Filed 6/11/19 A.M. v. Lieff Cabraser Heimann & Bernstein, LLP CA

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

A.M., a Minor, etc., et al., Plaintiff and Respondent, v. LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, Appellant.	B269624 Los Angeles County Super. Ct. No. BC332487
A.M., a Minor, etc., et al., Plaintiff and Respondent, v. LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, Defendant and Appellant.	B271817 Los Angeles County Super. Ct. No. BC475232

A.M., a Minor, etc., et al., Plaintiff and Appellant, v. ROBERT NELSON et al., Defendants and Respondents.	B271817, B276319 Los Angeles County Super. Ct. No. BC475232

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Mel Red Recana and J. Stephen Czuleger, Judges. Affirmed in part, dismissed in part, reversed in part, and remanded with instructions.

Klein & Wilson and Mark B. Wilson for Appellant and Cross-Respondent.

Long & Levit LLP, Joseph P. McMonigle, Jessica R. MacGregor and Douglas J. Melton for Respondent and Cross-Appellant.

INTRODUCTION

Respondent and cross-appellant Lieff Cabraser Heimann & Bernstein, LLP (Lieff Cabraser) represented A.M.'s family, including appellant and cross-respondent A.M., in a wrongful death action. After the conclusion of the underlying case, A.M.—through her guardian ad litem, Cristina E. Lacy—sued Lieff Cabraser for malpractice, breach of fiduciary duty, a common count of "mistake," and unfair competition. She complained that Lieff Cabraser's inability to effectuate a structured settlement on her portion of the trial proceeds resulted in otherwise avoidable tax consequences. A.M. also sought disgorgement of approximately $1.6 million in attorney fees and costs paid to Lieff Cabraser in connection with its work on her case.

After a bifurcated proceeding during which there was both a court trial and a 16-day jury trial, A.M. obtained a verdict for $400,000 on the common count of "mistake." On the claims of malpractice, breach of fiduciary duty, and unfair competition, the judgment was in favor of Lieff Cabraser.

A.M. filed three notices of appeal.[1] Lieff Cabraser filed a notice of cross-appeal from the judgment and a notice of appeal

---

[1] One of A.M.'s notices stated she was appealing from the judgment; another stated she was appealing from the judgment, from the order denying her motion to set aside the judgment, and from the order denying her motion for judgment notwithstanding the verdict; and another stated she was appealing from the order partially denying her motion for fees and costs incurred to prove the truth of certain requests for admission.

from the order denying its motion for judgment notwithstanding the verdict.[2]

In her appeal, A.M. asserts, inter alia, that the trial court erred in concluding as a matter of law that the retainer agreement and fee split agreement her mother signed were enforceable. A.M. also argues that, because the trial court ruled the 2009 minor's compromise order was void *ab initio* and the 2010 minor's compromise order did not cure any defect in the earlier order, A.M. is legally entitled to disgorgement of the entire amount of the fees and costs ($1,611,227) awarded to Lieff Cabraser for its representation of her in the underlying action. A.M. also argues that, as a matter of law, the jury erred in concluding Lieff Cabraser was not negligent because it settled the underlying wrongful death action without A.M.'s authorization.

Lieff Cabraser asserts the trial court erred as a matter of law in concluding that the 2009 minor's compromise order was void, or not otherwise cured by the 2010 minor's compromise order. Lieff Cabraser also argues there was no substantial evidence in the record upon which the jury could base an award of $400,000 to A.M. under the common count of "mistake."

---

[2] Between phase one and phase two of the malpractice trial, Lieff Cabraser filed in the underlying Chrysler litigation a "Motion for Order to Correct Clerical Errors in Connection with the 2010 Order on Petition for Minor's Compromise." The trial judge in that case denied the motion. Lieff Cabraser filed a notice of appeal from the order denying that motion, and this court consolidated that appeal with the present appeal and cross-appeal. Lieff Cabraser is no longer pursuing that appeal and requests its dismissal.

We find no error in the judgment in Lieff Cabraser's favor on A.M.'s negligence cause of action. Nor did the judge err in concluding the Charles Naylor retainer and fee splitting agreements were valid and enforceable.

We do, however, hold that the trial court erred in ruling the 2009 minor's compromise order was void *ab initio*. We hold that, under the circumstances of this case, the trial court's 2009 approval of the settlement of the action with regard to A.M., including the attorney fees component of that order, was not subject to collateral attack in a later-filed malpractice case. Moreover, even assuming arguendo that the 2009 Order was void *ab initio*, the 2010 Order—issued after the termination of the appeal and after the case was remitted to the superior court—authorized the payment of attorney fees to Lieff Cabraser for its work on A.M.'s behalf. The trial court's ruling to the contrary in this case is incorrect as a matter of law.

As there were enforceable minor's compromises and awards of attorney fees, and as the retainer agreements underlying them were valid and enforceable, A.M.'s demand for disgorgement is without legal basis. The jury found based on substantial evidence in the record that Lieff Cabraser was not negligent. That verdict shall stand on appeal. However, there is no substantial evidence in the record to support the jury's verdict of $400,000 on the common count for "mistake."

Accordingly, we reverse the judgment and remand the matter to the trial court with instructions to enter a new judgment for Lieff Cabraser on all counts.

FACTUAL AND PROCEDURAL BACKGROUND

In cases alleging legal malpractice, it is helpful to understand the underlying case upon which A.M.'s suit for professional negligence rests.

A. *The Chrysler Case*

The underlying case was an action brought by Adriana Mraz and her three children for the wrongful death of Richard Mraz from an accident caused by an allegedly defective Dodge pickup (the Chrysler case). A.M. is the natural child of Richard; the other minor children were her two step-brothers, Roy and Joe Lopez.

Richard Mraz was seriously injured on April 13, 2004 at his workplace in Long Beach. He tried to reenter and stop a Dodge pickup that had self-shifted from park to reverse and was moving backwards in a circle. Richard was struck by the truck and died the next month as a result of his injuries.

Shortly after Richard's accident and while he was still alive, Adriana retained attorney Charles Naylor to represent Richard. After Richard's death, Adriana signed a new retainer agreement with Naylor on behalf of herself and as guardian ad litem for her three minor children. At the time of this retainer agreement and throughout the litigation, there were no conflicts between Adriana and her children because they shared the same goal in their single wrongful death claim and Adriana placed her children's interests before her own.

Naylor did not seek court approval of this retainer agreement under Family Code section 6602 at the time. Rather, he believed that this authority could be obtained as part of a minor's compromise upon the settlement or resolution of the case.

Appreciating the complexity and expense of a product defect case against an automobile manufacturer, Naylor brought in Lieff Cabraser to assist in the prosecution of the lawsuit. Naylor's small practice focused on worker's compensation and personal injury; he lacked the experience or resources to litigate the family's product defect claim against Chrysler.

On April 12, 2005, Naylor introduced Adriana to attorneys from Lieff Cabraser. Adriana understood and agreed that Lieff Cabraser and Naylor would jointly prosecute the wrongful death suit. Lieff Cabraser and Naylor entered into an attorney fee split agreement. Adriana understood that the terms of the original Naylor retainer still applied, with the additional provision regarding any future division of attorney fees between the two firms. Adriana signed the fee split agreement on her own behalf and in her representative capacity for the children and the estate. As with the retainer agreement, Naylor did not submit the fee split agreement to the court for approval under Family Code section 6602 as he did not believe the statute required it to be done at that time.

On April 26, 2005, Lieff Cabraser filed the wrongful death case on behalf of the Mraz family. The defendants named in the action were American President Lines Ltd. (APL), Richard's employer and the truck owner, and DaimlerChrysler Corp. (Chrysler), the manufacturer of the truck. Along with the filing of the complaint, Adriana sought court appointment as guardian ad litem for the three minor children, including A.M. On August 4, 2005, the court appointed Adriana as guardian ad litem.

