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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LINDA MAYBEE WEINBERG, Plaintiff, Cross-defendant and Respondent, v. O'NEIL & MATUSEK, Defendant, Cross-complainant and Appellant.	B271326 (Los Angeles County Super. Ct. No. BC543577)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Dalila C. Lyons, Judge. Affirmed.

Mardirossian & Associates, Garo Mardirossian and Adam Feit for Plaintiff, Cross-defendant and Respondent.

O'Neil & Matusek and Henry John Matusek II for Defendant, Cross-complainant and Appellant.

Defendant, cross-complainant and appellant O'Neil & Matusek, LLP (O&M) appeals a judgment following a court trial. The judgment awarded plaintiff and respondent Linda Maybee Weinberg (Weinberg) $20,000 on her complaint against O&M, Weinberg's former attorneys, for breach of fiduciary duty, and also awarded O&M the sum of $5,000 on its cross-complaint against Weinberg for quantum meruit.

O&M also appeals the trial court's denial of its motion for judgment notwithstanding the verdict (JNOV) or for new trial,[1] as well as postjudgment orders denying O&M's motion to tax Weinberg's costs, granting Weinberg's motion to tax O&M's costs, and granting a motion by Weinberg to amend the judgment to specify the amount of prejudgment interest.

By way of background, O&M initially represented Weinberg in a personal injury matter after she was injured in a car accident. Not long afterwards, she discharged O&M after it advised her that recovery of the proceeds of the other driver's $25,000 liability policy was the "best case scenario" that could be realized. Weinberg ultimately was represented by Mardirossian & Associates, Inc. (Mardirossian), which obtained a $450,000 settlement for her. O&M was included as a payee on the settlement check, but it refused to endorse the check unless it

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[1] The order denying the motion for JNOV is appealable. (Code Civ. Proc., § 904.1, subd. (a)(4).) The order denying the motion for new trial is not appealable, but a notice of appeal specifying such an order may be deemed to constitute an appeal from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 22.) The orders on the motions to tax costs are appealable as postjudgment orders. (Code Civ. Proc., § 904.1, subd. (a)(2).)

were paid, in advance, a sizable portion of the settlement. The essential issue presented is whether O&M's refusal to endorse the settlement check is actionable as a breach of fiduciary duty. It is established that an attorney " 'may not do anything which will injuriously affect [the] former client in any matter in which [the attorney] formerly represented [the client].' " (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (*Oasis*).) Therefore, we perceive no error in the trial court's ruling in favor of Weinberg on her cause of action for breach of fiduciary duty. We also reject O&M's other contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*.[2]

In 2010, Weinberg was injured in a motor vehicle accident when her car was struck from behind by a car driven by Nicole Huntley, who was insured by Mercury Insurance (Mercury). Weinberg suffered two ruptured disks in her neck and required surgery.

On January 30, 2011, Weinberg retained the law firm of O&M to represent her. Her contact with O&M was limited. She never met with any of the attorneys at O&M during the course of its representation. Weinberg and O&M's attorneys spoke on the phone about three times, and exchanged four or five e-mails. Attorney O'Neil told her that the other driver had a $25,000 policy, and that such recovery was the "best case scenario" that could be achieved but was "not likely."

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[2] We summarize the facts in accordance with the general rule that an appellate court will view the evidence in the light most favorable to the respondent, here, Weinberg. (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 492, fn. 1.)

Weinberg discharged O&M and retained Armen M. Tashjian to represent her. Tashjian so notified O&M on May 5, 2011. O&M promptly notified Mercury that it had a lien against any settlement or judgment obtained in the matter.

Tashjian sent a $450,000 demand letter to Mercury but was unable to settle the matter. He then referred the case to Mardirossian.

On February 17, 2012, Mardirossian filed the underlying personal injury complaint on Weinberg's behalf against Huntley. In January 2014, the case settled for $450,000.

After the personal injury case settled, Mardirossian was contacted by O&M regarding its lien. However, O&M never provided an accounting of the work it performed for Weinberg, despite repeated requests by Lawrence Marks of the Mardirossian firm. Marks sent three or four letters to O&M "asking them to please, please send me their support for their lien. Tell me how much their lien is, give me any kind of accounting or documentation to support the monies, if any, that they advanced. I was trying my best to resolve what they were claiming to be a lien."

