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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

DIONNE COOPER et al., Plaintiffs and Appellants, v. FARMERS INSURANCE EXCHANGE, Defendant and Respondent.	B292019 (Los Angeles County Super. Ct. No. BC538151)

APPEAL from a judgment of the Los Angeles County Superior Court, Michelle Williams Court, Judge. Affirmed.

Gemmill Baldridge & Yguico and William P. Gemmill for Plaintiffs and Appellants.

Woolls Peer Dollinger & Scher, H. Douglas Galt and Gregory B. Scher for Defendant and Respondent.

Dionne Cooper and her daughter, Chelsea,[1] appeal from a judgment entered in favor of Dionne's automobile insurance provider, Farmers Insurance Exchange (Farmers), on their causes of action for breach of contract and breach of the covenant of good faith and fair dealing. This case arose out of a rear-end collision in which an uninsured driver drove into Dionne's car, injuring Dionne and Chelsea. Farmers promptly paid for the loss of the vehicle, but did not pay other damages until an arbitrator issued a ruling awarding $19,987.60 to Dionne and $16,771.60 to Chelsea seven years after the Coopers first submitted their claim.

After a bench trial, the trial court found Farmers neither breached its contract with the Coopers nor acted in bad faith. The court found the delay in payment principally resulted from the Coopers' failure to provide information about their medical providers to Farmers and their refusal to respond to discovery.

Dionne and Chelsea contend the evidence did not support the trial court's finding Farmers previously made a $25,000 settlement offer to each of the Coopers; the court erred in relying on the arbitrator's award instead of an earlier default judgment entered against the uninsured driver; the court should have awarded prejudgment interest; and the evidence did not support the trial court's findings on the Coopers' breach of contract and bad faith claims. We affirm.

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[1] We refer to the Coopers individually by their first names and collectively as the Coopers.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Automobile Accident*[2]

On March 6, 2010 Dionne was driving then 15-year-old Chelsea when their vehicle was hit from behind by a car driven by an uninsured driver, Luis Duarte. The force of the impact pushed the Coopers' car into the vehicle in front of them. Dionne and Chelsea suffered soft tissue injuries, and they received physical therapy and chiropractic care.

B. *Farmers Investigates the Claim*

The day after the accident Dionne and Chelsea submitted an uninsured motorist claim to Farmers. Farmers concluded the vehicle was a total loss and paid Dionne $12,800 for the property damage.

Erin Roberts, a special claims representative for Farmers, was initially assigned to handle the Coopers' claim. On March 29, 2010 Roberts independently evaluated the claim and concluded the Coopers were not at fault for the accident. Roberts estimated the value of the Coopers' claim at $6,000. On March 29 Roberts contacted Dwight Lindholm, the Coopers' attorney, to find out the status of the Coopers' medical treatment. The next day Lindholm confirmed he was representing the Coopers, but he did not provide any medical information. Roberts needed a list of the Coopers' medical providers and authorizations to release their medical records. On April 13

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[2] Because appellants have not included in the appellate record the evidence submitted to the trial court at trial, we rely on the factual findings made by the trial court in its statement of decision, except where otherwise noted.

Roberts provided Lindholm with two blank medical authorization forms for Dionne and Chelsea to sign. She also requested he arrange for Roberts to take recorded statements from Dionne and Chelsea and to assist with obtaining their medical records and treatment progress reports.

According to William Gemmill, who later assumed representation of the Coopers, Lindholm provided the completed medical authorization forms and lists of medical providers on June 16, 2010. However, Roberts declared she received the signed authorizations on July 1, but not the list of medical providers. Gemmill does not dispute that on July 1 Roberts requested Lindholm provide a "complete provider list" and a signed authorization for Kaiser, which required a specific authorization. Lindholm did not respond to this request. Roberts tried to reach Lindholm on July 13, August 10, and October 8, 13, and 28, 2010, to no avail.

