emotional distress and loss of quality of life; and punitive damages.

The court held Jones had not proven emotional distress or punitive damages, nor had she shown damages stemming from Feldsott's interpleader. The court further observed that the fees awarded in the interpleader were set by the Los Angeles Superior Court; it refused to reconsider those fees.[7]

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[5] We have taken judicial notice of the opinion in *Feldsott & Lee v. Jones* (Sept. 6, 2016, B262710) [nonpub. opn.], per Feldsott's request. According to the opinion, Jones dodged service of process, moved to quash service and to transfer, and filed a cross-complaint, causing Feldsott to prepare a demurrer, a motion to strike, and a motion for sanctions under Code of Civil Procedure section 128.7, thus accounting for the more than $9,000 in fees.

Feldsott has requested judicial notice of the briefs filed in the *Feldsott & Lee v. Jones* appeal, which request we deny. We also deny Feldsott's motion for sanctions for filing a frivolous appeal.

[6] In her trial brief, Jones requested nine categories of damages: four categories stemming from the interpleader and its appeal, arbitration costs and interest thereon, all Feldsott's attorney fees from the arbitration settlement, emotional distress and loss of quality of life ($75,000) and punitive damages.

[7] At the time the court made its ruling in this case, the opinion in the appeal of the Los Angeles case had not yet been issued.

The court next dealt with the damages for the breach of fiduciary duty claim. It held Jones had not proven the elements of the breach by preponderance of the evidence. The "conflict" Jones alleged between herself and Frau did not develop until after the arbitration was over and the case had settled. When it did develop, Feldsott immediately informed Jones and Frau that it could not be involved and interpleaded the amount of the settlement funds ($16,637) as to which it made no claim. Jones failed to prove her claim that Feldsott was not entitled to *any* fees at all (her claim the whole $50,000 from the settlement belonged to her).

Finally, the court addressed the heart of the lawsuit – Jones' claim that the settlement money should be used to pay the experts, Modugno and Reiser. The CC&R's entitled the prevailing party to recover "costs of court," without defining what those were. Jones, who is a lawyer, did her own research on costs. She evidently became confused by the language of Code of Civil Procedure section 1033.5, subdivision (a)(8), which allows a prevailing party to claim as costs "[f]ees of expert witnesses ordered by the court." She seemed at first to have thought this subdivision referred to experts *hired by her*.

The court did not find Jones' testimony that Feldsott had told her she could recover expert fees credible. It found instead that Feldsott did *not* promise recovery of expert fees. It also decided she would not have agreed to a pre-arbitration offer to settle with the HOA under Code of Civil Procedure section 998 that would have shifted the expert fees to the HOA. It entered final judgment in favor of Feldsott and Stanley Feldsott.

DISCUSSION

We have encountered several difficulties in reviewing the judgment in this case. The operative pleading was the first amended complaint, which was inexplicably

omitted from the record.[8] We augmented the record on our own motion to obtain it. But the trial as represented by the record seemed to be only occasionally related to the allegations of the first amended complaint. When it issued the decision, the trial court did not frame it in terms of the complaint's causes of action but rather mainly in terms of categories of Jones' damages. Finally, the issues on appeal identified in Jones' opening brief have only a tenuous relationship to the court's decision. For example, Jones asks us to reverse the "judgment" that interpleading money in the Los Angeles County Superior Court was not conversion. There is no such judgment. There is also no judgment that the settlement fund did not include expert witness fees, another "judgment" Jones asks us to reverse.

The first amended complaint contained three causes of action, for professional negligence, breach of fiduciary duty, and conversion. The trial court, in effect, held Jones had not carried her burden of proof with respect to any cause of action. We address each in turn.

On appeal, Jones did not identify any cause of action for which she claims she met her burden of proof. And she did not point to any procedural irregularity that would have caused a miscarriage of justice.

I. Professional Negligence/Malpractice

"The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 (*Budd*), superseded by stat. on other grounds.)

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[8] Jones requested leave to file a second amended complaint to add a claim for punitive damages. The court reserved its ruling until trial, and the complaint was marked "received" rather than "filed" until the court ruled.

In the first amended complaint, Jones alleged Feldsott was negligent in failing to include the expert fees in the cost bill and in failing to make sure the settlement agreement allocated the settlement amount between attorney fees and costs. In her opening brief, however, Jones does not identify this purported lapse as an issue on appeal. In fact, she does not identify *any* issue relating to professional negligence on appeal.[9] We therefore affirm the judgment as to the cause of action for negligence.

