Filed 5/8/18 Fat Face Fenner's Falloon v. Lurie, Zepeda, Schmalz & Hogan CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FAT FACE FENNER'S FALLOON, Plaintiff and Appellant, v. LURIE, ZEPEDA, SCHMALZ & HOGAN, Defendant and Appellant; WILLIAM F. CLARK, Defendant and Respondent.	B275863, B277256 (Los Angeles County Super. Ct. No. BC525130)

APPEAL and CROSS-APPEAL from a judgment, and APPEAL from an order of the Superior Court of Los Angeles County, Steven Kleifield, Judge. Judgment reversed; cross-appeal and appeal of order dismissed.

Timothy D. McGonigle, for Plaintiff and Appellant.

Hinshaw & Culbertson, Filomena E. Meyer and Desmond J. Hinds for Defendant and Appellant.

Nemecek & Cole, Michael McCarthy and James D. Hepworth, for Defendant and Respondent.

In 2010, restaurant operator Fat Face Fenner's Falloon (Fat Face) filed a lawsuit against its landlord, Pierside Properties, regarding the condition of the premises and various rental charges. Pierside filed a cross-complaint seeking unpaid rent and termination of Fat Face's leases. On the opening day of trial, the parties reached a settlement that required Fat Face to pay Pierside $25,000, and forfeit its option to renew its leases.

Fat Face then filed a legal malpractice action against its attorneys, William Clark and defendant Lurie, Zepeda, Schmalz & Hogan (LZSH), regarding their handling of the litigation with Pierside. The complaint alleged that immediately prior to the commencement of the Pierside trial, LZSH told Fat Face it was not prepared to try the case, which forced Fat Face to accept an unfavorable settlement. LZSH filed a motion for summary judgment arguing that Fat Face could not establish it would have obtained a more favorable result had the case against Pierside proceeded to trial. The trial court granted the motion.

Fat Face appeals the judgment, asserting that LZSH failed to make a prima facie showing that Fat Face could not prevail on its malpractice claim. LZSH cross-appeals the court's determination that a settlement between co-defendant William Clark and Fat Face was made in good faith. (See Code of Civ. Proc., §§ 877, 877.6.) We reverse the court's judgment, and dismiss the appeal and cross-appeal concerning the determination of good faith settlement.

FACTUAL BACKGROUND

A. ***Summary of Fat Face's Litigation Against Pierside***

1. Fat Face's leases of the Fishack and Fishook premises

The "Loreto Plaza" (the plaza) is a commercial property located in Hermosa Beach, California that consists of two buildings. The second floors of the buildings are attached by the "north bridge" and the "south bridge," which extend over an outdoor courtyard. The north bridge is an enclosed structure, and the south bridge is open.

In 1999, Fat Face leased space on the second floor of the plaza for use as a restaurant named "Fishack." The Fishack lease designated the north bridge as part of the premises, and required Fat Face to pay the lessor, Jerry Newton, the amount Newton was obligated "to pay to the City of Hermosa for rent of the airspace occupied by the enclosed bridge area." At the time Fat Face signed the lease, Newton had an agreement with the City that required him to pay $163 a month for use of the north bridge airspace. Although the Fishack lease did not identify the south bridge as part of the leased premises, Newton permitted Fat Face to use the area for outdoor dining.

In 2005, Pierside Properties acquired the plaza from Newton. Two years later, Fat Face leased a second space in the plaza for use as a restaurant named "Fishook." The Fishook lease ran through December 31, 2009, and provided Fat Face two five-year renewal options that, if exercised, would extend the lease until December 31, 2019.

In 2009, Fat Face and Pierside extended the Fishack lease until December 31, 2014, with an option for a further five-year extension that would end December 31, 2019.

2. Disputes with Pierside

In 2008, Pierside authorized another tenant in the plaza, "Froyo Life" (Froyo), to make improvements to the electrical systems of a yogurt shop located next to Fishook, and beneath Fishack. During the course of the improvements, Fat Face lost power at both of its restaurants, and was forced to temporarily close them. After the improvements were completed, Fat Face experienced a series of electrical problems that damaged its refrigeration systems, and caused a fire in the subpanel of Fishook. An electrician concluded Fat Face's electrical problems had been caused by faulty fuses that were installed as part of the improvements to the Froyo tenancy.

In 2011, Fat Face notified Pierside that the north bridge, the south bridge and the common areas of the plaza were in need of repair. Fat Face complained that both bridges had extensive dry rot, and that the property was infested with termites and pigeons. Pierside disputed both the necessity of the repairs and its obligation to pay for them. In October of 2011, Pierside initiated a month-long repair to the south bridge that prevented Fat Face from seating its customers in that area.

Fat Face and Pierside became involved in additional disputes regarding charges Pierside had been imposing for use of the airspace above the north bridge, seating on the south bridge and trash disposal.