In November 2010 Jon De Brincat, also a special claims representative, assumed responsibility for the Coopers' claim. De Brincat reviewed the claim file and again requested the Coopers' attorney provide a complete list of medical providers. De Brincat did not hear back from Lindholm; instead, Gemmill send an e-mail to De Brincat on November 24 stating he had assumed representation of the Coopers. De Brincat immediately called Gemmill and left a message requesting the medical provider list. De Brincat called two more times, then sent letters to Gemmill on January 14 and February 11, 2011, again requesting the medical information. It was not until February 14, 2011 that Gemmill responded to De Brincat. Gemmill stated he would provide the requested medical information but not the Coopers' social security numbers.

C. *The Coopers Sue Duarte and a Default Judgment Is Entered*

On March 2, 2012 the Coopers filed a lawsuit in Riverside County Superior Court against Duarte. Duarte failed to appear, and on July 26, 2013 the superior court entered a default judgment against Duarte. The superior court awarded Dionne $42,915 and Chelsea $41,971, plus costs.

In March 2012 general claims representative Karyn Tsang took over the Coopers' claim. In a March 12 phone conversation, Gemmill told Tsang he had filed a lawsuit against Duarte, and the Coopers intended to pursue recovery against Duarte instead of Farmers. Gemmill told Tsang he would provide her complete medical records and make a demand for payment if the Coopers changed their minds.

Tsang next heard from Gemmill over a year later, on August 1, 2013, when she received a letter from Gemmill enclosing the default judgment. Gemmill demanded Farmers pay Dionne and Chelsea the amount of the judgment, less the $12,800 Farmers had previously paid Dionne. Tsang responded by sending a letter to Gemmill informing him the demand for payment of the default judgment was not proper, and Farmers would not pay it.

D. *The Coopers' Bad Faith Action Against Farmers and Arbitration of Their Uninsured Motorist Claim*

On February 27, 2014 Gemmill sent a letter to Farmers demanding it arbitrate the Coopers' claims. The Coopers filed this action on March 3, 2014 (bad faith action). In their first amended complaint, the Coopers alleged claims for breach of contract, breach of the covenant of good faith and fair dealing,

and declaratory relief stating they could pursue their uninsured motorist damages claim through arbitration.[3]

In March 2014 Monica Solorio Poemoceah, a general adjuster for Farmers, assumed responsibility for the Coopers' claim. Farmers also assigned an attorney, Marcella Wilson, to defend against the Coopers' claim and arbitration demand. On April 29 Farmers sent subpoenas seeking records to the Coopers' medical providers. In July and September Wilson served discovery requests on Gemmill. Gemmill refused to respond to the discovery, asserting Wilson could propound discovery in the bad faith action and rely on the declarations Dionne and Chelsea filed in the Riverside lawsuit.

On November 19, 2014 Farmers filed a petition pursuant to Insurance Code section 11580.2, subdivision (f),[4] to compel the Coopers to respond to discovery propounded in connection with the proposed arbitration of the Coopers' uninsured motorist claim. The discovery proceeding, case No. BS152322, was later consolidated with this action. Wilson sent letters to Gemmill on

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[3] The Coopers also sued Farmers Insurance Company and Mid-Century Insurance Company, but the Coopers dismissed them on the first day of trial.

[4] This section gives the superior court jurisdiction to rule on discovery matters arising in an uninsured motorist arbitration. (*Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 926 ["the uninsured motorist law grants the superior court the *exclusive* jurisdiction to hear discovery matters arising under uninsured motorist arbitrations"]; *Menchaca v. Farmers Insurance Exchange* (1976) 59 Cal.App.3d 117, 124 ["The subdivision also enables the parties to utilize the deposition and discovery provisions of the Code of Civil Procedure [and] the superior court to have jurisdiction over those matters."].)

September 10 and November 18, 2014, explaining Farmers had a right to take discovery from the Coopers pursuant to the Insurance Code, but Gemmill refused to respond. Farmers filed two motions to compel the Coopers to respond to Farmers' discovery, and on October 21, 2015 the trial court granted the motions.[5] The Coopers served their responses on November 10, 2015. On February 15, 2016 Wilson took the depositions of Dionne and Chelsea. After initially objecting to having their medical examinations taken, in August 2016 the Coopers submitted to medical examinations.