In a letter dated February 6, 2014, O&M claimed a $45,000 lien, "an amount equal to 25 percent of the total attorney fee."[3]

Mardirossian believed that O&M's lien was "nominal, at best," given O&M's failure to provide any documentation showing that it had advanced any costs on Weinberg's behalf, and because the file relating to the representation merely contained a letter

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[3] Correspondence between Mardirossian and O&M, referring to $45,000 as an amount equal to 25 percent of the total attorney fee, reflects that the total attorney fee on Weinberg's recovery was $180,000.

from O&M to Mercury asking the insurer to disclose the amount of the policy. At one point, O&M advised Marks that it had spent "an hour and a half" on Weinberg's case.

On February 10, 2014, the Mardirossian firm wrote to O&M that "[i]n order for us to evaluate the value of your lien in this matter, we ask that you please provide us with documentation and an accounting of your efforts and costs, if any, on behalf of Ms. Weinberg. We ask that you please provide support for your $45,000 demand. [¶] With your agreement, we will gladly place $3,000 into a Trust Account, and maintain it there pending the resolution of your claimed lien. We could be ready to arbitrate this issue as soon as you wish, as early as next week if you would like. Should you be able to convince an arbitrator that your claim is worth more than $3,000, you can trust that our firm is solvent enough to satisfy any Arbitration Award entered in your favor."

Mardirossian's February 10, 2014 letter also proposed that O&M agree to have the settlement draft issued without O&M as a payee so that the funds could be disbursed to Weinberg without undue delay. "To facilitate disbursement to Ms. Weinberg, we ask that you agree to allow the settlement check be issued without your firm's name on it. If you insist on having your Firm's name on the check, it will likely cause delay in disbursing money to Ms. Weinberg. We wish to avoid any such delays. In the event that you require your Firm's name to be listed on the settlement check, we trust that you will immediately execute the check, and not hinder or delay our ability to disburse money to Ms. Weinberg."

In a letter dated February 11, 2014, O&M "agree[d] to endorse the draft to facilitate prompt distribution of all

undisputed monies; but because our contract is with [Weinberg], not you, we must insist that the full disputed amount of 25% of the fee remain in trust pending our resolution."

Mercury issued the settlement check on April 9, 2014, made payable to O&M, Weinberg, and Mardirossian. Mardirossian contacted O&M to obtain its signature so that the check could be deposited. O&M responded, "we're not signing that check until you pay us, until you protect our interest. You pay us first . . . ."

Because Mardirossian could not deposit the check without O&M's signature, Mardirossian could not pay O&M, could not disburse Weinberg's share to her, could not satisfy the medical liens,[4] and could not pay the Mardirossian firm its attorney fees.

Therefore, in correspondence dated April 17, 2014, Mardirossian asked O&M to endorse the draft promptly, as it had previously agreed to do, and advised that Weinberg was "very much in need of these funds." Mardirossian agreed to maintain $45,000 in its trust account and proposed immediate arbitration of O&M's lien, stating "despite the fact that we disagree with the amount of your claimed lien, we have already agreed to deposit, and maintain in our trust account, the full $45,000 that you are claiming. We have also encouraged you to provide us with names of Arbitrators, and we would be willing to Arbitrate your claimed lien, as early as you are available. We could be available as early as next week. Please provide names of Retired Judges who you would agree to hear this matter."

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[4] Weinberg had somewhere between $270,000 and $320,000 in medical liens that needed to be negotiated and paid from the settlement monies.

In another letter on April 21, 2014, Mardirossian reiterated its position: "Despite several requests, we are still waiting for you to make yourself available to sign Ms. Weinberg's settlement check. As you know, until you sign this check, we remain unable to disburse money to Ms. Weinberg. [¶] Please explain why you continue to prevent Ms. Weinberg from receiving her much needed money. You have been assured that the entire $45,000 of your claimed lien amount will remain in trust pending the resolution of our dispute. Your interests are protected. Please allow Ms. Weinberg to get her money. [¶] You have also been asked, at least 3 times, to provide us with names of Arbitrators who you would agree to decide the value of your 'services' rendered in this matter. To date, these requests have been ignored. We have also asked you to provide us with the basis for your claimed fees. You have provided nothing."