3. Litigation between Fat Face and Pierside

a. Fat Face's complaint

In May of 2011, Fat Face, then represented by attorney William Clark, filed a complaint against Pierside and Froyo alleging claims for negligence, breach of contract, negligent and

intentional interference with future economic interest, constructive eviction and declaratory relief.

Fat Face's negligence claim alleged Froyo and Pierside had made improper modifications to the plaza's electrical systems that had forced Fat Face to temporarily close its restaurants. Fat Face's claims for breach of contract and intentional interference with economic interest alleged Pierside had "intentionally refused to repair the common area of the property"; "intentionally failed to . . . repair and renovate the [north and south bridges]"; and "improperly and excessively charg[ed]" Fat Face for trash disposal.

In its declaratory relief claim, Fat Face requested an order finding that it was permitted to seat customers on the south bridge, and that Pierside had no basis to impose a fee for use of the airspace above the north bridge. The complaint alleged that the fee the City had been charging Pierside for use of the airspace was not lawful. The complaint further alleged that because Pierside was not legally obligated to pay the City, it had no right to pass the fee on to Fat Face.

In December of 2011, Fat Face began withholding rent based on a lease provision that authorized rent abatement for any period during which Pierside's repairs to the property rendered any portion of Fat Face's premises unusable.

b. Pierside's unlawful detainer actions and cross-complaint

After Fat Face initiated rent withholding, Pierside filed an unlawful detainer action seeking to collect approximately $17,000 in unpaid rent, eject Fat Face from the premises and terminate the leases. Fat Face filed a motion to consolidate the unlawful detainer action with its previously-filed complaint. On

February 27, 2012, the trial court granted the motion to consolidate on the condition that Fat Face resume paying base rent as of March 1, 2012.

In April of 2012, Pierside filed a second unlawful detainer action seeking approximately $100,000 in unpaid rent and fees, which was also consolidated with Fat Face's prior complaint, and a cross-complaint alleging claims for breach of contract and declaratory relief. Pierside's cross-complaint asserted Fat Face had breached the leases by, among other things, seating customers on the south bridge; failing to pay base rent for the three-month period between December 2011 and February 2012; failing to pay fees for trash disposal; and failing to pay for use of the north bridge airspace.

4. Pierside's motion for summary adjudication

In July of 2012, Pierside filed motions for summary adjudication seeking judgment on each of the claims set forth in the parties' cross-complaints. Pierside argued that the undisputed evidence showed Fat Face had breached the leases by withholding base rent from December 2011 to February of 2012, and failing to pay fees for the north bridge airspace and trash disposal. Pierside contended Fat Face's failure to make these payments constituted a material breach that authorized the immediate termination of both leases.

With respect to Fat Face's claims for negligence and breach of contract, Pierside argued that the undisputed evidence showed: (1) Pierside could not be held liable for losses caused by the improvements Froyo had made to its tenancy; (2) Pierside had no duty to pay for the repairs to the north bridge because those repairs were not structural in nature; (3) Fat Face was not permitted to use the south bridge for customer seating; and (4) if

Fat Face was permitted to use the south bridge, it was required to pay Pierside a fee.

In its opposition, Fat Face argued that the provisions of the lease permitted it to withhold rent for the period during which Pierside's improvements to the Froyo tenancy had rendered its restaurants unusable. Fat Face also argued there were disputed factual issues concerning Pierside's duty to repair the north bridge. In support, Fat Face cited an engineering report finding that a foundational beam of the bridge needed to be repaired. Fat Face also argued there were questions of fact about the seating of customers on the south bridge.

On October 10, 2012, the trial court issued an order granting Pierside summary adjudication of Fat Face's claim for constructive eviction, and denying the remainder of Pierside's motions. The court concluded that Fat Face had established there were triable issues of fact concerning payment to Pierside "for the use of the enclosed North Bridge," and whether Pierside had an obligation to repair the bridge. The court also found there were triable issues of fact with respect to Pierside's entitlement to terminate the leases. The court's order explained that even if Pierside was able to prove Fat Face had breached the leases by withholding base rent and other payments, "the question of whether these breaches are material to [the] leases as a whole is a question of fact precluding the grant of this motion."

5. Settlement

Prior to the court's ruling on Pierside's motions for summary adjudication, Fat Face settled its negligence claim

against Froyo for $135,000.[1] One week before trial was scheduled to begin, Fat Face and Pierside attended a mandatory settlement conference. Fat Face's mediation brief indicated that it might be willing to settle its claims for $165,000. The settlement conference was unsuccessful.

On the opening day of trial, which was estimated to last 20 to 25 days, Fat Face's attorney, Kurt Schmalz, requested a continuance to allow the parties more time to discuss settlement. The court denied the request. During a recess, the parties reached a settlement that required Fat Face to pay Pierside $25,000, and to vacate the premises by December 31, 2014.[2] The parties further agreed, however, that Fat Face would be permitted to seek a buyer to purchase its restaurants and assume the leases, subject to the approval of Pierside.