On May 18, 2016 Wilson sent Gemmill a written settlement offer to settle Chelsea's claim for $12,500 and Dionne's claim for $13,950. According to Wilson and Poemoceah, Farmers subsequently tendered an offer of $25,000 each for Dionne and Chelsea to settle the case. After the Coopers rejected the offers, Farmers increased its offer by $2,001 for each claimant, but the Coopers rejected this offer as well. On August 16 the parties participated in a mandatory settlement conference, but the case did not settle.

On August 26, 2016 Gemmill informed Wilson the Coopers would not submit to binding arbitration of their uninsured motorist claim.[6] In September 2016 Farmers filed a motion to

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[5] On our own motion we augment the record to include the November 19, 2014 petition and the October 21, 2015 minute order granting Farmers' motions to compel discovery. (See Cal. Rules of Court, rule 8.155(a)(1)(A).) Judge Teresa Sanchez-Gordon presided over the hearing and ruled on the motions.

[6] The Coopers elected not to arbitrate their claims following the Supreme Court's February 2016 decision in *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, which clarified that a plaintiff in an arbitration is not exempt from the five-year

compel arbitration of the Coopers' uninsured motorist claims and to bifurcate and stay the bad faith action. The Coopers opposed the motion. After hearing oral argument, on October 26, 2016 the trial court[7] granted the motion to compel arbitration and stayed the bad faith action until completion of the arbitration.

E. *The Arbitrator's Ruling*

Arbitration of the uninsured motorist claim commenced on May 1, 2017 before retired Judge David W. Long. Judge Long issued a nine-page ruling on June 2, 2017. The arbitrator stated in his ruling he would not consider the default judgment award because he considered it "irrelevant to the issues." The arbitrator found Duarte was exclusively at fault for the accident.

1. *The arbitrator's findings as to Dionne*

Dionne was treated by a chiropractor and received physical therapy at Kaiser. She did not receive medical treatment immediately after the accident and did not miss time from work. The arbitrator found significant that Dionne received no further treatment for injuries from the accident after August 6, 2010. Moreover, the Kaiser records indicated that as of August 2012 Dionne was exercising five days each week for 60 minutes per day, and as of September 2012 was exercising every day for 50 minutes per day. Although Dionne denied exercising this much, the arbitrator found "it difficult to accept the premise that a medical facility as thorough and detailed as Kaiser in their record

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time limitation to bring a case to trial under Code of Civil Procedure section 583.310. At the time *Gaines* was decided, the Coopers' bad faith action had been pending for two years.

[7] Judge Joseph R. Kalin.

keeping would note such 'history' if the physician had not been so told." The arbitrator concluded Dionne received treatment as a result of the accident from March 6, 2010 through August 6, 2010.

The arbitrator found Dionne was "entitled to medical specials totaling $6,503.00 less the Med Pay credit to which [Farmers] is entitled in the amount of $4,526.40 for a net UM medical specials award of $1,987.60." (Boldface omitted.) The arbitrator awarded Dionne $18,000 for general damages, for a total award of $19,987.60. As the arbitrator explained, "[T]his is at worst or at best a modest rear end collision, not of major closing speeds. Treatment casually connected to this accident lasted approximately just shy of 6 months. This claimant's injuries did not cause **any** time off work or loss of income nor were they deemed sufficiently severe to require X-Ray examination, either lumbar or cervical by the treating chiropractor and lumbar spine only by the Kaiser physicians."[8]

2. *The arbitrator's findings as to Chelsea*

Following the accident, Chelsea was taken to a hospital emergency room by ambulance where she was examined, treated, and released after two hours. Chelsea was given prescription medications but no cervical collar or cervical restraining device. Chelsea's primary complaint was pain in the right side of her neck. Chelsea received chiropractic treatment from Kaiser through August 10, 2010 and physical therapy until October 1, 2010. While she was receiving treatment, Chelsea continued to

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[8] The arbitrator concluded any emotional distress damages resulting from Dionne witnessing injury to Chelsea under *Dillon v. Legg* (1968) 68 Cal.2d 728 were "modest, at best."

play competitive volleyball. Chelsea testified she continued playing volleyball until she suffered a knee injury in 2011, and later sustained a concussion during volleyball practice in the late summer or early fall of 2011. Although Chelsea argued the concussion suffered was connected to the automobile accident, the arbitrator concluded the evidence did not support this conclusion.