Also, due to the delay in disbursing the settlement funds, Weinberg continued to accrue interest on her medical providers' lien balances.

On April 22, 2014, O&M contacted Mercury and asked that it reissue the settlement draft as follows: $180,000 payable to Mardirossian, O&M and Weinberg; and $270,000 payable to Mardirossian and Weinberg. O&M's proposal would have tied up $180,000 of the $450,000 settlement, even though O&M's claimed lien amount was $45,000.

On April 24, 2014, Weinberg filed and promptly served the subject complaint against O&M for breach of fiduciary duty based on its refusal to endorse the settlement check.

On May 13, 2014, Mardirossian again wrote to O&M, advising that Weinberg is "desperately in need of this money. She needs to pay her medical providers. She needs and cannot

afford additional medical care. Your refusal to sign the check has prevented Ms. Weinberg from [receiving] money that she needs to survive." Mardirossian reiterated that O&M's interests were protected, stating "you have already been told, in writing, several times, that the amount in dispute would be placed in a trust account, pending resolution by Binding Arbitration. That said, your personal interests are protected. We have encouraged you to suggest an Arbitrator, and we have told you that the matter of your claimed lien can be resolved and satisfied within a few days. You have refused to entertain this option. In fact, you have ignored our requests to resolve your claimed lien. [¶] Please let me know when you will be available to sign Ms. Weinberg's check. We can have someone bring it by your office at your convenience. Please do not continue to cause Ms. Weinberg harm."

On May 21, 2014, Mardirossian returned the $450,000 settlement draft to Mercury because it could not be deposited without O&M's endorsement, and asked that Mercury instead issue new and separate checks as follows: $405,000 payable to Weinberg and Mardirossian; and $45,000 payable to Weinberg, Mardirossian and O&M. Mercury agreed and issued new checks accordingly on or about May 23, 2014. Mardirossian was able to deposit the $405,000 check that did not include O&M as a payee. Mardirossian then was able to disburse Weinberg's funds to her. As for the $45,000 check, it could not be deposited without O&M's signature, became stale after six months, and remained in Mardirossian's possession.

2. *Proceedings*.

As indicated, Weinberg commenced this action for breach of fiduciary duty on April 24, 2014. The named defendants were

O&M and its two principals, Thomas O'Neil and Henry John Matusek II. Weinberg alleged, inter alia, that O&M's failure and refusal to endorse the $450,000 settlement check violated Rules of Professional Conduct (hereafter Rules), Rule 4-100(B)(4), and constituted a breach of fiduciary duty.[5]

O&M answered on behalf of itself and its principals. O&M filed a cross-complaint against Weinberg, seeking to recover in quantum meruit for services rendered.

On January 13, 2016, following a two-day bench trial, the trial court entered judgment in favor of Weinberg on her complaint, in the amount of $20,000 plus prejudgment interest, and awarded O&M the sum of $5,000 on its cross-complaint. There was no request for a statement of decision.[6]

On January 26, 2016, O&M filed timely motions for JNOV and for a new trial (Code Civ. Proc., § 629, subd. (b), § 659), which the trial court denied on March 3, 2016.

On April 1, 2016, O&M filed a timely notice of appeal from

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[5] Rule 4-100(B)(4) requires a member of the State Bar of California to "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

[6] The doctrine of implied findings "requires that in the absence of a statement of decision, an appellate court will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record. In other words, the necessary findings of ultimate facts will be implied and the only issue on appeal is whether the implied findings are supported by substantial evidence. [Citations.]" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267, fn. omitted.)

the judgment and the order denying its motion for JNOV. (Cal. Rules of Court, rule 8.108; see fn. 1, *ante*.)

On April 20, 2016, the trial court denied O&M's motion to strike or tax Weinberg's costs, and awarded Weinberg, as the prevailing party on the complaint, costs in the sum of $15,799.68. The trial court also granted Weinberg's motion to strike or tax costs in the amount of $1,011, and awarded O&M, as the prevailing party on the cross-complaint, costs in the sum of $1,541.71. In addition, the trial court granted a motion by Weinberg to amend the judgment to specify $3,490.76 in prejudgment interest, as the original judgment awarded prejudgment interest but did not specify the amount thereof. The trial court then entered an amended judgment which so specified.