II. Breach of Fiduciary Duty/Conflict of Interest

The elements of a cause of action for compensatory damages for a breach of fiduciary duty are a fiduciary relationship, a breach of that relationship, and proximately caused damages. (*O'Neal v. Stanislaus County Employees' Retirement Assn.* (2017) 8 Cal.App.5th 1184, 1215.) Whether a fiduciary duty has been breached is a question of fact. (*Ibid.*)

The breach of fiduciary duty claim in Jones' complaint alleged a string of misconduct. Most of the allegations concerned the settlement agreement. Jones alleged it was negotiated in secret, without her consent, and did not preserve her rights against the HOA or Frau or her right to recover her expert fees. Jones also alleged Feldsott breached its fiduciary duty by failing to include the expert fees in the arbitration cost bill and by filing the interpleader without depositing the full amount in dispute. She asked for "compensatory damages" "in an amount of unreimbursed costs and expenses, attorneys' fees and costs, lost interest and other damages to be proved at trial." She also sought punitive damages.

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[9] Legal malpractice and breach of fiduciary duty by a lawyer are not the same thing. A malpractice claim speaks to an attorney's competence, while a breach of fiduciary duty claim "requires some further violation of the obligation of trust, confidence, and/or loyalty to the client. [Citation.] ['[F]iduciary breach allegations that constitute negligence, which do not implicate a duty of confidentiality or loyalty, and are merely duplicative of a negligence cause of action, do not support a cause of action for fiduciary breach'].]" (*Broadway Victoria, LLC v. Norminton, Wiita, & Fuster* (2017) 10 Cal.App.5th 1185, 1193.) The only issue of this kind Jones has identified on appeal dealt with Feldsott's duty of loyalty, so she has abandoned any claim that Feldsott committed malpractice. (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1170.)

On appeal, Jones did not discuss the breaches of fiduciary duty alleged in the complaint. Jones now bases her contention that Feldsott breached its fiduciary duty on two grounds. First, Feldsott did not have a signed retainer agreement with Frau. Second, Feldsott did not get Jones' "informed written consent" to represent Frau without a retainer agreement, which consent she claimed Feldsott had to obtain under rule 3-310(C) of the California Rules of Professional Conduct. Jones asserts that allowing Frau to "free ride" in the arbitration (i.e., without a retainer agreement) breached Feldsott's duty of loyalty to Jones by sticking her with paying the experts' fees. This argument assumes that if Feldsott had obtained a written retainer agreement from Frau, Frau would have been equally liable with Jones for the expert fees incurred in the arbitration.

Before we discuss the specific fiduciary duty issues Jones has identified in this appeal, we observe that rule 1-100(A) of the Rules of Professional Conduct provides in pertinent part, "These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty." The trial courts are not normally responsible for enforcing the Rules of Professional Conduct. (*Conservatorship of Becerra* (2009) 175 Cal.App.4th 1474, 1484.)

While violating a rule of professional conduct may subject an attorney to State Bar discipline, a client seeking to hold an attorney liable in compensatory damages for breach of fiduciary duty must prove each element of these causes of action by a preponderance of the evidence: duty, breach of duty, and proximately caused damages. The same goes for a cause of action for malpractice. Without proof of proximately caused damages, a client cannot recover for either kind of breach of duty. (See *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1183 [breach of fiduciary duty; *Budd, supra*, 6 Cal.3d at p. 200 [malpractice];].

A retainer agreement with Frau would not have made her liable for the expert fees or any portion of them. The retainer agreement required the client to

reimburse the firm "for all actual costs and expenses incurred" by the firm and authorized the firm to hire expert witnesses at the client's expense. Feldsott did not hire Modugno or Riesner, the experts. Jones hired them. Their deal – such as it was – was with her. The agreement they had with her began many months before Jones consulted Feldsott. Even if Frau and Feldsott had entered into a retainer agreement, it would not have covered these experts' bills. Jones was not injured as to the experts' fees by the absence of a retainer agreement with Frau.

Frau stated unequivocally both before and during trial that she would not have joined in the arbitration if she had been required to pay more than the $3,000 she paid to Jones (*not* to Feldsott) as her half of the attorney fees. Jones' assertion that she would have been able to pass half of the expert fees off to Frau finds no support in the record.

Most importantly, the trial court found that Feldsott's representation of Jones and Frau did not create a conflict of interest. This determination turns on individual facts. (See *Vivitar Corp. v. Broidy* (1983) 143 Cal.App.3d 878, 882.) "A conflict of interest between jointly represented clients exists 'whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other.' [Citation.]" (*Foremost Ins. Co. v. Wilks* (1988) 206 Cal.App.3d 251, 260.)