The arbitrator concluded Chelsea's treatment for injuries resulting from the accident lasted through August 10, 2010. He awarded Chelsea a total of $4,942 for the hospital, chiropractic treatment, and physical therapy, less a $4,170 credit for Farmers' medical payments, resulting in an award of $771.60 for Chelsea's medical specials. The arbitrator also awarded Chelsea $16,000 in general damages, for a total award of $16,771.60.

Farmers paid Dionne and Chelsea the amount of the arbitrator's award on the day of the award.

F. *The Bad Faith Trial and Statement of Decision*

On February 2, 2018 the Coopers' breach of contract and bad faith claims proceeded to trial.[9] The parties stipulated the trial would proceed based on declarations, exhibits, briefing, and oral argument. The Coopers submitted 80 exhibits and filed declarations from Dionne, Chelsea, and Gemmill. Farmers submitted 60 exhibits and filed declarations from Wilson, three claims representatives, and an adjustor. Farmers also filed a declaration from Joanna Moore, an expert in insurance claims handling. Moore opined Farmers complied with its obligations under the insurance policy and the Insurance Code and was not at fault for the delay.

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[9] The trial court found the cause of action for declaratory relief was moot in light of the arbitration award.

The Coopers sought to recover the full policy benefits for their uninsured motorist coverage ($250,000 per person). They argued Farmers acknowledged their claim, but did not promptly respond, leading the Coopers to demand arbitration, then file the bad faith action. Farmers asserted it immediately acknowledged the claim, confirmed coverage, and paid for damage to the vehicle and all medical bills. Farmers argued the remaining claims for loss of earnings, additional medical bills, and pain and suffering were properly submitted to arbitration, and Farmers immediately paid the amount the arbitrator awarded. Farmers also contended that to the extent there was any delay in payment, the delay was caused by the Coopers, who failed to respond to Farmers' multiple requests for information needed to resolve the claims, including their medical records, a list of medical providers, and other documentation.

On March 28, 2018 the trial court ordered the parties "to file a statement specifying the principal controverted issues about which they request a statement of decision." The Coopers submitted five pages of issues for the trial court to address. On April 5, 2018 Farmers lodged a proposed statement of decision. The Coopers filed objections to Farmers' proposed statement of decision.

On June 12, 2018 the trial court issued a 34-page statement of decision, finding in favor of Farmers on all claims. The trial court found, "While it is undisputed that Farmers paid [the Coopers'] property damage claim within a reasonable time, the remainder of the claim took more than seven years to resolve from the time the claim was submitted to the time the arbitration award was paid. During that time, Farmers made no fewer than three requests for authorizations and a list of providers over the course of three months before the information was provided

despite the fact Farmers advised [the Coopers] it may be unable to consider payment of the medical bills until those forms are returned.

"Upon receipt of this information, Farmers renewed its request for a complete list of providers and requested a Kaiser-compliant authorization. Over the next 20 months, Farmers requested provider lists and Kaiser-compliant authorizations from [the Coopers] at least 17 times. [The Coopers] failed to cooperate with Farmers' requests for information. It was not until compelled to do so by court order did [the Coopers] provide the information requested by Farmers to evaluate the claims.

"Both sides tendered settlement offers. Farmers' settlement offer exceeded the amount [the Coopers] were awarded in arbitration. Farmers' response to [the Coopers'] demand it pay the default judgment in the uninsured motorist action was not based solely on a policy that it does not pay judgments. The default judgment resulted from a summary proceeding in which no party cross-examined the evidence and included recovery for property damage which Farmers had already paid. See also Insurance Code § 11580.2(c)(3).