On May 12, 2016, O&M filed a timely notice of appeal, specifying the April 20, 2016 postjudgment orders and the amended judgment.

CONTENTIONS

O&M contends: (1) its refusal to endorse the settlement check is not actionable as a breach of fiduciary duty; (2) Weinberg's claim at trial that O&M breached its fiduciary duty by charging a one-third fee on a medical payment (medpay) check was time-barred; (3) Weinberg did not suffer any compensable damages; (4) the trial court improperly awarded Weinberg prejudgment interest and wrongfully denied O&M prejudgment interest; (5) the trial court improperly denied O&M its filing fees after O&M prevailed on its cross-complaint; (6) the amended judgment is void as a matter of law; and (7) O&M is entitled to judgment in its favor, together with costs and interest.

DISCUSSION

1. *No merit to O&M's contention that its refusal to endorse the settlement check was not actionable as a matter of law.*

Rule 4-100(B)(4) provides that a member shall "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive." (Italics added.) Weinberg asserted, and the trial court implicitly determined, that O&M's refusal to the endorse the settlement check violated this rule and constituted an actionable breach of fiduciary duty.

O&M contends that Weinberg's fiduciary duty claim fails as matter of law because a violation of the Rules is not actionable in tort, [7] and, in any event, O&M's fiduciary duties to Weinberg ceased when Weinberg retained new counsel. O&M is wrong on both counts.

The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.)

"The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional

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[7] Rule 1-100(A) states in relevant part: "The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts. . . . [¶] *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." (Italics added.)

Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' [Citations.]" (*Stanley v. Richmond*, *supra*, 35 Cal.App.4th at pp. 1086–1087.) Although a violation of the Rules does not, in and of itself, render an attorney liable for damages, in a tort action for breach of fiduciary duty or professional negligence, the Rules may inform the scope of an attorney's duty. (*Prakashpalan v. Engstrom, Lipscomb and Lack* (2014) 223 Cal.App.4th 1105, 1128.)

Further, the law is clear that while certain fiduciary duties of an attorney to a client terminate when the representation ends, other fiduciary duties continue beyond the termination date. Our Supreme Court has explained: " '[T]he effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. [Citation.] The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship.' [Citation.] Accordingly, 'an attorney is forbidden . . . after severing [the] relationship with a former client [to] . . . do anything which will injuriously affect [the] former client in any matter in which [the attorney] formerly represented [the client].' " (*Oasis*, *supra*, 51 Cal.4th at p. 821; see also *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1151 ["an attorney's fiduciary duty can extend to former clients, to conduct not strictly pertaining to representation of a client, and to conduct with a nonclient which affects the relationship with a client"].) Thus, O&M's fiduciary duty to avoid actions that injuriously harmed

Weinberg in connection with the *Huntley* matter survived the termination of the attorney-client relationship.

2. *No merit to O&M's contention that substantial evidence did not support the trial court's resolution of Weinberg's breach of fiduciary duty claim*.

O&M next contends that even if some of its fiduciary duties to Weinberg survived the termination of the attorney-client relationship, Weinberg's claim nonetheless fails because O&M had the right to do what it did—i.e., to refuse to endorse the settlement check until the attorney fee dispute was resolved. This claim, too, fails.

O&M is correct that when an attorney has a lien on a former client's recovery, the attorney may delay payment of the recovery or settlement proceeds until any disputes over the lien can be resolved. "For example, when there is a dispute over the existence or amount of an attorney's charging lien, the attorney can prevent the judgment debtor or the settling party from remitting the recovery to the client until the dispute is resolved. [Citation.] Alternatively, when the settlement draft is made jointly payable to the client and the attorney, the attorney may refuse to endorse the check until the dispute is resolved. [Citation.] Even when the proceeds have been deposited in the client's trust account, the attorney may withhold an amount equivalent to the disputed portion. [Citation.] In each of these instances when the charging lien is disputed, the client's recovery will be ' "tied up until everyone involved can agree on how the money should be divided . . . or until one or the other brings an independent action for declaratory relief." ' [Citation.]" (*Fletcher v. Davis* (2004) 33 Cal.4th 61, 69, fn. omitted.)