Substantial evidence supports the trial court's conclusion that no conflict of interest between Jones and Frau arose while Feldsott was representing them in the arbitration. At that point, Jones' and Frau's interests were identical – obtain removal of the emergency special assessments on their condominiums. Representing Frau added no expenses to the amounts Jones had already agreed to pay. The dispute between Jones and Frau arose *after* Feldsott had completed the task for which it was retained.

Although Jones alludes to this only obliquely, her assumption seems to be that because of the conflict between her and Frau, the money Feldsott obtained as its fees

should be paid over to her.[10] She repeatedly asserted that an attorney who has a conflict of interest or breaches a duty of loyalty waives its fees. She discussed several cases she claimed uphold her views on this point. (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135 (*Fair*); *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072 (*A.I. Credit*); *Jeffrey v. Pounds* (1997) 67 Cal.App.3d 6 (*Jeffrey*); *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 (*Goldstein*).)

Jones ignores the difference between the circumstances of this case and the circumstances of the cases she cited. In all those cases, without exception, attorneys were suing clients for unpaid fees, either under a contract or under quantum meruit. In all those cases, the courts decided that the clients did not have to pay the fees because the attorneys had conflicts.[11] (*Fair, supra,* 195 Cal.App.4th at p. 1169 [quantum meruit]; *A.I. Credit, supra,* 113 Cal.App.4th at pp. 1076, 1079 [disqualified attorney not entitled to fees; summary judgment granted on cross-complaint for fees]; *Jeffrey, supra,* 67 Cal.App.3d at p. 12 [attorney entitled to compensation only up to beginning of conflict]; *Goldstein, supra,* 46 Cal.App.3d at p. 617 [contract for legal services void for conflict; no quantum meruit recovery].)

That is not the situation here. Feldsott is not suing Jones for unpaid fees. What is more, Jones did not pay the fees Feldsott gained from arbitration. The HOA's insurer paid them through the settlement.

The trial court also found that the settlement agreement did not create a conflict between Feldsott and Jones. Jones knew of and approved the settlement

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[10] She asserts that the court erred when it held that Feldsott "did not waive its fees at the initial point when [Feldsott] had an undisclosed conflict of interest by undertaking to represent . . . Frau, a second client."

[11] In only one cited case, *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2016) 244 Cal.App.4th 590, has a court suggested that a law firm might have to *return* fees already paid by a client because of a conflict of interest. (*Id.* at p. 620.) The Supreme Court granted review of this case in April 2016, so it has no binding or precedential effect. Jones cited this case to us without complying with California Rule of Court, rule 8.1115(e). We were not amused.

negotiations, which included the return to her of her initial attorney fee payment of $6,000. Substantial evidence supports this conclusion as well.

On appeal, Jones made a different – and confusing – argument that Feldsott had a conflict with her. Although this argument is exceedingly difficult to understand, we *think* Jones is maintaining that Feldsott should have settled with the HOA *before* arbitration, but went through arbitration in order to increase its fees.[12] We can make no sense of this. As far as we can tell from this record, there were no settlement overtures *before* the arbitration itself. The HOA was motivated to settle *after* it lost because it was looking down the barrel of a substantial award of attorney fees and costs. In any event, this novel argument, which credits Feldsott with the *sang froid* to gamble that it would win in the arbitration, is not supported by any allegation in the first amended complaint and, so far as the record indicates, was never raised during the evidence portion of the trial. It cannot make its debut here. (See *Varjabedian v. Madera* (1977) 20 Cal.3d 285, 295, fn. 11.)

III. Conversion

"'"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. . . ." [Citation.]' [Citations.]" (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.) Money can be the subject of a conversion cause of action only if a specific identifiable sum is involved. (*PCO, Inc. v.*

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[12] "[T]he interests of Ms. Jones and Feldsott & Lee were also conflicted, since a settlement (if not dropping the case outright) was better for Ms. Jones, while Feldsott & Lee could only recover more than the $6,000.00 flat fee if there was an "award" of more fees after arbitration, which there never was, although Feldsott & Lee took $33,362.50 in additional fees out of their Attorney-Client Trust Account, over Ms. Jones' objection and despite her request for fee arbitration. . . . (It appears that after creating the original conflict of interest with Ms. Jones, whereby Feldsott & Lee benefited from proceeding to arbitration, while Ms. Jones benefited from settlement, they added Ms. Frau on terms were [*sic*] she would benefit from an arbitration, like they would, to help cajole Ms. Jones into proceeding with the arbitration." The record contains no evidence of Frau "cajoling" Jones to do anything. It also contains no evidence that Jones was reluctant to arbitrate.

Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP (2007) 150 Cal.App.4th 384, 396.)