"Farmers promptly paid the claim upon completion of the arbitration. The Court finds, under the circumstances, Farmers accepted and paid [the Coopers'] claims in a timely manner. Based on the foregoing, the Court finds Farmers fulfilled its duties under the law as they pertain to [the Coopers] and did not violate the provisions of [the] Insurance Code . . . or Civil Code §3294. While the Court acknowledges this has been a difficult process for [the Coopers], the Court finds Farmers is not liable for any emotional distress experienced by either [Dionne or Chelsea]. As Farmers did not withhold payment on this claim unreasonably, [the Coopers] are not entitled to attorney fees."

The trial court entered judgment in favor of Farmers on June 12, 2018. The Coopers timely appealed.

DISCUSSION

A. *Standard of Review*

The Coopers contend we should review the trial court's decision de novo; Farmers contends we should review for substantial evidence. Neither is fully correct.

We review questions of law de novo. (*T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1117; *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089.) As to the trial court's factual determinations, because the court found the Coopers failed to meet their burden to support their bad faith claim of showing Farmers unreasonable delayed or denied their policy benefits, we review whether the evidence compels a finding in favor of the Coopers. ""[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'"" (*Patricia A. Murray Dental Corp. v. Dentsply Internat., Inc.* (2018) 19 Cal.App.5th 258, 270; accord, *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 734; *Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838.)

B. *The Trial Court Did Not Err in Finding for Farmers on the Coopers' Breach of Contract and Bad Faith Claims*

1. *The trial court properly relied on Farmers' offer to settle for $25,000 plus $2,001 each for Dionne and Chelsea*

The Coopers contend the trial court erred in finding that, after the Coopers rejected Farmers' first settlement offer, "Farmers later tendered another offer of $25,000 per [p]laintiff, and yet another offer adding $2,001 per plaintiff. Plaintiffs rejected these offers." In rejecting the Coopers' claims, the trial court relied on the fact these offers exceeded the amount the Coopers were awarded in arbitration. The Coopers have not pointed to evidence in the appellate record compelling a finding to the contrary.

In its statement of decision, the trial court summarized Poemoceah's testimony: "Farmers offered Plaintiffs $25,000 each to settle the case. These offers were rejected, as were later offers to pay an additional $2,001 to each Plaintiff." Similarly, the court summarized Wilson's testimony: "On May 18, 2016, Wilson sent Gemmill a written settlement offer–$12,500 for Chelsea Cooper and $13,950 for Dionne Cooper. Farmers later tendered another offer of $25,000 per Plaintiff. On August 25, 2016, after Plaintiffs had rejected those offers, Wilson sent a list of proposed arbitrators. Farmers later offered an additional $2,001 per Plaintiff which was not accepted."

The Coopers have failed to include in the appellate record the witnesses' declarations or exhibits considered by the trial court to support their contention Farmers did not make the settlement offers. "It is the appellant's affirmative duty to show error by an adequate record." (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.) Failure to provide an adequate record

requires the issue be resolved against the Coopers. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187 ["'Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant].'"]; accord, *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502; see *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 ["'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.'"].)

The Coopers also contend the trial court should not have considered evidence of Farmers' settlement offers because Evidence Code section 1152, subdivision (a), bars consideration of offers to compromise to prove liability. But Evidence Code section 1152, subdivision (b), provides that settlement offers are admissible to show an insurance company acted in good faith.[10] (See *Heimlich v. Shivji* (2019) 7 Cal.5th 350, 360 [settlement "offers could be admitted for a different purpose: to show the insurer's bad faith"]; accord, *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 887 ["The language of [section 1152] does not preclude the introduction of settlement negotiations if offered not

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[10] Section 1152, subdivision (b), provides, "In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement."

to prove liability for the original loss but to prove failure to process the claim fairly and in good faith."].) The Coopers contend the exception in Evidence Code section 1152, subdivision (b), does not apply because there was no proof Farmers made the $25,000 settlement offers. As discussed, we have rejected the Coopers' contention the offers were not made.