*B. **The Current Action***

1. Summary of Fat Face's complaint

On October 18, 2013, Fat Face filed a legal malpractice action against William Clark and Lurie, Zepeda, Schmalz and Hogan (LZSH) regarding their handling of the Pierside litigation. The complaint alleged that Clark had "abandon[ed]" Fat Face

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[1] As part of the settlement, Fat Face's insurer agreed to pay Fat Face an additional $35,000 for its losses, increasing Fat Face's total recovery to $170,000.

[2] Pierside's insurer agreed to pay an additional $50,000 to settle the claims. The insurer was required to make the payment to Fat Face, who was then required to assign that amount back to Pierside.

after Pierside filed its motions for summary adjudication, and failed to "properly prepare the case for trial."

The complaint alleged that LZSH had associated into the case shortly after Pierside filed its motions for summary adjudication. According to the complaint, on the morning the trial against Pierside was schedule to commence, LZSH attorney Kurt Schmalz informed Fat Face he was "not prepared to try the case," thus "forc[ing] [Fat Face] to accept a harmful, inadequate and unfavorable settlement." Fat Face alleged that as a result of LZSH's actions, it had been forced to dismiss "valid legal claims against Pierside that were supported by an overwhelming amount of evidence," and forfeit its option to renew the leases for a five-year period.

2. Motion for summary judgment

a. Summary of LZSH's motion

In May of 2015, LZSH filed a motion for summary judgment arguing that Fat Face could not establish it would have obtained a more favorable result had it proceeded to trial against Pierside. LZSH asserted that the undisputed evidence showed Fat Face had withheld over $100,000 in payments that were due under the leases, which included three months of base rent, and monthly fees for trash disposal and use of the north bridge airspace.

LZSH further contended that Fat Face could not have prevailed on its claim that Pierside was liable for damages that resulted from the improvements to the Froyo tenancy. In support, LZSH cited a provision in the parties' leases stating that Pierside was not liable "for any damages arising from any act or neglect of any other lessee, occupant or user of Loreto Plaza

[tenant]." According to LZSH, this provision precluded any recovery against Pierside because "the damages from the upgrade were . . . caused by . . . Froyo."

LZSH also argued the evidence showed Fat Face could not have prevailed on its claim for damages resulting from Pierside's temporary closure of the south bridge. Although LZSH acknowledged Pierside's repairs to the south bridge had "precluded outside patio seating for a month," it contended that Pierside had "strong evidence disputing Fat Face's entitlement to use the South Bridge walkway . . . in the first place."

LZSH also argued Fat Face could not have prevailed on its claim that Pierside had imposed improper charges for use of the north bridge airspace and trash disposal. LZSH asserted that Fat Face had waived any claim related to the north bridge airspace fee because it had paid that fee for years without objection. Regarding trash disposal fees, LZSH asserted that Fat Face's claim was based on a provision of the leases that related to the common areas of the property. LZSH contended, however, that a separate provision made clear that Fat Face was required to pay all trash disposal fees that were "metered to the premises."

LZSH also argued that even if Fat Face could have prevailed on some of the claims at issue in the underlying litigation, it could not prove that its recovery at trial would have exceeded the benefits of the settlement. LZSH contended that Fat Face's damages expert in the underlying litigation, Mike Leigh, had used a flawed methodology in concluding that Pierside's actions had caused a $300,000 drop in Fat Face's business revenue. According to LZSH, Leigh's deposition testimony showed Leigh failed to consider a variety of important factors that "could have explained [Fat Face's] decrease in sales,"

including the sharp economic downturn in 2008 and increased competition from new restaurants that had opened in the area. LZSH argued that as a result of these flaws, Fat Face could not prove that "a jury . . . would have accepted [Leigh's] expert[] opinion."

In support of its motion, LZSH presented a declaration from Kurt Schmalz, who had associated into the case in August of 2012 and served as Fat Face's trial counsel. Schmalz asserted that when he initially reviewed the case, he had "serious concerns" that Fat Face would be unable to defend itself "against Pierside's unlawful detainer and breach of lease actions." Schmalz explained that the leases did not appear to allow Fat Face to withhold rent, and that Fat Face's "documented business interruption damages" amounted to only $50,000, significantly less than the amount it had withheld from Pierside. Schmalz also believed the damages analysis of Fat Face's expert was "vulnerable," and could be rejected by a jury.