In the third cause of action for conversion, Jones's complaint alleged that Feldsott "arrogated to themselves a fund belonging to [Jones]," i.e., the settlement proceeds, without specifying the amount of this fund. She also alleged that Feldsott failed to provide an accounting for the fund.

On appeal, Jones asks us instead to reverse the judgment that Feldsott did not convert her money by depositing $16,000 with the court in the Los Angeles interpleader action. She further asserts that we should reverse the judgment that Feldsott did not breach its duty of loyalty by refusing to disburse to her the undisputed funds, which it interpleaded instead.

There is no explicit judgment, pro or con, on a cause of action for conversion. So there is nothing on that score to reverse.

What the trial court found, and we agree, was that it was not going to get involved in the interpleader action. At the time of the trial, the discharge and fee order was on appeal before the Second District Court of Appeal, and any issues related to the interpleader would be determined by that court. Likewise, the disbursement of the interpleaded funds was an issue for the court hearing the interpleader, not the Orange County Superior Court.

Jones could not prevail on any issue connected with the interpleader for two reasons. First, the litigation privilege of Civil Code section 47, subdivision (b), protects Feldsott from liability stemming from filing the complaint in interpleader. Jones is, in effect, suing Feldsott for publications made in a judicial proceeding. Feldsott's conduct in this regard is absolutely privileged. (See *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216.)

Second, the Second District Court of Appeal has now spoken on this issue. It has affirmed the order discharging Feldsott under Code of Civil Procedure section

386.5 and affirmed the trial court's order granting Feldsott its fees and costs in that action. (Code Civ. Proc., § 386.6.) This decision is final. Jones cannot now challenge either the filing of the complaint in interpleader or the award of fees. Both were decided adversely to her in the Los Angeles case. (See *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824-825.)

IV. Other Issues on Appeal

Jones' opening brief identifies two issues unconnected with any cause of action pleaded in her complaint. We address these two orphaned issues.

A. The Composition of the Settlement Fund

On appeal, Jones has requested a reversal of the judgment "that the $50,000.00 release and settlement agreement does not include expert fees." There is no such ruling in the judgment.

The court did state that Jones knew as of August 2013, before the arbitration, that expert fees were not recoverable as court costs, and the evidence supports this conclusion. Code of Civil Procedure section 1033.5, subdivision (b)(1), explicitly states that "[f]ees of experts not ordered by the court" "are not allowable as costs, except when expressly authorized by law." No law expressly authorized payment of expert fees as court costs in this case.

The settlement fund was always composed of the court costs, as set forth in the cost bill, and attorney fees. The cost bill amount was a fixed amount. The only amount in play was the amount of the attorney fees. With the clients' approval, Feldsott rejected the first offer for fees, after insuring that the clients would not suffer if the arbitrator awarded it less than the offer, and agreed to the second offer. During these negotiations, the expert fees were never part of the settlement fund. Jones could have had no expectation of recovering anything from the settlement fund for expert fees.

Jones' argument in the opening brief that the settlement agreement *did* include money to pay expert fees – a matter of contract interpretation – shades into an

argument that the agreement *should have* included money to pay expert fees. The argument relies on Jones' testimony that Feldsott told her expert fees were recoverable. The trial court did not believe that testimony. It found that Feldsott had *not* told her she could recover those fees. Substantial evidence supports this finding, and we do not disturb findings of fact supported by evidence on appeal. On the contrary, we resolve conflicts in the evidence in favor of the judgment. (See *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1127.)

B. Damages

The court stated that Jones had not offered evidence to support the following categories of damages: emotional distress and quality of life, punitive, Jones' time spend on the interpleader, and costs and attorney fees associated with the interpleader. Jones disagreed and pointed us to two exhibits admitted during trial by stipulation. Exhibit 77 was a list headed "Binding Arbitration Costs" and included entries for JAMS fees, court reporter fees, the retainer agreement ($6,000), and, of course, the expert fees in the amount of $8,875.[13] Exhibit 78, entitled "Interpleader Defense Expenses," included amounts for various motions and legal fees for the interpleader itself and for the appeal. Jones asserts that these two exhibits support her claims for damages.[14]

The stipulation regarding these two exhibits is somewhat murky, but it is clear enough to convince us that the parties were stipulating that the numbers represented

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[13] The total amount from the experts' invoices was $8,125.

[14] Jones complained several times during trial that she had not seen any money from the arbitration settlement, not even the court costs and the $6,000 refund. The reason for this is obvious. Feldsott had to interplead these funds, and, according to the opinion of the Second District Court of Appeal, Jones dragged out the proceedings by evading service and filing meritless pleadings. She then appealed the order discharging Feldsott. So naturally the disbursal of the funds was held up while these procedures played out.

the damages Jones was *claiming* and that the total was correct. Both exhibits were admitted as summaries.[15] No concession was involved.