Attorneys Robert Nelson and Scott Nealey of the Lieff Cabraser firm and Naylor represented the Mraz family in the wrongful death case. That lawsuit alleged the truck driven by Richard and manufactured by Chrysler was defective. The litigation was hard fought and expensive to prosecute. A number of cases previously had been filed alleging a defective transmission manufactured by Chrysler that created a "false park" position so that the vehicle would drop into reverse and move, even though the driver believed the transmission had been placed in park. A number of these "false park" defect cases had resulted in defense verdicts. Making the lawsuit even more difficult to win was the fact that Chrysler had announced a recall regarding this problem and the responsible government agency—although under-resourced and understaffed—had approved the fix. It was uncertain, even at trial, whether the truck's owner had taken the truck in for the recall repairs.

Additional facts unique to this case made the case harder yet to win. There was a serious question regarding Richard Mraz's personal responsibility for his injuries. Richard had failed to shift the vehicle entirely into park, which plaintiffs had to concede. And, he was outside of the truck and in the zone of safety when the transmission engaged and the truck started moving in powered reverse. Had he decided not to attempt to reenter the vehicle, he would not have been injured. Comparative fault issues, therefore, loomed large in the case. There were also challenges with the non-economic damages aspects of the case as well. A.M. was only one year old when her father died and Adriana had been married to him for only a year. Richard had not adopted the two step-children. The children's young ages and the short length of the marriage created a

distinct risk that any award of non-economic damages would be small. In addition, Adriana was engaged to be married again at the time of the trial, thus posing some difficulty in arguing that damages due to loss of association would be substantial.

Before trial, plaintiffs settled with one of the defendants, APL, for $1.6 million in cash and forgiveness of about $300,000 in liens. As part of that settlement, APL received a lien against any future award from Chrysler in the amount of $1,050,000. On October 20, 2006, Naylor filed a petition for minor's compromise seeking approval of the APL settlement and its allocation among Adriana, the children, and the attorneys. The court approved the minor's compromise and Adriana allocated just over $30,000 to A.M. Lieff Cabraser took a smaller fee in this settlement than the retainer agreement provided for because it was to be the family's nest egg if the claims against Chrysler failed. A.M.'s settlement funds were placed into a blocked account, not a structured settlement. Adriana never told the attorneys that she wanted any portion of the APL settlement to be structured.

The Mraz family went to trial against Chrysler and ultimately prevailed. On March 2, 2007, after a lengthy trial, the jury (on a vote of nine to three) returned a compensatory damages award of $4,391,984.62. The jury awarded $5,033,753, but reduced that amount by ten percent due to Richard's contributory negligence. On March 7, 2007, the jury returned a $50 million punitive damages award. On May 11, 2007, the trial court (Judge Mel Red Recana) entered judgment against Chrysler for $54,391,984.62. Chrysler filed a notice of appeal on June 28, 2007.

The result Lieff Cabraser obtained in the case was noteworthy on a number of grounds. Until this verdict and judgment, no plaintiff had won a park-to-reverse defect case against Chrysler. And, the jury assigned only ten percent in comparative fault to Richard for failing to shift the truck fully into park. In addition, the award of punitive damages was exactly the amount suggested by plaintiffs' counsel, despite the shadow that a then-recent United States Supreme Court decision (*Philip Morris USA v. Williams* (2007) 549 U.S. 346 (*Philip Morris*)) had cast on the constitutionality of such awards. On May 11, 2007, the trial court entered a single judgment for the Mraz family. There was no division of the lump sum award among the plaintiffs.

Both parties appealed. Chrysler initially asked Lieff Cabraser if it would waive the bonding requirement on appeal. Lieff Cabraser declined. Chrysler ultimately obtained a bond from Safeco Insurance Company of America, which it secured with more than $81 million of Chrysler assets.

One major issue Chrysler presented in its appeal was whether the jury's award of $50 million in punitive damages met the standards articulated in *Philip Morris*, decided while the trial was underway.

Before the appeals were fully briefed, Naylor and Lieff Cabraser asked Adriana to sign an addendum to the Naylor fee agreement, providing for an additional seven percent contingency fee if the Mraz family prevailed. The Naylor 2005 retainer agreement left the issue of appellate fees to be decided later, if the issue arose. Although the attorneys originally suggested an additional 10 percent fee, Adriana reduced that share to seven

percent. Nealey, from Lieff Cabraser, agreed and signed the agreement, as did Adriana.

On April 30, 2009, with the appeal still pending, Chrysler filed a bankruptcy petition, which automatically stayed the Chrysler appeal. The bankruptcy filing interjected even greater uncertainty into what was already a challenging appeal. At a minimum, bankruptcy could stay the appeal and keep the case in limbo for years. If the stay were lifted and the appeal lost, a remand would terminate the $81 million Safeco bond and leave the family to retry the case against a bankrupt company. Even if the appeal were successful, the punitive damages were unlikely to survive bankruptcy court scrutiny.

Time was of the essence. Thousands of lawyers, creditors, and other interested parties wanted money from Chrysler. Chrysler's unsecured creditors were particularly interested in minimizing the amount Safeco paid to the Mraz family because the appellate bond was secured by Chrysler cash. The more Safeco paid on the secured bond, the fewer assets there would be for Chrysler's other creditors. In addition, Chrysler had to pay an annual premium to maintain the bond. If Chrysler defaulted on that payment in bankruptcy, the bond would be nullified. The cash underlying the Safeco bond was the largest asset of Old Carco, the bankrupt entity.

Given these substantial obstacles, Lieff Cabraser retained bankruptcy counsel and sought to lift the automatic stay for either (a) oral argument in the court of appeal, or (b) settlement discussions with the surety on the appellate bond. Lieff Cabraser requested that oral argument be set, but the court of appeal rejected that request. A mediation then was held.

On August 27, 2009, Adriana—for herself and her children—mediated with Safeco and Chrysler. Although Safeco expressed doubt that the bankruptcy court would approve a large settlement, the family was able to obtain an agreement from Safeco to pay $24 million subject to bankruptcy court approval. The parties prepared and signed a term sheet, which contained the key terms of the settlement and was intended to be disclosed to the bankruptcy court. Nothing in that term sheet required a structured settlement for A.M., nor did Adriana (as A.M.'s guardian) seek such a provision.

To effectuate this settlement before the bankruptcy proceedings looked to Chrysler's bond security for satisfaction of unsecured debts, the parties sought bankruptcy court approval by way of a stipulated approval of settlement. Fashioned after stipulations that the bankruptcy judge in the Chrysler matter already had approved, it was intentionally straightforward and unconditional. Chrysler's bankruptcy counsel prepared the first draft, which tracked the term sheet. The stipulation set a short deadline for Safeco to fund the settlement as a way to limit the time when Chrysler's creditors' committee could attempt to stop the payment. As Adriana had not yet decided whether she wanted A.M.'s portion to be structured, Lieff Cabraser made the strategic decision to avoid any reference in the stipulation to structured settlements or the future periodic payments they might require.

On September 24, 2009, the bankruptcy court approved the settlement. Lieff Cabraser told Adriana she would need to decide quickly how she was allocating the settlement money and how she wanted it invested. Discussions regarding the pros and cons of a structured settlement for A.M. continued into mid-October.

Lieff Cabraser's next step was to seek court approval of the settlement through a petition for minor's compromise. As part of that process, Adriana decided how much of the $24 million would be allocated among the children and herself. Adriana decided to allocate $2.5 million to A.M. However, she still had not decided whether to structure those funds. Adriana was still weighing having the tax consequences incurred up front and then depositing A.M.'s funds for investment versus structuring the settlement.