Schmalz's declaration further stated that during a mandatory settlement conference held one week before trial, the mediator had identified several weaknesses in Fat Face's claims, and encouraged Fat Face president Gary Vincent to pay Pierside $40,000 to settle the matter. Schmalz stated that on the opening day of trial, Pierside signaled that it "might be willing to accept less than $50,000 from Fat Face to resolve [the matter]." Schmalz claimed that he told Gary Vincent he was "ready to try the case," but advised him to make a settlement offer of $25,000 to avoid the risks and costs of trial. According to Schmalz, Vincent then "authorized a $25,000 offer to Pierside," which Pierside accepted.

LZSH submitted numerous other documents in support of the motion, including copies of Fat Face's leases with Pierside, the pleadings and motions filed in the underlying litigation and various materials related to the parties' discovery.

b. Fat Face's opposition

Fat Face's opposition argued LZSH had failed to make a prima facie showing that Fat Face could not prove it would have obtained a more favorable judgment at trial against Pierside. Fat Face contended that, despite the fact that the trial court in the underlying litigation had specifically found there were triable issues of fact with respect to each of these issues, LZSH had cited no evidence establishing that Pierside could not be held liable for damages caused by the improvements to the Froyo tenancy and the south bridge, nor had LZSH shown that Fat Face could not recover for improper fees related to the north bridge airspace and trash disposal.

Fat Face also argued LZSH had failed to show Fat Face could not prove its recovery at trial would have exceeded the benefits of the settlement. Fat Face contended there were triable issues of fact whether a jury would have accepted Michael Leigh's damages analysis. Fat Face also argued that it had retained a second damages expert, Karl Schulze, who had concluded that Fat Face's business losses substantially exceeded $300,000.

In support of its motion, Fat Face provided a declaration from its president, Gary Vincent, that included a detailed history of Fat Face's disputes with Pierside. Vincent's declaration also addressed the events that had preceded Fat Face's settlement with Pierside. According to Vincent, after the trial court denied Pierside's motions for summary adjudication, attorney Schmalz had informed him that Fat Face was "75% to 80% of the way to

winning the case." Vincent asserted that on the opening day of trial, Schmalz informed him that Fat Face's trial costs were likely to exceed $200,000. In response, Vincent told Schmalz that Fat Face was "fully committed to going to trial," and gave Schmalz a $7,500 deposit for trial costs. After receiving the deposit, Schmalz told Vincent he was "unprepared to try the case," and asked the court to continue the matter. When the court denied the request, Schmalz advised Vincent he should to accept "a $25,000 settlement with Pierside." Vincent declined the offer, and directed Schmalz that he "expected [LZSH] to go to trial."

During a recess, Schmalz reiterated that he was not prepared to try the case, and implored Fat Face to accept the settlement. Vincent asserted that, based on Schmalz's statements, he felt Fat Face had to accept the unfavorable settlement. Vincent explained that Fat Face had been harmed by the settlement because it was forced to dismiss valid claims that were supported by a "multitude of evidence," and forfeit its option to renew the leases for an additional five-year period. Vincent estimated that this five-year renewal option represented $7.5 million in gross sales at Fat Face's two restaurants.

Fat Face also presented declarations from Karl Schulze, an accountant specializing in business valuation, and Michael Dempsey, a legal expert. Schulze's declaration stated that based on Fat Face's historical revenue and the value of similar businesses in the area, he estimated that Fat Face's restaurants were worth between $900,000 and $1,000,000 at the time it was forced to vacate the premises.

Dempsey's declaration stated that the deposition testimony of William Clark and Kurt Schmalz showed LZSH had not prepared for the Pierside trial. Dempsey further asserted that

such conduct "fell below the standard of care for attorneys practicing law in Southern California." Dempsey concluded that as a result of LZSH's actions, Fat Face was "prevented . . . from being able to proceed to trial as [it] intended, and [was] instead forced . . . to accept an unfavorable settlement with Pierside."

3. The trial court's ruling

On September 9, 2015, the trial court granted LZSH's motion for summary judgment. The court's order explained that when a malpractice claim challenges the adequacy of a settlement, the applicable standard is "whether the settlement [was] within the realm of reasonable conclusions, not whether the client could have received more or paid less." The court noted that the declaration Schmalz had provided in support of LZSH's motion "set forth . . . the various factors that went into the decision to settle the case, explained the various strengths and weaknesses in the case, and the reasons why the settlement was reasonable." The court found Schmalz's declaration constituted "competent evidence that the settlement was within the range of reasonableness, which is all the law requires." The court further found that although Fat Face had produced evidence showing that LZSH was not prepared to try the case against Pierside, it had failed to provide any "evidence . . . that the settlement terms [with Pierside] were outside the range of reasonableness, much less why. No competent evidence is offered explaining what could have been recovered had the case been tried, that would have justified the risks . . . ." The court concluded that in the absence of such evidence, Fat Face's malpractice claim failed as a matter of law.