Jones evidently misunderstood what the stipulation was intended to accomplish. The lists of damages were objectionable on both authentication and hearsay grounds. (See Evid. Code, § 1400 [authentication]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 121 [hearsay].) What the stipulation did was to admit them into evidence, despite these objections, for what they were – compilations. They did not constitute evidence of the actual damages, but only of the amounts by category of the damages Jones was claiming. They were two lists, nothing more. Stipulating that the lists could come in did not prove, for example, that Jones actually incurred $12,000 in attorney fees for the interpleader appeal.

The damages listed in exhibit 77 were nearly all covered in the cost bill or in the presettlement agreement with Feldsott. The only item not so covered was the expert fees. The court's holding that various categories of damages lacked sufficient evidence is irrelevant on this appeal, since Jones abandoned most of the issues on which the damages listed in exhibit 77 would be meaningful. For example, she presented no argument on appeal that the evidence of exhibit 77 supported an award of punitive damages or emotional distress damages.

Exhibit 78 listed all the damages Jones was claiming regarding the interpleader. The trial court correctly decided not to get involved in any issues relating to the interpleader. As we have already discussed, Jones is not entitled to any damages relating to the interpleader proceeding as a matter of law.

We note that, as a practical matter, Jones' ability to do a cost/benefit analysis is somewhat impaired. She complains she had to spend $25,000 to have a

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[15] Feldsott made other objections to exhibit 78 on the grounds that these damages had not been pleaded in the first amended complaint, had not been substantiated by documents in discovery, and were the subject of an appeal presently before the Second District Court of Appeal. The court put off ruling on these objections until all the evidence was in.

$16,000 special assessment removed and she would not have done so had she known she would not get her costs back.

Jones' original assessment was $16,000, and she was willing to pay Feldsott $6,000 to have it canceled. So she must have considered this amount reasonable. Modugno and Rieser billed $8,125 in expert fees, and she incurred approximately $12,000 in court costs. After the arbitration and the settlement wrapped up, and under the terms of her deal with Feldsott, she was going to recoup her court costs *and* the $6,000 she paid Feldsott, leaving a net outlay of a little over $2,000 (instead of $6,000) to remove a $16,000 assessment. This seems like a bargain to us. Now, however, she is liable for at least $9,000 in fees from the interpleader, and she has invested an unknown, but probably not inconsiderable, amount to prosecute this action. She is, of course, entitled to spend her money as she pleases, but she cannot then be heard to bemoan the injustice of her fate.

Finally, we cannot overlook the numerous and egregious violations of the California Rules of Court and the principles of appellate practice committed by Jones' counsel, beginning with an opening brief that exceeded the word-count limit of rule 8.204(c)(1) by over 1,500 words. Rule 8.1115 was also ignored. In the reply brief, counsel repeatedly referred to a fictional request for judicial notice, violating the rule that limits assertions of fact to matters in the record. (See *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 845-846; *Dominguez v. Financial Indemnity Co.* (2010) 183 Cal.App.4th 388, 392, fn. 2.) The reply brief includes other references to factual matters not in the record.

Far more serious, however, were the repeated misrepresentations of the cases cited to support appellant's arguments. For example, counsel frequently asserted that the fee-waiver cases cited in the opening brief approved of "disgorgement" of attorney fees as a remedy for a conflict-of-interest ethical violation. Every one of the cases cited involved an action by an attorney against a client for payment of fees. In each

case, the remedy was that the client did not have to pay the fees. None of these cases approved of or even considered "disgorgement" as a remedy. As far as this record indicates, disgorgement was never mentioned as a possible remedy for conflict of interest.

As a widely used treatise on appellate practice observes, "Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly 'undo' an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions . . . and may well cause you to *lose the case!* (2 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 9:27, p. 9-8.) After laboriously checking the record and the cases for ourselves in this appeal, we can attest to the accuracy of this observation.[16]

DISPOSITION

The judgment is affirmed. Respondents' request to take judicial notice of the briefs filed in the interpleader appeal, *Feldsott & Lee v. Jones*, B262710, is denied. Respondents' motion for sanctions is denied. Respondents are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.

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[16] We are not admirers of respondents' briefing either. Respondents spent over 11 pages of a 47-page brief quoting page after page of a single case. They used up another 17 pages quoting entire sections verbatim from Witkin's California Procedure. While this may be a tribute to counsel's ability to copy and paste, it hardly qualifies as appellate advocacy.