As no decision had been made about structuring, the petition sought court approval to place A.M.'s $2.5 million into a blocked account. As explained in the petition, Adriana was still consulting financial advisors to understand the potential tax liability and the best method for investing the funds in a manner that maximized A.M.'s recovery. Adriana reviewed the petition and, by signing it, agreed that the contents were true and that the proposed settlement allocation and attorney fees and costs were fair, reasonable, and in the best interests of A.M.

Lieff Cabraser filed the petition on September 30, 2009. In that petition, A.M., through her guardian, agreed to a contingency fee agreement with Lieff Cabraser and Naylor. That agreement called for a 33 and one-third percent fee for pretrial settlement, a 40 percent fee for a favorable trial verdict, and an additional 7 percent to handle all post-trial motions, appeals, and bankruptcy matters. The petition then set out the monetary distribution of the $24 million settlement with Chrysler and Safeco. Adriana would receive $8,594,722.55, Roy and Joe Lopez would each receive $600,000, A.M. would receive $2.5 million, and the attorneys would collectively receive

$10,902,867.16 in fees and $802,410.29 in costs. There were no objections to the petition.

The petition was set for hearing on October 5, 2009 before Judge Recana, who had presided over the trial. A.M. did not raise any objection to the petition being heard and decided in the superior court, nor did Judge Recana express any reservations.

Until October 1, Adriana had not decided whether to structure A.M.'s portion of the settlement. Given that Safeco was required under the agreement to wire the funds by October 5, it was not entirely certain that such a structure could be effectuated in that short a period of time. Lieff Cabraser nevertheless sought to protect that possibility. On October 1, 2009, attorney Nelson e-mailed Safeco's counsel and asked that Safeco send that portion of the funds designated for A.M. directly to the insurance companies overseeing any structure, and promised to provide Safeco with the names of those companies in the next day or two. Despite these explicit instructions, Safeco wired the entire $24 million to Lieff Cabraser's trust account on October 2, 2009. The next day, Safeco agreed to fix its error.

At the hearing on October 5, 2009, the attorneys and Adriana appeared but the matter was continued to October 13, 2009. On October 6, 2009, Adriana finally decided to structure the settlement for A.M.'s funds. Lieff Cabraser submitted a supplemental memorandum to the court providing Judge Recana with details about the chosen structure.

On October 13, 2009, Judge Recana entered the 2009 Order Granting the Minor's Compromise Petition. Under that order, each Mraz family member received his or her portion of the $24 million settlement. Naylor received $3.3 million in fees and costs. Lieff Cabraser was allocated $7.1 million in attorney fees

and more than $700,000 in costs. There were no objections to or appeals taken from the 2009 order.

Although Safeco originally agreed to reverse its October 2, 2009 wire transfer, it later insisted it needed an order from the bankruptcy court to do so. Accordingly, on October 13, 2009, bankruptcy counsel filed a motion to amend the stipulation. The motion sought an order permitting Safeco to reverse the wire transfer and requiring it to cooperate in executing documents necessary to create a structured settlement for that portion of the settlement going to A.M. Safeco, however, objected to having to participate in any aspect of a structured settlement, fearing it might create some obligation in the future. For example, upon the failure of the party primarily obligated to make a structured payment, Safeco was concerned the beneficiary might look to it. This "tail" of future obligations was something Safeco was simply unwilling to incur. And, such an obligation was not required in the term sheet agreed to by the parties, nor had it been included in the stipulated settlement the bankruptcy court had approved.

Despite Safeco's intransigence, Lieff Cabraser continued actively to pursue the possibility of a structured settlement for A.M. A structured settlement still could be achieved if Safeco could be persuaded to sign the necessary documents. By November 2009, however, Adriana had retained Steven Bernstein, who ultimately filed the malpractice lawsuit. At this point, Adriana no longer was taking advice from Lieff Cabraser. And, at the end of the day, Safeco rejected the critical indemnity and future payment obligations necessary to create a structured settlement for A.M.

On May 6, 2010, the court of appeal dismissed the Chrysler appeal and issued an order to show cause. Lieff Cabraser

dismissed the cross-appeal. The court of appeal then remitted the case to the superior court.

By late 2010, Adriana had assembled a team of four lawyers (other than Lieff Cabraser) and, upon their advice, submitted a new petition for minor's compromise on November 15, 2010. That petition again sought approval of the settlement, the allocation among family members, and the payment of over $11 million in attorney fees and costs. The new petition, however, sought permission to place A.M.'s settlement funds in a minor's settlement trust rather than in a structured settlement.

Judge Recana held a hearing on the 2010 petition on December 17, 2010. At that hearing, Nelson from Lieff Cabraser disputed A.M.'s argument that a structured settlement was no longer possible and argued, instead, that it could be accomplished if Safeco would agree to sign structured documents. A.M. no longer wished to pursue that option and Judge Recana issued an order approving the 2010 petition. In accordance with that order, Lieff Cabraser wired A.M.'s $2.5 million share to Securant Bank & Trust on December 23, 2010.

B. ***The Malpractice Case***

In December 2011, A.M. filed a complaint for professional negligence against Lieff Cabraser. That complaint alleged a single cause of action for legal malpractice based on the firm's alleged breach of the standard of care in failing to obtain a structured settlement for her. A.M. realleged that same cause of action in a first amended complaint.

In June 2013, A.M. sought leave to file a second amended complaint adding causes of action for fraud, breach of fiduciary duty, and common count (money had and received/money paid by mistake). In this complaint, A.M. sought damages stemming

from the Naylor retainer and fee split agreement and the addendum. The parties then stipulated to the filing of a third amended complaint and the second amended complaint never was filed.

In the third amended complaint, A.M. added causes of action for constructive fraud and unfair competition. Following a demurrer, the court dismissed A.M.'s fraud claims.

During discovery, A.M. promulgated extensive written discovery, including six separate sets of requests for admissions, for a total of 669 requests. The vast majority of these requests were phrased in such a way as to make it difficult if not impossible for Lieff Cabraser to provide unqualified admissions or denials. Instead, Lieff Cabraser served lengthy explanations and provided a basis for each request that it did not admit.

A.M. sought leave to file a fourth amended complaint in March 2015. The court denied that request. In that new pleading, A.M. alleged for the first time that the 2009 minor's compromise order was void and that, as a result, Lieff Cabraser should disgorge its fees and costs. Despite the lack of an amended pleading, the judge allowed A.M. to support her existing causes of action by arguing that the 2009 order was void and submitting evidence to that effect.

The parties stipulated to a bifurcated adjudication of the case.

At the initial court trial, the trial judge decided whether the various retainer agreements challenged by A.M. were legally valid and enforceable. Specifically, the judge was asked to decide whether: (1) Lieff Cabraser complied with Family Code section 6602; (2) Lieff Cabraser did not violate Rule 3-310(C) of the Rules of Professional Conduct (prohibiting the representation of

adverse interests); (3) the fee split agreement did not violate Rule 2-200 of the Rules of Professional Conduct (governing financial arrangements among lawyers); (4) the fee split agreement did not violate Rule 3-400 of the Rules of Professional Conduct (governing efforts to limit liability to a client); (5) the addendum did not violate Rule 3-300 of the Rules of Professional Conduct (prohibiting interests adverse to a client); and (6) the addendum did not violate Rule 4-200 of the Rules of Professional Conduct (prohibiting an unconscionable fee). In addition, at this initial phase of the litigation, the judge was asked to determine whether the 2009 and 2010 orders by Judge Recana on A.M.'s petitions for minor's compromise were valid and, if not, whether A.M. was equitably estopped from seeking disgorgement of attorney fees.