4. Settlement with William Clark

Several weeks after the court granted LZSH's motion for summary judgment, co-defendant William Clark settled Fat Face's malpractice claim for $30,000. Clark then filed a motion for a determination of good faith settlement. (See Code Civ. Proc. §§ 877, 877.6.) LZSH opposed the motion, arguing that the amount of the settlement was "grossly disproportionate to Clark's percentage of liability." In support, LZSH noted that Fat Face was seeking more than $1 million in damages on its malpractice claim, and that Clark had served as lead counsel until a month before trial.

Following a hearing, the court granted the motion, and entered an order determining the settlement was made in good faith. Several months later, the court entered a judgment dismissing Fat Face's claims against LZSH. The judgment was based on the court's prior grant of LZSH's motion for summary judgment, and did not reference Fat Face's claims against Clark.

DISCUSSION

A. The Court Erred in Granting LZSH's Motion for Summary Judgment

1. Standard of review

"A motion for summary judgment is properly granted . . . when 'all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citation.] We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citation.]" (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1301 (*Chavez*).)

"Where, as here, a defendant moves for summary judgment and the plaintiff bears the burden of proof by a preponderance of the evidence at trial on the issues that are the subject of the motion, the defendant initially 'must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not. . . . [Citation.] More specifically, a moving defendant must make a prima facie showing that the plaintiff does not possess, and cannot reasonably obtain, sufficient evidence to establish at least one element of plaintiff's cause of action." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 506-507 [emphasis in the original] [citing and quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851-852]; see also *Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1003.) "A defendant can satisfy its initial burden to show an absence of evidence through 'admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing' [citation], or through discovery responses that are factually devoid.' [Citation.]" (*Chavez, supra,* 207 Cal.App.4th at p. 1302.)

"Only after the defendant's initial burden has been met does the burden shift to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. [Citations]. On review of an order granting summary judgment, we view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's." (*Chavez, supra,* 207 Cal.App.4th at p. 1302.)

2. Summary of legal principles governing malpractice claims

"In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.)

The causation element requires the plaintiff "to establish that, but for the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241.) "This standard requires a 'trial-within-a-trial' of the underlying case, in which the malpractice jury must decide what a reasonable jury or court would have done if the underlying matter had been tried instead of settled." (See *Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1582 (*Namikas*).) The purpose of the trial-within-a-trial method "is to safeguard against speculative and conjectural claims. [Citation.] It serves the essential purpose of ensuring that damages awarded for the attorney's malpractice actually have been caused by the malpractice." (*Viner, supra*, 30 Cal.4th at p. 1241.)

"'It is not enough for [the plaintiff] to simply claim . . . that it was possible to obtain a better settlement or a better result at trial. The mere probability that a certain event would have happened will not furnish the foundation for malpractice damages.' [Citation.] In other words, the plaintiff must show that '[he] would *certainly* have received more money in a

settlement or at trial.' [Citation.]" (*Namikas, supra*, 225 Cal.App.4th at p. 1582 [emphasis in original]; see also *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528 (*Slovensky*) [to prevail on malpractice claim, "the plaintiff must prove damages to a legal certainty, not to a mere probability"].)

"[C]ausation is a question of fact for the jury [that] ordinarily cannot be resolved on summary judgment. [Citation.] In legal malpractice claims, the absence of causation may be decided on summary judgment "only if, under undisputed facts, there is no room for a reasonable difference of opinion." (*Namikas, supra,* 225 Cal.App.4th at p. 1583; see also *Slovensky, supra,* 142 Cal.App.4th at p. 1528 ["[N]ormally a question of fact, causation [in a legal malpractice claim] may be decided as a question of law if the undisputed facts permit only one reasonable conclusion"]; *Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 113 ["the question of [causation] becomes one of law where the facts are uncontroverted and only one deduction or inference may reasonably be drawn"].)

In its briefing, LZSH repeatedly asserts that to survive summary judgment under the "legal certainty" standard applicable in malpractice claims, Fat Face was required to produce evidence establishing that, but for LZSH's alleged negligence, it certainly would have obtained a judgment against Pierside that was more favorable than the settlement. This argument improperly conflates Fat Face's burden of proof at trial and the burden of proof applicable at the summary judgment stage of the proceedings. As the party moving for summary judgment, LZSH had an initial burden to make a prima facie showing that Fat Face did not possess, and could not reasonably obtain, evidence that would permit a rational trier of fact to

conclude Fat Face certainly would have obtained a more favorable judgment at trial against Pierside. If (and only if) LZSH were able to make such a showing, the burden would then shift to Fat Face to produce evidence showing the existence of a triable issue of fact whether a jury could find it would have certainly obtained a more favorable judgment at trial.

3. LZSH failed to make a prima facie showing that Fat Face does not possess sufficient evidence to establish the causation element of its malpractice claim

LZSH does not dispute there are triable issues of fact whether LZSH attorney Kurt Schmalz breached his professional duty of care by failing to prepare for the trial against Pierside. Nor does LZSH dispute there are triable issues of fact whether Fat Face would have rejected Pierside's settlement, and proceeded to trial, had Schmalz been prepared to try the case.