The trial court therefore properly considered evidence of the offers made to Dionne and Chelsea to settle for $25,000 plus an additional $2,001, pursuant to Evidence Code section 1152, subdivision (b), to support the trial court's finding Farmers acted in good faith.[11]

2. *The trial court properly relied on Farmers' payment of the arbitration award*

The Coopers contend the trial court erred in rejecting their breach of contract claim by relying on Farmers' payment of the arbitrator's award of $19,987.60 to Dionne and $16,771.60 to Chelsea instead of the award in the default judgment of $42,915 to Dionne and $41,971 to Chelsea. This argument lacks merit.

Insurance Code section 11580.2, subdivision (f), provides that uninsured motorist claims must be arbitrated if not settled: "The policy or an endorsement added thereto shall provide that the determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the

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[11] The Coopers argue Farmers, by making an offer of $2,001 for each plaintiff after the Coopers rejected the $25,000 offers, withdrew the $25,000 offers. But there is no evidence in the record to rebut the testimony from Wilson and Poemoceah that Farmers "increased" the offers by $2,001 for each plaintiff.

insurer or, in the event of disagreement, by arbitration." In *Bouton v. USAA Casualty Ins. Co.* (2008) 43 Cal.4th 1190, 1201, the Supreme Court concluded that in applying section 11580.2, "it is for an arbitrator, and not a court, to decide whether the default judgment [the claimant] obtained against the underinsured tortfeasor binds [the insurance company]." As the court explained, "The entire controversy—whether [the claimant] is entitled to damages arising out of his accident with the underinsured tortfeasor, and the amount thereof—is arbitrable. Whether the default judgment binds [the insurance company] is a part of the controversy between the parties regarding liability and damages, and must be resolved by the arbitrator in the course of addressing the two statutorily mandated arbitrable issues." (*Id.* at p. 1202.) Thus, the trial court properly relied on the arbitrator's determination the default judgment was not relevant to calculation of the amount of damages.

Further, because the Coopers failed to timely challenge the arbitrator's determination, the ruling is final. Code of Civil Procedure section 1288 provides that "[a] petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner." "'"[I]f one wishes to have an award vacated or corrected he [or she] must act within one-hundred days of service of the award or be precluded from attacking the award.'" [Citation.] 'If [the party who lost in the arbitration does] not serve and file a petition to vacate or a response to [a] petition to confirm within the 100–day period from the date of service of the award . . . , the award must be treated as final.'" (*Eternity Investments, Inc. v. Brown* (2007) 151 Cal.App.4th 739, 745; accord, *Douglass v. Serenivision, Inc.* (2018) 20 Cal.App.5th 376, 385.)

3. *The trial court did not err in failing to award prejudgment interest*

The Coopers contend the trial court erred in not including prejudgment interest under Civil Code section 3287 in determining the money owed by Farmers on the Coopers' claim. According to the Coopers, prejudgment interest should have run from the date Farmers rejected payment of the default judgment on August 13, 2013 or, at the latest when Farmers was served with the complaint on March 3, 2014. The Coopers are incorrect.

"'"'"[T]he test for recovery of prejudgment interest under [Civil Code] section 3287, subdivision (a) is whether *defendant* actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount. [Citation.]' [Citations.] 'The statute . . . does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, "depends upon a judicial determination based upon conflicting evidence and it is not ascertainable from truthful data supplied by the claimant to his debtor."'"'" (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 729; accord, *Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 43-44.)

Here, there was conflicting evidence as to the amount of damages suffered by Dionne and Chelsea. For example, Dionne claimed continuing injuries, but she returned to work immediately after the accident, and, as of August 2012 Dionne was exercising five days a week. Similarly, Chelsea claimed she suffered a concussion during a volleyball practice as a result of the accident, but the arbitrator found the concussion was not caused by the accident. Therefore, calculation of damages depended on the arbitrator's determination based on conflicting

evidence, and the amount was """"not ascertainable from truthful data supplied by the claimant to his debtor."""" (*Duale v. Mercedes-Benz USA, LLC, supra*, 148 Cal.App.4th at p. 729.)