At the conclusion of the court trial, the trial judge issued a 24-page statement of decision. In that decision, the judge ruled that the original retainer agreement and fee split agreements between A.M. and Lieff Cabraser were legally permissible and did not violate any statute or Rule of Professional Conduct. The court rejected A.M.'s arguments that a conflict existed that precluded Lieff Cabraser's joint representation of the Mraz family and that A.M. could disaffirm the contracts. The judge also rejected A.M.'s contention that these agreements did not comply with the Family Code and the Rules of Professional Conduct. Rather, compliance with Family Code section 6602 was satisfied upon the successful motion for minor's compromise and was not required to be submitted to the court at an earlier time.

The judge, however, invalidated the 2009 addendum to the original retainer and fee split agreement providing Lieff Cabraser with an additional contingent percentage of seven percent in

exchange for its appellate advocacy because it failed to comply with Business and Professions Code section 6147. A failure to comply with that provision renders the addendum voidable at the option of the plaintiff, but "the attorney shall thereupon be entitled to collect a reasonable fee." After that ruling, the court declined to order any disgorgement or reimbursement of the attorney fees earned for Lieff Cabraser's appellate work on the case. As the trial judge noted, "[A.M.] has failed to demonstrate that she was damaged by any attorney misconduct[,] or that defendant failed to perform under any agreement with her[,] or that she paid an unreasonable fee. Without more, disgorgement is not an appropriate remedy. The type of failures described here and at length in the court's statement of decision do not act to strip defendant of its fees; however, it may call for the fee's approval under a theory of quantum meruit if warranted." In addition, the court noted, "[h]ere it is clear that the plaintiff received services which were performed for a fee and not gratuitously. The multiple fee agreements, the minor's compromise material, and the other evidence clearly establishes that fact. Furthermore, plaintiff did benefit from defendant's services, did receive 2.5 million and did agree to pay what appears to be a reasonable fee."

With regard to the minor's compromise issues, the judge found that the 2009 order on the petition for minor's compromise was void because it was heard and decided in the trial court, not in the court of appeal. In so concluding, the judge rejected Lieff Cabraser's argument that the rule articulated in *Anderson v. Latimer* (1985) 166 Cal.App.3d 667 (*Anderson*) did not apply where, as here, the action seeking disgorgement of attorney fees and costs included in that petition was collateral to the judgment.

The trial judge also declined to allow the 2010 order issued on a second-submitted petition for minor's compromise—filed after the appeal was dismissed and the jurisdiction over the case was returned to the trial court—to cure any deficiencies in the 2009 order. And finally, the judge rejected Lieff Cabraser's contention that A.M., by accepting the payment of monies under the 2009 and 2010 orders, was equitably estopped from complaining regarding only one aspect of those orders, *i.e.*, the payment of A.M.'s portion of Lieff Cabraser's attorney fees.

Given these rulings, after the conclusion of the first bifurcated proceeding, the judge allowed Lieff Cabraser to amend its answer to the third amended complaint to allege an affirmative defense under quantum meruit. As noted in its first ruling, the court did not intend to strip the firm of its fees by invalidating the 2009 addendum regarding attorneys fees for appellate work; rather, that decision might call for the fee's approval under quantum meruit. And, as the court reasoned, until its ruling on the 2009 addendum, Lieff Cabraser could not have filed a lawsuit requesting its fees when it already had those fees in its possession.

The second trial, before a jury, presented A.M.'s claims that Lieff Cabraser negligently performed its professional duties with regard to her settlement and breached its fiduciary duty. In addition, the jury was asked to decide a common count cause of action for the money paid "by mistake" to Lieff Cabraser for attorney fees and costs. During the presentation of evidence on this count, A.M. was allowed to submit to the jury "all of the . . . ethical breaches that do justify . . . disgorgement . . . ."

After a lengthy trial, the jury reached a verdict. The jury found Lieff Cabraser had not breached its standard of care

owed to A.M. It also found Lieff Cabraser had not breached its fiduciary duty to her. The jury concluded, however, that A.M. had paid Lieff Cabraser "money by mistake" and, for that reason, the fees paid to the firm for the work it performed on her behalf should be reduced. The jury fixed that amount at $400,000. This verdict essentially required Lieff Cabraser to disgorge a portion of the fees it earned in the Chrysler litigation.

After the jury returned its verdict, the court held a hearing on A.M.'s unfair competition cause of action and returned a verdict in Lieff Cabraser's favor. In ruling on that claim, the court considered the testimony and other evidence offered at the jury trial. In his statement of decision, the judge found the equities weighed in favor of Lieff Cabraser. And—while noting that mistakes were made during the course of the representation—the court concluded that these mistakes did not support the disgorgement of reasonable attorney fees.

"Plaintiff, in fact, got exactly what she bargained for. Plaintiff obtained a substantial settlement under difficult circumstances and paid a reasonable fee for that settlement. This Court found in the first phase of the trial in August 2015 that the fees were not unconscionable and were reasonable. Now, with a fuller record on the issue, nothing in this phase of the trial alters the Court's earlier view." Accordingly, the court entered a verdict in favor of Lieff Cabraser on A.M.'s Business and Professions Code section 17200 cause of action.

A.M. filed post-trial motions to set aside the judgment, for a new trial, and for judgment notwithstanding the verdict. In addition, A.M. sought an order directing Lieff Cabraser to pay reasonable expenses incurred in proving the truth of 22 requests for admission. The judge denied the motions to set

aside, for judgment notwithstanding the verdict, and for a new trial. The judge also partially denied A.M.'s motion relating to the requests for admission. Specifically, the court found Lieff Cabraser had good reason to object and answer in the way it did to all but three of the 22 requests at issue. Accordingly, the judge awarded A.M. $10,275.

Lieff Cabraser also filed a motion for judgment notwithstanding the verdict on the ground that the jury's verdict on the common count was erroneous as a matter of law. The court denied that motion.

ISSUES PRESENTED ON APPEAL AND ON CROSS-APPEAL

A. *A.M.'s Appeal*

A.M.'s first claim—captioned under a "catch-all" request to "Reverse, Remand, and Order the Trial Court to Enter Judgment for A.M. in the Amount of $1,611,277"—rests on her contention that, as a matter of law, Lieff Cabraser cannot keep any of the attorney fees it earned based on a number of reasons. She asserts the fee agreements underlying Lieff Cabraser's retention must be set aside as illegal. She also argues that—because the trial court found the 2009 minor's compromise order void and the 2010 minor's compromise order unable to cure that void order—she is entitled to have the $1,611,277 in attorney fees and costs awarded to Lieff Cabraser under those orders disgorged and returned to her. A.M. also contends that, for the same reason, the jury erred in finding only $400,000 in mistaken payments under the common count.

In addition, A.M. argues this court should order the trial court to award pre-judgment interest. She also asserts that, as a matter of law, Lieff Cabraser was negligent and the trial court

must conduct a new trial to determine damages. A.M. further contends the trial court erred in denying her motion to file a fourth amended complaint. And, finally, A.M. appeals the denial, in part, of her motion for attorney fees and costs incurred in proving up certain requests for admission.

B. ***Lieff Cabraser's Cross-Appeal***

Similarly—but from the opposite perspective—Lieff Cabraser questions the trial court's ruling regarding the validity of the 2009 and 2010 minor's compromise orders. Lieff Cabraser, however, challenges the judge's decision that Judge Recana lacked fundamental jurisdiction in 2009 to decide Lieff Cabraser's fees and costs as part of the petition for minor's compromise. While Judge Recana's 2009 order may have been in excess of his jurisdiction, that fact does not render the orders made at that time void *ab initio*. Lieff Cabraser also contends that, even if the 2009 petition were filed in the wrong court, the trial judge erred in concluding that the 2010 petition and order for minor's compromise did not cure this defect. In addition, Lieff Cabraser argues the trial judge erred in rejecting its equitable estoppel argument and in allowing A.M. to challenge the validity of the 2009 order in a separate collateral action six years later.