However, although an attorney may refuse to endorse a settlement check when doing so would have the effect of extinguishing a valid lien, the attorney "must fulfill his or her duty [under Rule 4-100(B)(4)] to promptly find other reasonable methods of delivering the undisputed portion to the client. Indeed, where the client requests that the attorney disburse the funds to the client and the attorney claims an interest in such funds, 'the attorney violates rule 4-100(B)(4) if he or she does not promptly take appropriate, substantive steps to resolve the dispute in order to disburse the funds.' (*In the Matter of Kroff* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838.) [An attorney] may not simply sit back and wait for such a resolution. Where the attorney and client cannot reach agreement on disbursement of the funds, and the client has requested payment or delivery of those funds, the attorney has an *affirmative obligation* to seek arbitration or a judicial determination without delay in order to comply with rule 4-100(B)(4)." (L.A. County Bar Assn. Formal Opn. No. 438.)" (Cal. Eth. Op. 2009-177 (Cal. St. Bar. Comm. Prof. Resp.), 2009 WL 2480735, italics added.) [8]

O&M urges that it complied with this standard because it made a "reasonable" proposal and, when Weinberg rejected it, "moved promptly to resolve the dispute" by "waiv[ing] their lien to all but the maximum disputed attorney fee of $180,000.00."

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[8] Opinions of the State Bar Standing Committee on Professional Responsibility and Conduct do not bind the Court of Appeal, but are persuasive and may properly inform our conclusion in this case. (See, e.g. *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 49 ["In the absence of contrary binding authority, we adopt the California State Bar's sound reasoning"].)

The problem with O&M's assertion is that it is simply an invitation to this court to reweigh the evidence that was adduced at trial—something we may not do. (See, e.g., *Williamson v. Brooks* (2017) 7 Cal.App.5th 1294, 1300 [" '[I]t is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in the testimony' "].) Instead, "our review begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below. [Citations.] In assessing whether any substantial evidence exists, we view the record in the light most favorable to respondents, giving them the benefit of every reasonable inference and resolving all conflicts in their favor. [Citation.]" (*Ibid.*) Viewing the evidence in the light most favorable to Weinberg, the evidence showed:

Weinberg discharged O&M very early in the *Huntley* matter, after O&M advised her that a $25,000 recovery was the maximum she could expect to achieve. Weinberg subsequently retained Mardirossian, and due to Mardirossian's efforts, the case settled two years later for $450,000. O&M claimed a $45,000 lien, an amount equal to 25 percent of the total $180,000 attorney fee. Despite repeated requests by Mardirossian, O&M never provided an accounting of the work it performed for Weinberg, and also refused Mardirossian's repeated requests to arbitrate the matter. O&M initially agreed to endorse the draft to facilitate prompt distribution of all undisputed monies, but stated that "because our contract is with [Weinberg], not you, we must insist that the full disputed amount of 25% of the fee remain in trust pending our resolution." However, when the settlement check arrived, O&M refused to endorse it unless Mardirossian *first* paid O&M. O&M persisted in its refusal, despite being

advised that Weinberg was "very much in need of these funds." O&M thereafter contacted Mercury and asked that it reissue the settlement draft as follows: $180,000 payable to Mardirossian, O&M, and Weinberg; and $270,000 payable to Mardirossian and Weinberg. O&M's proposal to Mercury would have tied up $180,000 of the $450,000 settlement, even though O&M's claimed lien amount was $45,000. Ultimately, Mercury instead issued new and separate checks as follows: $405,000 payable to Weinberg and Mardirossian; and $45,000 payable to Weinberg, Mardirossian and O&M. The latter check became stale after six months.

In view of all the above, the trial court properly made the implied finding that O&M's course of conduct with respect to the settlement check, including its demand to be paid $45,000 before it would endorse the check, was unreasonable and in breach of its fiduciary duty to Weinberg. Further, the trial court could reasonably conclude that because O&M claimed $45,000 in attorney fees, not $180,000, its demand that Mercury issue a $180,000 check payable to Mardirossian, O&M, and Weinberg was an attempt to coerce the vulnerable Weinberg to agree to pay an excessive fee to O&M, in clear violation of O&M's fiduciary duty.[9]

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[9] O&M also argues the statute of limitations barred Weinberg's theory that O&M breached its fiduciary duty by charging a one-third fee on a medpay check. It is unnecessary to address this issue because O&M's conduct with respect to the settlement check is sufficient to support the trial court's implied finding that O&M breached its fiduciary duty.