LZSH argues, however, that there are nonetheless three reasons it is entitled to judgment on Fat Face's malpractice claim.[3] First, LZSH asserts that the undisputed evidence shows

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[3] In conducting our review of LZSH's motion for summary judgment, we confine our analysis to the arguments that LZSH raised in the trial court proceedings, and decline to consider any arguments it has raised for the first time on appeal. (See *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676 ["'Generally, the rules relating to the scope of appellate review apply to appellate review of summary judgments. [Citation.] An argument or theory will . . . not be considered if it is raised for the first time on appeal. [Citation.]. . . . 'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.' [Citation.]"].)

Fat Face's claims and defenses against Pierside would have failed at trial, resulting in substantial liability for unpaid rent and the immediate termination of the leases. Second, LZSH argues that even if Fat Face might have prevailed on some of its claims or defenses, it cannot establish that its recovery at trial would have exceeded the benefits of the settlement. Third, LZSH argues Fat Face's claim fails as a matter of law because the evidence showed the "settlement terms . . . were reasonable."

a. LZSH has failed to make a prima facie showing that Fat Face could not have prevailed on its claims against Pierside

LZSH argues Fat Face cannot establish the causation element of its malpractice claim because the undisputed evidence shows it would not have prevailed on any of the claims or defenses at issue in the underlying litigation against Pierside. LZSH further asserts that because Pierside would have prevailed at trial, the resulting judgment would have required Fat Face to pay substantially more than the $25,000 it agreed to pay in settlement, and resulted in an immediate termination of both leases.

LZSH's motion addresses three categories of claims that were at issue in the underlying litigation between Fat Face and Pierside: (1) Fat Face's claim that it was entitled to abate rent and recover damages for losses caused by Pierside's improvements to the Froyo tenancy and the south bridge; (2) Fat Face's claim that it was improperly charged for use of the airspace above the north bridge and trash disposal; and (3) Pierside's claim that it was entitled to terminate the leases based on Fat Face's failure to pay rent and other fees. For the reasons that follow, we conclude LZSH's motion fails to make a prima

facie showing that Fat Face did not possess, and could not reasonably obtain, sufficient evidence to prevail on any of these claims.

i. Fat Face's claims regarding the improvements to the Froyo tenancy and the south bridge

In the underlying litigation against Pierside, Fat Face alleged it was entitled to recover losses it had incurred as the result of negligent improvements Pierside had made to the Froyo tenancy's electrical systems. Fat Face also argued that section 9.5 of the leases entitled it to abate rent for the period of time that Pierside's improvements had forced it to close its restaurants. Section 9.5 states, in relevant part: "In the event Lessor repairs or restores the Building or Premises . . . and any part of the premises is not usable (including loss of use due to loss of essential services), the rent payable . . . for the period during which such damage, repair or restoration continues shall be abated."

LZSH motion argues these claims fail as a matter of law because Pierside could not be held liable for any losses caused by the improvements to the Froyo tenancy. The sole evidence LZSH cites in support of this argument is an exculpatory clause in section 8.8 of the leases stating that Pierside "shall not be liable for any damages arising from any act or neglect of any other lessee, occupant or user of the Loreto Plaza." LZSH asserts that "any harm caused by the Froyo upgrade was deemed to have been caused by Froyo and therefore within the ambit of [s]ection 8.8, [and] not abatable [under section] 9.5."

LZSH, however, has cited no evidence in support of its assertion that Froyo was "deemed to have caused" any harm resulting from the improvements to the Froyo tenancy. Fat Face specifically contested that issue in the underlying litigation,

asserting that Pierside had assumed responsibility for the improvements to the Froyo tenancy by agreeing to pay for a portion of the improvements, and by informing Fat Face that the terms of the leases gave the lessor the authority to make the improvements. LZSH's motion does not address those arguments, nor does it provide any evidence establishing that Froyo was solely responsible for the improvements. Thus, even if LZSH is correct that section 8.8 of the leases immunized Pierside from liability for damages caused by the actions of other tenants, LZSH has failed to make a prima facie showing that Fat Face does not possess, and could not reasonably obtain, sufficient evidence to show Pierside was liable for the damages caused by the improvements to the Froyo tenancy.

In the underlying litigation, Fat Face also claimed it was entitled to recover lost revenue resulting from Pierside's repairs to the south bridge, which allegedly precluded Fat Face from seating customers in that area for a one-month period. Fat Face further asserted that section 9.5 of the lease entitled it to withhold rent for that portion of the premises during the period of closure.