Lieff Cabraser appeals the jury's verdict on the common count claim, contending it is erroneous as a matter of law because Lieff Cabraser defeated A.M.'s claims of negligence and breach of fiduciary duty. As a common count must "stand or fall on the viability of the plaintiff's other claims," the verdict on this count is inconsistent and fails.

DISCUSSION

A. *Standards of Review*

A.M.'s contention that the Naylor Retainer and the Fee-Split Agreement were unenforceable because they violate the Family Code and the Rules of Professional Conduct raises an issue of law that we decide de novo. (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1126.)

We review A.M.'s contention that the court erred in denying her motion to file a fourth amended complaint under an abuse of discretion standard. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.) That same appellate standard applies to A.M.'s claim of error with regard to the trial court's ruling on the discovery sanctions sought based on Lieff Cabraser's responses to 22 requests for admission. (*Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447, 1454.)

A.M.'s entitlement to the return of Lieff Cabraser's attorney fees and costs in the amount of $1,611,127 due to the invalidity of the minor's compromise orders was adjudicated by the trial court and rejected. Whether the 2009 and 2010 orders were void and therefore the attorney fees and costs paid to Lieff Cabraser ought to have been disgorged are legal questions subject to de novo review.

A.M.'s claim of error in the jury's conclusion that Lieff Cabraser was not negligent is subject to a sufficiency of the evidence standard of review on appeal. (*Multani v. Knight* (2018) 23 Cal.App.5th 837, 857.)

Lieff Cabraser's cross-appeal presents a number of claims regarding the proper application of the law. Whether the 2009 and 2010 orders on the petition for minor's compromise were void, as stated above, is a question of law. If, as actions taken

in excess of jurisdiction, these orders are subject to collateral attack, that also presents a legal question subject to de novo review. And, Lieff Cabraser's argument that a judgment based on a common count for mistake is legally impermissible in light of the jury's verdict on A.M.'s malpractice and breach of fiduciary duty claims is subject to de novo review.

B. *Analysis*

While somewhat difficult to disaggregate, the following claims have been asserted in the appeal and cross-appeal. We consider each of them in turn.

1. *The Validity of A.M.'s 2009 Order for Minor's Compromise*

Both A.M. and Lieff Cabraser question whether the trial court properly decided the validity and enforceability of Judge Recana's 2009 minor's compromise order.

A.M. asserts the judge's ruling was correct, but, as a result, she is entitled to the disgorgement of the $1.6 million in attorney fees and costs authorized by that order. The court's failure to require Lieff Cabraser to disgorge those fees given this void order is—according to A.M.—legal error.

Lieff Cabraser argues that the order—while arguably in excess of the trial court's jurisdiction—is not void. And, even if arguably voidable because it was done in excess of the trial court's jurisdiction, the 2009 order and the attorney fee award it authorized cannot be challenged by way of a collateral lawsuit brought years after the order could have been appealed. Further, Lieff Cabraser argues that, even if the 2009 order is defective because it was filed in the wrong court, Judge Recana's 2010 order of minor's compromise expressly and independently authorized the award of over $10 million in attorney fees and

costs (including that portion of Lieff Cabraser's fees and costs at issue here) and therefore cured any defect in the 2009 order.

In *Anderson*, *supra*, 166 Cal.App.3d 667, a passenger injured in an automobile accident sued both drivers, Anderson and Latimer. (*Id*. at pp. 669-670.) The trial centered on each defendant's respective liability. (*Id*. at p. 672, fn. 1.) The jury found both defendants equally at fault. (*Id*. at p. 670.) Anderson appealed and Latimer cross-appealed. While the appeal was pending, Latimer and the passenger, who was a minor, settled. The minor then filed a petition for minor's compromise in the trial court. The trial judge initially entered an order compromising the minor's claim subject to the court of appeal finding the settlement in good faith under Code of Civil Procedure section 877.6. (*Anderson*, at pp. 675-676.) Before the court of appeal ruled, the trial court—on its own motion—declared the order approving the minor's compromise invalid. (*Id*. at p. 676, fn. 13.) Cross-appellant Latimer then petitioned for a writ of mandate directing the trial court to approve a petition for minor's compromise and to find the compromise settlement to be one in good faith within the meaning of section 877.6. (*Anderson*, at p. 675.) The Court of Appeal declined to grant the writ. Because the case was not pending in the trial court at the time of the petition for minor's compromise, the trial court could not proceed. And, as there never was a valid approval of the minor's compromise, no legal settlement could exist and therefore no determination of good faith settlement could be entered. (*Id.* at p. 676.)

In this case, the trial judge, citing *Anderson*, concluded the trial court lacked jurisdiction to hear and decide A.M.'s 2009 petition for minor's compromise and therefore the order was void

ab initio. The first issue presented in this appeal and cross-appeal is whether that ruling was correct as a matter of law.

In *Anderson,* the court set out the way in which petitions for minor's compromise should be addressed when a case is on appeal. As noted in *Anderson*, *supra*, 166 Cal.App.3d at p. 676, if parties to an action then pending on appeal desire to compromise a minor's claim under Code of Civil Procedure section 372, it must be done by a petition filed in the appellate court. The appellate court then either (1) approves or disapproves of the compromise forthwith or (2) refers the matter to the trial court for a report and receives a report back from the trial court, and then the appellate court approves or disapproves the compromise. (*Anderson*, at p. 677.) In any event the appellate court—not the trial court—approves or disapproves the compromise of the minor's claim when the action is pending on appeal. (*Id*. at pp. 676-677.)

It is undisputed that the parties did not follow the *Anderson* procedure in this case. But the challenge to the petition for minor's compromise in this case—unlike in *Anderson* —was not raised while the appeal was still pending. Rather, here, A.M. waited years after the 2009 order had been issued to allege that the court's 2009 order was void. The question presented here is not whether the parties ought to have submitted the petition in 2009 to the Court of Appeal and not the trial judge, but rather whether, at this juncture, the parties' failure to comply with *Anderson* renders the 2009 order void *ab initio*.

To answer that question requires a consideration of additional authority on the subject of jurisdiction. " 'The term "jurisdiction," "used continuously in a variety of situations, has so

many different meanings that no single statement can be entirely satisfactory as a definition.' ' " (*County of Los Angeles v. Harco National Ins. Co.* (2006) 144 Cal.App.4th 656, 661 (*Harco*).)

> " 'Essentially, jurisdictional errors are of two types. "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." [Citation.] When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and "thus vulnerable to direct or collateral attack at any time." [Citation.]
>
> " 'However, "in its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations." [Citation.] It may also "be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." [Citation.] " '[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.' " [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and

> a party may be precluded from setting it aside by "principles of estoppel, disfavor of collateral attack or res judicata." [Citation.] Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final unless "unusual circumstances were present which prevented an earlier and more appropriate attack." ' "

(*Harco*, *supra*, 144 Cal.App.4th at pp. 661-662; *see also People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 661 (*American Contractors*).)

To determine whether a particular order is void or voidable, it is necessary to look first to the language of the statute. (*American Contractors*, *supra*, 33 Cal.4th at p. 661.) In this case, the 2009 petition for minor's compromise was based on Code of Civil Procedure section 372. Under subdivision (a), a guardian *ad litem* shall have power—with the approval of the court in which the action or proceeding is pending—to compromise the claim. (Code Civ. Proc., § 372, subd. (a)(1).)