3. *No merit to O&M's contention that Weinberg did not suffer any compensable damages*.

O&M contends: Weinberg failed to prove damages, an essential element of a claim for breach of fiduciary duty; she produced no evidence of actual harm; general damages are not recoverable absent actual harm; and in any event, any emotional harm was caused by Weinberg's and Mardirossian's failure to act reasonably.

As noted above, an essential element of a cause of action for breach of fiduciary duty is "*damage proximately caused by that breach*. [Citation.]" (*Mosier v. Southern Cal. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1044, italics added.) Here, the trial court awarded Weinberg damages in the amount of $20,000. O&M's arguments that Weinberg did not suffer any compensable damages as a consequence of O&M's conduct, and that the delay in disbursement should be attributed to Weinberg and Mardirossian, are simply another invitation to this court to reweigh the evidence.

A plaintiff may recover both economic and noneconomic (emotional distress) damages for breach of fiduciary duty. (See, e.g., *Stanley v. Richmond*, *supra*, 35 Cal.App.4th at p. 1097 and cases cited therein). In the instant case, Weinberg introduced evidence of both economic and noneconomic damages. She testified at trial that upon receiving the settlement proceeds, she was able to obtain additional care that she needed, including physical therapy, massage, and physical training. Once she obtained that care, her symptoms improved. In addition, it was not until she received the funds that she was able to commence fertility treatment, and time was of the essence because "some of my most fertile years were spent in bed recovering." Weinberg

also relied on the settlement funds to start a new business, after having suffered a loss of earnings following the accident. In addition, the delay in disbursement of the settlement proceeds caused Weinberg to continue to accrue interest on her medical liens.

Further, although Weinberg initially was "elated" when the case settled, she became extremely distressed by the news that her funds were being withheld due to O&M's refusal to endorse the check. Weinberg's wife testified: "[Weinberg] was devastated. It was unconscionable. It was egregious. It was extortion. It was holding her hostage when she owed hundreds of thousands of dollars to people, and she couldn't pay it back."

In view of the above, we reject O&M's contention that the delay in disbursing the settlement proceeds did not cause Weinberg any compensable damages. We conclude there was substantial evidence to support the damages awarded to Weinberg.

4. *Prejudgment interest.*

a. *Trial court acted within its discretion in awarding prejudgment interest to Weinberg.*

O&M contends the trial court erred in awarding Weinberg prejudgment interest on her claim for breach of fiduciary duty because Civil Code section 3287 permits an award of prejudgment interest only on damages that are certain, or capable of being made certain, by calculation. (*Ibid.*)

O&M's focus on Civil Code section 3287 is misplaced because Civil Code section 3288 vests the trial court with discretion to award prejudgment interest on tort claims. (*Altavion, Inc. v. Konica Minolta Systems Laboratory Inc.* (2014) 226 Cal.App.4th 26, 69, and fn. 8.) The "underlying theory is that

‘ “an individual who must litigate to recover damages should be placed in the same position, when he recovers, as the individual who recovered the day he suffered an injury. Otherwise, the tortfeasor benefits from denying liability and continuing to litigate, while he retains the use of money to which the plaintiff is entitled, and the plaintiff is deprived of the benefit he should have derived from an immediate recovery.” ’ ” (*Ibid*.) On the record presented, the award of prejudgment interest to Weinberg under Civil Code section 3288 was proper.

b. *No error in trial court’s refusal to award prejudgment interest to O&M on its cross-complaint for quantum meruit*.

O&M contends the trial court erred in failing to award it prejudgment interest on its $5,000 recovery in quantum meruit on its cross-complaint. The argument lacks merit.

This court “must affirm the denial [of prejudgment interest] if there was a reasonable basis for the court’s decision in accordance with the governing rules of law.” (*Faigin v. Signature Group Holdings, Inc*. (2012) 211 Cal.4th 726, 752.)