4. *The evidence in the record does not compel a finding Farmers unreasonably delayed or denied payment of benefits*

The Coopers contend the trial court erred in finding Farmers did not breach the insurance contract or act in bad faith by failing promptly to pay the Coopers after the filing of their claim. But the Coopers have not presented any evidence admitted at trial that compels a finding contrary to the trial court's determination Farmers did not unreasonably delay or deny payment of benefits to the Coopers.

Because damages are an essential element of a breach of contract claim, where the insurer pays all policy benefits due the insured under insurance policy, as here, the insured cannot recover for breach of contract. (*Case v. State Farm Mutual Automobile Ins. Co., Inc.* (2018) 30 Cal.App.5th 397, 402; *Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1468.) But even where the insurer pays all benefits due, a delay in payment can constitute a breach of the covenant of good faith and fair dealing. "The law implies in every contract, including insurance policies, a covenant of good faith and fair dealing. 'The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's benefits. . . . When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.'" (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720; accord, *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073.) "[A]n insurer's denial of or

delay in paying benefits gives rise to tort damages only if the insured shows the denial or delay was unreasonable." (*Wilson*, at p. 723; accord, *Jordan*, at p. 1073.)

In its statement of decision, the trial court acknowledged that although Farmers promptly paid the Coopers for property damage to their car, it took seven years from the time the Coopers submitted a claim for Farmers to pay medical and special damages on their claim. However, as the trial court found, the delay resulted principally from the Coopers' failure to provide Farmers with information it needed to evaluate the Coopers' medical claims. Farmers made more than 17 requests for a list of providers and Kaiser-compliant authorizations over a 20-month period in order to obtain basic medical information needed to evaluate the Coopers' claims, then the Coopers refused to respond to Farmers' discovery. After the trial court granted Farmers' motion to compel discovery on October 21, 2015, discovery continued through 2016, including Farmers taking the Coopers' depositions in February 2016 and medical examinations in August 2016 (after the Coopers initially objected). An unsuccessful mandatory settlement conference took place in August 2016. At some point in 2016 Farmers made an offer to settle for $25,000 each for Dionne and Chelsea, and later increased the offer by $2,001. After the Coopers then refused to arbitrate their claims, Farmers was forced to file a motion to compel arbitration, which the trial court granted on October 26, 2016. Once the arbitrator issued his ruling on June 2, 2017, Farmers made payment to Dionne and Chelsea the same day. As the trial court found, "[U]nder the[se] circumstances, Farmers accepted and paid Plaintiffs' claims in a timely manner."

The Coopers have not presented evidence in the appellate record (for example, any conflicting evidence at trial) that

compels a finding in their favor. "[U]nless the trial court makes specific findings of fact in favor of the losing [party], we presume the trial court found [that party's] evidence lacks sufficient weight and credibility to carry the burden of proof." (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486.) Further, we "must view all factual matters most favorably to the prevailing party and in support of the judgment." (*Dreyer's Grand Ice Cream, Inc. v. County of Kern*, *supra*, 218 Cal.App.4th at p. 838.) On this record, we cannot conclude the evidence compels a finding in favor of the Coopers on their bad faith and breach of contract claims.

5. *The Coopers have forfeited their remaining contentions*

The Coopers contend Farmers breached the insurance policy by filing its motion to compel discovery in Los Angeles County instead of Ventura County and by requiring the depositions and medical examinations of the Coopers also to take place in Los Angeles County. According to the Coopers, the insurance policy required Farmers to conduct all "claims handling" in the county where the claimants reside. The Coopers have forfeited this argument.

The Coopers initiated this action in Los Angeles County, and they have not cited to any provisions in the insurance policy that would have required the discovery to take place in Ventura County. Further, the statement of decision is silent as to the proper location of discovery and discovery motions, and there is no showing in the record the Coopers raised this argument in the trial court, for example in opposition to the motions to compel discovery or at trial. Thus, the Coopers have forfeited this argument. (*Pittman v. Beck Park Apartments Ltd.* (2018)

20 Cal.App.5th 1009, 1026, quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 880-881 [an argument ""“may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it”""]; *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 972 [""“[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.”""].)

DISPOSITION

The judgment is affirmed. Farmers is entitled to its costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.