Unlike *Anderson*, in this case it is not at all clear in which court the minor's portion of the case was "pending." At the time of the 2009 order, the Chrysler bankruptcy court had stayed the appeal, thus depriving the appellate court of its ability to act independently. The bankruptcy court had lifted the stay for oral argument in the Court of Appeal, but not for any other action. In light of this limitation, the Court of Appeal declined the parties' request to schedule oral argument. The bankruptcy court

also lifted the stay for purposes of mediation. The Mraz family then settled the entire action with Chrysler at mediation. The terms of the settlement required Safeco to pay $24 million by October 5, 2009 directly into the Lieff Cabraser trust account. Those were the settlement terms submitted to the bankruptcy court for its approval. At that point, although an appeal had been briefed, it was stayed and incapable of being litigated. Under the unique facts of this case, we cannot conclude that the case was "pending" in the Court of Appeal when the 2009 minor's compromise order was entered. Arguably, once the bankruptcy court approved the stipulated settlement—more than two weeks before Judge Recana held a hearing on the petition for minor's compromise—the appeal was entirely moot.

Confusing jurisdictional problems of the type presented in this appeal generally have not been held to render a court order void when challenged in a collateral action. For example, in *Harco*, *supra*, 144 Cal.App.4th 656, an insurance company posted bail and then later tried collaterally to attack a forfeiture order when the defendant failed to appear. The trial court ordered the bond forfeited, but six months later the company moved for an extension of time to surrender the defendant. (*Id.* at p. 658.) Two months later, the trial court granted summary judgment on the bond in the county's favor. Rather than appeal the summary judgment, the company moved to vacate the forfeiture and set aside the judgment. That motion was made to a different superior court judge. (*Id.* at pp. 658-659.) The company argued the first judge lacked jurisdiction to grant summary judgment because she had waited too long after entering the forfeiture order. (*Id.* at pp. 659-660.) The new judge denied the motion as impermissibly asking one judge of equal

jurisdiction to review another. In affirming, the Court of Appeal rejected the argument that the first judge had waited too long to enter summary judgment. (*Id.* at pp. 660-662.) Noting the company itself had invoked jurisdiction by moving for an extension of time, the Court of Appeal held the first judge had acted in excess of jurisdiction, but that ruling ought to have been challenged "directly on appeal, rather than by way of collateral attack after the judgment was final." (*Id.* at p. 662.)

As in *Harco*, Judge Recana did not lack jurisdiction over the parties to the 2009 minor's compromise petition in the fundamental sense. He possessed authority over the subject matter and the parties. The statutory provision requiring the petition to be brought in the court in which the action was "pending" was satisfied, as the bankruptcy stay precluded the exercise of appellate court jurisdiction over this case. The parties, including A.M., were on notice and had been litigating the case for years. A.M., through her mother Adriana, submitted herself to the jurisdiction of the trial court and was present for the 2009 hearing on the petition.

As in *Harco*, A.M., through her attorneys, filed the 2009 petition for minor's compromise in the superior court, despite knowing the case had been appealed.[3] "[A] litigant who has

---

[3] Not only did A.M. petition for the 2009 order from Judge Recana, she thereafter manifested an intention to treat it as valid. (Cf. *County of Los Angeles v. Ranger Ins. Co.* (1999) 70 Cal.App.4th 10, 18 (*Ranger*).) A.M. accepted the $2.5 million and she relied on the 2009 order to distribute the remaining millions from the Chrysler/Safeco settlement to the other members of her family. Even now, her request does not seek to set aside the entire 2009 order. She does not, for example,

stipulated or otherwise consented to a procedure in excess of jurisdiction may be estopped to question it." (*People v. Bankers Ins. Co.* (2010) 182 Cal.App.4th 1377, 1385, citing *People v. National Automobile & Casualty Ins. Co.* (2000) 82 Cal.App.4th 120, 126.) Where, as here, a party has full notice of an order that she participated in obtaining, later objections should not be allowed. To grant relief in such instances would " 'impair another person's substantial interest of reliance on the judgment.' " (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1229.)

As in *Harco,* any objections by the parties to Judge Recana's exercise of his authority in excess of jurisdiction in 2009 could have been challenged directly on appeal. (*See, e.g., Curtis v. Estate of Fagan* (2000) 82 Cal.App.4th 270.) Had A.M. presented this question by way of a timely appeal, it could easily have been corrected, as in *Anderson*. A voidable judgment must be challenged while the Court of Appeal can still correct the mistake. (*American Contractors, supra,* 33 Cal.4th at p. 665.)

In *Ranger*, *supra*, 70 Cal.App.4th 10, a bail bond insurer asked the trial court to delay judgment on a forfeiture order after the defendant failed to appear for a court appearance. The court then tolled the statutory deadlines to vacate or enter judgment on the forfeiture order. (*Id*. at p. 13.) Months passed and when the company still was unable to produce the defendant, the county moved for judgment of forfeiture on the bond. (*Id*. at pp. 14-15.) The insurer then claimed the statutory deadline to enter that judgment had passed and that the court's tolling order was void

---

challenge the $3.3 million in fees and costs approved under that order for Naylor, her other attorney.

because it lacked jurisdiction. (*Id.* at p. 15.) Finding the insurer equitably estopped, the Court of Appeal held:

> "When, as here, the court has jurisdiction of the subject, a party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. . . . A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when '[t]o hold otherwise would permit the parties to trifle with the courts.' "

(*Id.* at p. 18.)

A.M. does not suggest that any exceptional circumstance prevented her from appealing Judge Recana's 2009 ruling in a timely fashion. (See *American Contractors, supra,* 33 Cal.4th at p. 663.) Although A.M. asserts she had no knowledge that the 2009 order had been filed in the wrong court until she hired counsel, the record shows that malpractice counsel was hired sometime before November 10, 2009—while the underlying case was still pending before Judge Recana.

Thus, the trial court erred as a matter of law in concluding, as part of A.M.'s collateral attack, that the 2009 order of minor's compromise was void *ab initio*.

2. *The Validity of A.M.'s 2010 Order for Minor's Compromise*

Even if this court were to conclude that the 2009 order for minor's compromise was void and therefore invalid, there is a second basis upon which to find the trial court validly approved

the fees awarded to Lieff Cabraser for its representation of A.M. That the trial court declined to do so constitutes legal error.

In this instance, A.M. submitted a second petition for minor's compromise in 2010. In that petition, A.M. sought, inter alia, to amend her prior request for a structured settlement into one authorizing a lump sum payment into a blocked account.[4] That request necessarily and explicitly incorporated all of the requests previously made to and approved by the trial court. Specifically, the petition expressly set out the total amount of the settlement obtained as a result of the wrongful death of Richard Mraz. It further stated the bonding company, Safeco, had agreed to pay that amount in exchange for a release of all claims raised or potentially raised in the action. The petition then sought approval for the payment of $10,902,867.16 in attorney fees and all other expenses, and included, as Attachment 14a, a declaration explaining the basis for that request. Attachment 14a is a declaration from Scott Nealey of Lieff Cabraser setting out that firm's work in obtaining the judgment and in then securing a settlement following the Chrysler bankruptcy. Attachment 12b further set out the manner in which the settlement and allocation of fees and costs had been computed, including the entire 47 percent contingency fee provided for in this case. As part of Attachment 14b, Lieff Cabraser set out the costs incurred and the allocation of costs among A.M.'s various lawyers. As part of Attachment 18a, the petition included the retainer agreement between Adriana

---

[4] The 2010 order was entered after the appeal was dismissed, so there can be no argument that this ruling was made in excess of the trial court's jurisdiction.

and Charles Naylor and the addendum to that agreement for purposes of appellate representation.

In considering whether the 2010 order cured any jurisdictional defect that may have attached to the 2009 order, the trial judge in this case found the cursory language of the 2010 order granting the petition for minor's compromise did not authorize the payment of attorney fees to Lieff Cabraser. Citing Probate Code section 3500, the trial court concluded the order issued by Judge Recana on a second occasion did not reflect the approval of Lieff Cabraser's fees or costs. "That order does not contain the 'imprimatur' of the trial court's approval of [ ] Lieff Cabraser's fees and costs."