In an action “in *quantum meruit* where there is an express contract but where the value of the services can only be established by evidence and is not susceptible of computation from the face of the contract or by reference to established market values, interest is not recoverable prior to judgment. [Citations.]” (*Parker v. Maier Brewing Co*. (1960) 180 Cal.App.2d 630, 634.) In the instant case, the trial court’s award of $5,000 in quantum meruit was far less than O&M’s request in closing argument for earned attorney fees of $36,273. This demonstrated that the value of O&M’s services was not certain or capable of being made certain by calculation, but could only be determined by the trier of fact based on conflicting evidence.

Thus, the trial court properly denied O&M prejudgment interest on its claim for services rendered.

5. *No merit to O&M's contention the trial court erred in striking $435 from its cost bill.*

O&M incurred a fee of $435 to file its answer to Weinberg's complaint. O&M, as the prevailing party on the cross-complaint, filed a memorandum of costs in which it sought, inter alia, the $435 fee it paid to file the answer to Weinberg's complaint. Weinberg successfully moved to strike the $435 fee from O&M's cost bill. O&M contends the trial court erred in refusing to award it said filing fee because O&M was the prevailing party on the cross-complaint.

The argument is meritless. As the trial court explained in ruling on the matter, "[h]ere, [O&M] seeks to recover costs that are not associated with the filing of the Cross-Complaint, but the first appearance fee which is associated with the Answer to the Complaint, which [O&M] did not prevail upon." Stated another way, O&M's success on the cross-complaint did not entitle it to recover the cost of answering the complaint; on the complaint, it was Weinberg who was the prevailing party.

6. *No merit to O&M's contention that the trial court lacked jurisdiction to amend the judgment to specify the amount of Weinberg's prejudgment interest.*

The original judgment, entered on January 13, 2016, awarded Weinberg the sum of $20,000 "plus pre-judgment interest at an annual rate of 10% beginning on April 17, 2014." On April 20, 2016, the trial court entered an amended judgment specifying the amount of prejudgment interest. The latter judgment awarded Weinberg $20,000 in damages "plus pre-judgment interest at an annual rate of 10% beginning on April

17, 2014, *in the amount of $3,490.76*." (Italics added.) O&M contends the amended judgment is void as a matter of law because it substantively modified the original judgment by adding prejudgment interest. The argument is meritless.

"The general rule is that once a judgment has been entered, the trial court loses its unrestricted power to change that judgment. The court does retain power to correct clerical errors in a judgment which has been entered. However, it may not amend such a judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error. [Citations.]" (*Craven v. Crout* (1985) 163 Cal.App.3d 779, 782.) It is "well settled" that " '[w]here the judgment is modified merely to add costs, attorney fees and interest, the original judgment is not substantially changed.' " (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222.)

Contrary to O&M's argument, the amended judgment did not effect a substantive modification of the original judgment. The original judgment awarded Weinberg prejudgment interest at the rate of 10 percent from a date certain, without specifying the amount of the award. The amended judgment specified the amount of prejudgment interest, i.e., $3,490.76, based on the formula contained in the original judgment. The trial court's finding "the instant error was one of clerical error and not judicial error" was proper. Because the change in the judgment was nonsubstantive, O&M's jurisdictional argument is meritless.[10]

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[10] Our rejection of all of O&M's assignments of errors necessarily disposes of its final contention, i.e., that O&M is entitled to entry of judgment in its favor, together with costs and interest.

7. *Weinberg's request for sanctions on appeal is denied.*

Sanctions are appropriate where an appeal is frivolous, i.e., any reasonable person would agree the appeal is totally and completely devoid of merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 651.) Sanctions for prosecuting frivolous appeals "should be used most sparingly to deter only the most egregious conduct." (*Ibid.*)

We conclude that although meritless, O&M's appeal is not frivolous. O&M's contention that its refusal to endorse the settlement check was not actionable as a breach of fiduciary duty because violation of Rule 4-100(B)(4), in and of itself, does not give rise to tort liability (Rule 1-100(A)), is theoretically arguable. "Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal." (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 650.) Here, it cannot be said that any reasonable person would agree that O&M's argument is " 'totally and completely devoid of merit.' " (*Id.* at p. 651.)

Weinberg's request for sanctions is denied.

DISPOSITION

The amended judgment and orders are affirmed. Weinberg's request for sanctions on appeal is denied. Weinberg shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

GOSWAMI, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.