LZSH's motion argues Fat Face could not have prevailed on this claim because Pierside had "strong evidence disputing Fat Face's . . . entitlement to use the [s]outh [b]ridge . . . for dining in the first place." The motion does not, however, describe the nature of this "strong evidence," nor does it present any argument explaining why the evidence would have necessarily defeated Fat Face's claim as a matter of law. LZSH's conclusory assertion that Pierside had "strong evidence" that Fat Face was not entitled to use the south bridge does not preclude the existence of competing evidence, and is not sufficient to make a

prima facie showing that Fat Face could not have prevailed on that issue at trial.[4]

ii. Fat Face's claims regarding charges for the north bridge airspace and trash disposal

In the underlying litigation, Fat Face claimed Pierside had overcharged it approximately $43,000 in monthly fees for use of the north bridge airspace. LZSH argues Fat Face could not have prevailed on this claim based on the defenses of waiver and estoppel. More specifically, LZSH asserts that the undisputed evidence shows Fat Face paid the north bridge airspace fee "without objection for ten years. [¶] By making these payments for over a decade, Fat Face has waived its right to contest the airspace rent vis-à-vis Pierside and is estopped from disputing the same."

"The terms 'waiver' and 'estoppel' are sometimes used indiscriminately. They are two distinct and different doctrines that rest upon different legal principles. [¶] Waiver refers to the act, or the consequences of the act, of one side. Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only. Waiver does not require any act or conduct by the other party." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd*. (1994) 30 Cal.App.4th 54, 59 (*DRG*).) "[W]aiver always

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[4] LZSH also argues Fat Face was not entitled to abate rent for the period its restaurants and the south bridge were closed because it did not notify Pierside that it intended to withhold rent. LZSH, however, has cited no evidence demonstrating Fat Face was required to provide such notice prior to abating rent, or that the failure to do so operated as a forfeiture of its right to abate.

is based upon intent and, thus, presents a question of fact." (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 745.) "'The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver."' [Citations.]" (*DRG, supra,* 30 Cal.App.4th at p. 60.)

Estoppel, in contrast, "is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts." (*DRG, supra,* 30 Cal.App.4th at p. 59.) "A party asserting the defense of estoppel must establish the following elements: (1) the party estopped must know the facts; (2) the party estopped must engage in conduct intended to be acted upon by the party asserting estoppel; (3) the party asserting estoppel must be ignorant of the true state of facts; and (4) injury must result from reliance on the other's conduct. [Citation.] . . . . [¶] . . . [¶] Delay alone cannot be the basis for a finding of estoppel." (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 438.) As with the defense of waiver, the existence of estoppel is ordinarily a "question of fact" for the jury to decide. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319 ["the determination of either waiver or estoppel is a question of fact"].)

The fact that Fat Face previously paid Pierside a monthly fee for the north bridge airspace without objection is, standing alone, insufficient to conclusively establish the defense of waiver. We cannot presume Fat Face's prior payment of the fee was made with "full knowledge of the facts" (*DRG, supra,* 30 Cal.App.4th at p. 59), or that it intended to relinquish its right to challenge the fee in the future. (See *Banducci v. Frank T. Hickey, Inc.* (1949)

93 Cal.App.2d 658, 663 ["whether or not a waiver is to be implied is a question of fact which must be determined from all the surrounding circumstances of the case"].) Whether Fat Face's prior payment of the fee constituted a waiver is a question of fact for the trier of fact to resolve.[5]

Fat Face's prior payment of the airspace fee is also insufficient to conclusively establish the elements of estoppel. (See generally *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468 [""the defendant has the initial burden to show that undisputed facts support each element of the affirmative defense""].) LZSH has cited no evidence that Fat Face's prior payment of the fee was intended to induce Pierside into taking (or refraining from taking) any specific action; that Pierside was unaware Fat Face believed the fee was improper; or that Pierside detrimentally relied on Fat Face's prior payment of the fee.[6]

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[5] We note that, in its opposition to LZSH's motion for summary judgment, Fat Face submitted evidence that its prior payment of the airspace fee was not made "without objection." Gary Vincent's declaration asserts that he repeatedly told Pierside there was no legal basis to impose the fee, and "continued to raise the issue and never led the landlord to believe that [Fat Face] had waived our right to object to [the fee]."

[6] In its appellate briefing, LZSH raises additional arguments regarding the airspace fee that were not presented to the trial court. In particular, LZSH asserts that the lease permitted Pierside to impose the fee, and that the fee was otherwise proper based on principles governing tenants at sufferance. For the reasons discussed in footnote 6, we decline to consider these arguments, which LZSH has raised for the first time on appeal. (See, *infra*, at fn. 3.)