A court order is interpreted under the same rules for interpreting writings in general. (*Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 Cal.App.3d 1406, 1414.) The language of a writing governs if it is clear and explicit, but where—as here—it "is susceptible to two interpretations, the court should give the construction that will make the [writing] lawful, operative, definite, reasonable and capable of being carried into effect and avoid an interpretation which will make the [writing] extraordinary, harsh, unjust, inequitable or which would result in absurdity." (*Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730.) Subsequent actions by the rendering judge may be considered as bearing upon the judgment's intended meaning and effect. (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 989.)

Here, the trial court interpreted the 2010 order on minor's compromise in a way that not only was unjust and inequitable, but also made it incapable of meeting the statutory requirements for such orders. The trial court's narrow reading ignored the

information provided by and the relief sought by the petition for minor's compromise A.M. submitted. Judge Recana could not have approved placement of A.M.'s settlement funds in trust in 2010 without also approving the entire $2.5 million settlement of that action and the attorney fees and costs associated with that settlement, including, necessarily, Lieff Cabraser's. Under Civil Procedure Code section 372 and Probate Code section 3500 et seq., the petition must contain a full disclosure of all information that has any bearing on the reasonableness of the compromise, covenant, settlement, or disposition. The amount of all of the attorney fees and costs being sought and approved by the trial court in 2010 was expressly included in the petition and was provided to permit Judge Recana to determine whether the amount allocated to the minor was fair and reasonable. As called for by the Probate Code, any order "shall" also "approve" the payment of reasonable expenses, including attorney fees and costs. (Prob. Code, § 3601.) This mandatory requirement of all such orders necessarily informs the scope and interpretation of Judge Recana's order here. Judge Recana's 2010 order should be read to comply with the requirements of the Probate Code, *i.e.,* approving the proposed distribution of the proceeds of the entire $24 million settlement, including those sums owing to Lieff Cabraser. Even though Judge Recana later declined to grant Lieff Cabraser's motion to correct clerical errors in that order, [5] the intent of the parties and the information contained

---

[5] In that hearing, Judge Recana noted there was nothing to correct in his 2010 order because Lieff Cabraser had retained the fees that had been awarded and paid to it. "So you're telling me to confirm an act that has been performed?" Further, Judge Recana's response when told he did not have jurisdiction in 2009

in the 2010 petition support the conclusion that this order authorized and approved the payment of Lieff Cabraser's attorney fees and costs.

To construe this order otherwise would result in a harsh and inequitable outcome. Lieff Cabraser—unaware of a later-claimed defect in the 2009 order upon which everyone was relying—would never have seen the need to have its award specifically mentioned in the 2010 order. Yet, that omission is being held—five years later—to deprive it of its right to its fees flowing from a bargain from which, according to the trial judge, A.M. received her full measure. Moreover, an order necessarily addresses and rules upon the various requests contained in the petition without having to restate each of them. To require otherwise would result in long, duplicative, and unnecessarily verbose court orders.

We therefore reverse the trial court's ruling finding the 2010 order invalid. That order cured any arguable jurisdictional shortcomings in the 2009 award of attorney fees and costs to Lieff Cabraser arising from its representation of A.M. Given that both the 2009 and 2010 orders for minor's compromise provide a lawful basis upon which Lieff Cabraser received its attorney fees

---

was, "Well, I don't know about that." And, given that the Court of Appeal had not so ruled, he was not entirely convinced by the fact that another of his colleagues had ruled otherwise. "With due respect, he's on his own, I'm on my own." Throughout the hearing, Judge Recana expressed concern that changing the order might affect the pending malpractice case.

and costs, the trial court correctly declined to order the disgorgement of those monies.[6]

3. *Substantial Evidence Supports the Verdict on the Malpractice Claim*

Substantial evidence in the record supports the jury's verdict that Lieff Cabraser did not breach the standard of care with regard to the structuring of A.M.'s settlement. As Adriana admitted at trial, she never told Lieff Cabraser before the mediation that the settlement was conditioned on a structured settlement. Corroborating that testimony is the term sheet itself, which makes no mention of a structured settlement.[7] In fact, there was substantial evidence that Adriana did not make a

---

[6] As A.M. was not entitled to the disgorgement of the Lieff Cabraser attorney fees and costs and is therefore not entitled to $1,611,227 as a matter of law, her claim for prejudgment interest also fails.

[7] It was not an abuse of discretion for the trial judge to admit the term sheet over A.M.'s evidentiary objections at trial. (*See Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 446-447.) A.M. sought to exclude the term sheet from evidence arguing that it was subject to the mediation privilege. The trial judge denied the *in limine* motion. The term sheet included language stating it was subject to disclosure outside of mediation. Evidence Code section 1123 permits admission of written settlements made at mediation if the agreement provides it is subject to disclosure "or words to that effect." Here, the trial judge concluded the parties intended the term sheet to be disclosed to the bankruptcy court in order to obtain its approval of the settlement. In fact, the stipulation that was later filed and approved by the bankruptcy court tracked and disclosed the same terms set forth on the term sheet.

final decision to structure her daughter's settlement until after the bankruptcy court had approved the terms of the settlement, which tracked the term sheet and did not provide for a structured settlement for A.M. Moreover, Adriana signed under penalty of perjury the original September 30, 2009 petition for minor's compromise that called only for a blocked account. In that petition, Adriana admitted she had consulted with tax advisors to understand the potential tax liability associated with a lump sum payment and had investigated the best methods for investing the funds in a manner that maximized recovery to the minor claimant.

Given the substantial evidence of delay in Adriana's decision to try to structure the settlement, the jury could have concluded that it was neither feasible nor strategic to negotiate at mediation for a hypothetical structured settlement. Thus, Lieff Cabraser's decision not to interject this issue into the bankruptcy court approval process cannot be considered to have fallen below the standard of care.

Substantial evidence also supported a conclusion by the jury that Lieff Cabraser did not fall below the standard of care in failing to stop Safeco from wiring the settlement funds into the trust account. Despite Lieff Cabraser's explicit instructions directing Safeco's counsel as to where to send the settlement funds, Safeco wired the funds to Lieff Cabraser. Nor did that fact mean A.M. was in either actual or constructive receipt of those funds. There was ample evidence upon which the jury could conclude A.M. was not in actual or constructive receipt of those funds until they were transferred to her trust in 2010.

Finally, there was substantial evidence that the real impediment to a structured settlement for A.M. was Safeco,

not Lieff Cabraser. Safeco's unwillingness to expose itself to even the remote potential of having to make periodic payments in the future was the ultimate obstacle to a structured settlement for A.M. Without Safeco's cooperation, it was impossible for any lawyer to have obtained a structured settlement for A.M.

Although A.M. asserts that Lieff Cabraser's negligence must be found as a matter of law, the question of a defendant's negligence is—except in the rarest of circumstances—a question of fact for the jury. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 971.) "A defendant's negligence may be determined as a matter of law only if reasonable jurors following the law could draw only one conclusion from the evidence presented." (*Ibid.*) In this case, reasonable jurors could readily draw more than one conclusion from the facts presented, and reasonable minds could readily differ as to whether the attorneys breached the standard of care. The appellate standard of review in this case, therefore, is not de novo but instead whether substantial evidence supports the jury's verdict in favor of Lieff Cabraser. We conclude it does and affirm that judgment.

4. *Substantial Evidence Supports the Court's Fee Agreement Rulings*

Before trial on the malpractice claims commenced, the parties requested that the trial court render a number of factual determinations regarding the fee agreements at issue in this case. The trial court rejected A.M.'s argument that the fee agreements here were void because they did not comply with Family Code section 6602. The trial court also ruled that the Naylor contingency fee agreement was not void and that there was no conflict of interest that would have required a waiver under rule 3-310(C) of the Rules of Professional Conduct. In

addition, the trial court ruled the fee split agreement and the Naylor contingency fee agreement complied with Business and Professions Code section 6147. The trial judge also ruled that the fee split agreement was enforceable against A.M. even though a court order appointing Adriana as guardian ad litem did not take place until litigation was filed. The trial court declined to read a paragraph of the fee split agreement to limit A.M.'s ability to hold Lieff Cabraser accountable for professional malpractice. Thus, it did not violate rule 3-400 of the Rules of Professional Conduct. Finally, the trial court found that the fees Lieff Cabraser obtained were not unconscionable, either as a matter of fact or as a matter of law. "[T]his court would again find the amounts reasonable."

However, the trial court found that the 2009 addendum to the original agreements did not comply with Business and Professions Code section 6147. Reasoning that, because the addendum contained "material modifications" to the original agreements, the trial court held it was "void for failure to comply with the directives of Section 6147."[8] Lieff Cabraser does not appeal that determination.

There is substantial evidence in the record to support the trial judge's rulings regarding the Naylor contingency and the fee splitting agreements. The court properly construed Family Code section 6602 to allow for attorney fees to be approved

---

[8] The trial court did not, however, order disgorgement of the percentage of fees allocated to A.M.'s appeal, nor does it appear that any claim of mistake rested upon that small percentage. The $400,000 jury award in A.M.'s favor cannot be supported by an arithmetic application of this small percentage to A.M.'s claim, nor does A.M. ask us to so find on appeal.

sometime after a fee agreement is entered into but before the approval of any settlement amount. In this case, the required statutory approval for these fee agreements was obtained as part of the APL settlement and 2006 minor's compromise order. There was substantial evidence adduced from which the court could hold that the Naylor contingency agreement complied with Business and Professions Code section 6147 and that the fee split agreement was not a material modification to the underlying contingency agreement. As a non-material modification, the fee splitting agreement did not have to comply with section 6147. The fee splitting agreement did not change the contingency fee; rather it simply set forth the conditions under which the fee would be split and assigned the amounts. There is also substantial evidence in the record supporting the trial judge's conclusion that these fee agreements did not violate the Rules of Professional Conduct. The fees obtained were not unconscionable; in fact they were reasonable. They were not void because Adriana later obtained guardian ad litem status when the case was filed and, thereby, complied with rule 2-200(A)(1) of the Rules of Professional Conduct. There was no term in the fee splitting agreement that precluded any plaintiff from holding Lieff Cabraser liable for professional malpractice; thus rule 3-400(A) was not violated. And, there was substantial evidence upon which the judge could conclude it was not necessary to obtain a conflict of interest waiver; therefore, a claim for violation of rule 3-310(C) could not be made.

As supported by substantial evidence in the record, A.M.'s varied claims of error cannot stand.

5. *Substantial Evidence Does Not Support a Verdict on Common Count*

On appeal, Lieff Cabraser argues the jury's verdict on the common count claim cannot stand as a matter of law because A.M. lost her substantive claims for professional negligence and breach of fiduciary duty. "A common count is not a specific cause of action . . .; rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394.) Thus, when "a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action," and the specific cause of action fails, then the common count must also fail as a matter of law. (*Ibid.*; *see also Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1559-1560.)

What "mistake" was it that A.M. claimed had been made? While A.M. ascribes the $400,000 award to some sort of reduction by the jury based on Lieff Cabraser's claim of quantum meruit, she cites only to the testimony of Christine Spagnoli, Lieff Cabraser's expert, as substantial evidence to support that verdict. That testimony, however, provides no support for this $400,000 award. Spagnoli testified the entire amount of fees Lieff Cabraser earned from its representation of A.M. was reasonable. She made no attempt to relate any aspect of that representation to—for example—the appellate portion of Lieff Cabraser's representation, or the aspect of that representation relating to the failed efforts at structuring A.M.'s settlement. Nor does a review of that testimony disclose any methodology by which

the jury could have apportioned or assigned a $400,000 discount to some "mistake" by Lieff Cabraser other than that claimed to have constituted professional negligence and breach of fiduciary duty. In fact, in the complaint, the common count incorporates by reference the allegations supporting those other two causes of action. As A.M. did not allege, or prove, any new, different, or additional conduct by Lieff Cabraser to support her common count for "mistake" or quantify how that mistake came to $400,000, the verdict is unsupported by substantial evidence in the record.[9]

A.M. further asserts that, even if the jury erred with regard to the common count, Lieff Cabraser invited this error and cannot complain. Specifically, A.M. argues the agreed-upon jury instructions, although erroneous, preclude Lieff Cabraser from asserting it as a ground for reversal on appeal. The jury instructions in this case explained that the money sought in the common count is the money paid to Lieff Cabraser in attorney fees and costs. And then a further clarifying instruction told the jury that the money sought in the common count was the money paid to Lieff Cabraser in attorney fees and costs and the jury "need[ed] to determine if the plaintiff is entitled to none, some or all of that money."

These agreed-upon clarifications, however, do not constitute invited error. As shown in the trial court record, Lieff Cabraser asserted its objections to the common count of

---

[9] The trial court excluded the statements made by Lieff Cabraser at the 2010 hearing on the petition for minor's compromise under *Loube v. Loube* (1998) 64 Cal.App.4th 421, 428. Excluded evidence cannot be considered on appeal to support the common count.

mistake being submitted to the jury on a number of occasions. Lieff Cabraser also objected to the judge giving the common count jury instruction. Once the judge decided to provide that instruction, it is not invited error for Lieff Cabraser to attempt to clarify it to the jury. The doctrine of invited error does not apply when a party proceeds in accordance with an adverse ruling to which an objection was lodged. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213.)

As the common count claim of mistake was wholly dependent upon the remaining causes of action for professional negligence and breach of fiduciary duty, when those failed, so too did the common count.

6. *The Rulings on the Motion to Amend and the Discovery Sanctions Were Not an Abuse of Discretion*

A.M.'s final objections arise from (a) the decision by the trial court to deny her leave to file a fourth amended complaint; and (b) the decision by the trial court to decline to impose sanctions for certain answers provided by Lieff Cabraser in response to 22 of A.M.'s requests for admission.

A.M. brought a late motion to amend. The proposed fourth amended complaint included Allison's allegations relating to the invalidity of the fee agreements and the unenforceability of the 2009 and 2010 minor's compromise orders. Although the judge denied the motion to amend as it was late in the history of the case, close to trial, and would have prejudiced the defendant, the trial judge allowed many of the factual allegations to be asserted in support of the then-pled causes of action for professional negligence, breach of fiduciary duty, and the common count of "mistake." Given the lateness of the proposed amendment and its prejudicial effect, the trial court properly

denied the motion. (*See Atkinson v. Elk Corp*. (2003) 109 Cal.App.4th 739, 761.)

A.M. also complains about the judge's ruling allowing sanctions for only three of the 22 requests for admission objected to by Lieff Cabraser. Under Code of Civil Procedure section 2033.420, subdivision (b), sanctions may not be imposed if there is any other "good reason" for the failure to admit. In this case, the judge noted that, with the exception of three responses, there were good reasons for Lieff Cabraser to answer as it did. Having considered the voluminous briefs and the answers provided to the 22 requests for admission in light of the entirety of the proceeding, the trial judge did not abuse his discretion in ruling as he did. Nor does A.M. provide any specific support for that claim. It is not an abuse of discretion simply because she does not agree with the ruling.

DISPOSITION

The judgment in favor of appellant is reversed and the matter is remanded to the trial court with instructions to enter a new judgment for Lieff Cabraser on the common count. At Lieff Cabraser's request, the appeal from the order in B269624 is dismissed. In all other respects, the judgment and orders are affirmed. Lieff Cabraser shall recover its costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JONES, J.*

We concur:

LAVIN, Acting P. J.

EGERTON, J.

---

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