In the underlying litigation, Fat Face also claimed Pierside had overcharged it approximately $6,000 for trash disposal services. LZSH's motion argues Fat Face could not have prevailed on this claim because the evidence shows the leases contained two separate provisions governing trash disposal fees. Article 11(A) of the leases required Fat Face to pay all trash disposal fees that were "specially or exclusively supplied and/or metered" to the leased premises, while article 4.2 required it to pay a percentage of the of the trash disposal fee for the common areas of the property. According to LZSH, Fat Face's assertion that it was overcharged for trash disposal "proceeds from a mistaken reliance on . . . section 4.2," which is "separate and distinct from the trash removal service charges set forth in [section] 11(A)." Thus, LZSH appears to argue that the challenged trash disposal charges were proper under article 11(A).

LZSH has failed, however, to provide any invoices or other evidence confirming that the amount Pierside charged Fat Face for trash disposal was actually proper under articles 11(A) and 4.2. Indeed, LZSH has presented no evidence regarding the trash disposal fees beyond the language of the leases. The fact that the leases contained multiple trash disposal fee requirements is, standing alone, insufficient to make a prima facie evidentiary showing that Pierside complied with those provisions.

iii. Pierside's claims for unpaid rent and declaratory relief terminating the leases

LZSH's motion also argues that the undisputed evidence shows Pierside would have prevailed on its unlawful detainer actions, which sought to evict Fat Face and terminate the leases for failing to pay base rent between December of 2011 and

February of 2012, and failing to pay monthly charges for the north bridge airspace and trash disposal. In support of this argument, LZSH cites a provision in the leases providing that the failure to "make any payment of rent or any other payment required . . . as and when due" constitutes a material breach that gives rise to a right to terminate. LZSH contends that because Fat Face admitted it withheld three months of base rent, the airspace charges and the trash disposal fees, Pierside would have been entitled to a judgment terminating the leases in their entirety.

In the underlying litigation between Fat Face and Pierside, the trial court denied Pierside's motion for summary adjudication on this very issue, concluding there were triable issues of fact whether Fat Face's failure to make such payments entitled Pierside to terminate the leases. LZSH's motion does not address that ruling, or explain why it was incorrect.

In any event, LZSH's argument that Pierside would have prevailed on its unlawful detainer action, and obtained a judgment terminating the leases, is predicated on the assumption that Fat Face could not prove it was lawfully permitted to withhold the base rent, airspace charges and trash removal fees. As discussed above, however, in the underlying litigation, Fat Face argued that section 9.5 of the leases authorized it to withhold rent for the period of time that its premises were rendered unusable due to Pierside's improvements to the Froyo tenancy and the south bridge. Fat Face also asserted that the leases did not permit Pierside to impose charges for the north bridge airspace or trash disposal. Because LZSH has failed to make a prima facie evidentiary showing that Fat Face could not

prevail on these claims, it has also failed to show Pierside would have necessarily prevailed in the unlawful detainer actions.[7]

For the reasons set forth above, we conclude LZSH has failed to make a prima facie showing that Fat Face did not possess, and could not reasonably obtain, sufficient evidence to prove it would have prevailed against Pierside with respect to its claims regarding the Froyo tenancy, the south bridge, the north bridge airspace charge and trash disposal fees. Nor has LZSH made a prima facie evidentiary showing that Fat Face could not

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[7] LZSH motion also argues that Fat Face could not assert that it was entitled to abate rent as a defense to Pierside's unlawful detainer actions. Citing *Schulman v. Vera* (1980) 108 Cal.App.3d 552, LZSH argues that "a covenant to pay rent under a commercial lease is typically independent of and is not excused by a landlord's failure to comply with its lease obligations of repair and maintenance." LZSH is correct that, under *Schulman*, a commercial lessee is generally prohibited from asserting damages "resulting from a breach of the lessor's covenant to repair . . . as a defense . . . in an unlawful detainer action by the lessor based on the lessee's non-payment of rent." (*Id*. at p. 560.) In this case, however, Fat Face's leases with Pierside contained a specific provision that permitted it to suspend the payment of rent for any period during which Pierside's repairs rendered a portion of the premises unusable. The rule of *Schulman* is therefore inapplicable. (*Id*. at pp. 558-559 [rule that covenant to pay rent is independent of the lessor's covenant to repair inapplicable when "the covenant to repair is expressly or impliedly made a condition precedent to the covenant to pay rent"].)

have mounted a successful defense to Pierside's unlawful detainer actions.[8]

b. LZSH failed to make a prima facie showing that Fat Face could not prove damages

LZSH also argues that even if there are triable issues of fact whether Fat Face could have prevailed on some of its claims against Pierside, the undisputed evidence shows Fat Face could not prove that the amount of its recovery at trial would have exceeded the value of the settlement.[9]

LZSH's motion asserts that Fat Face sought two categories of damages on its claims against Pierside: "(i) out-of-pocket expenses amounting to about $30,000; and (ii) alleged loss of business" in the amount of $300,000 to $400,000. Although LZSH does not challenge whether Fat Face could have proved the

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[8] LZSH's motion for summary judgment also failed to address several other categories of claims Fat Face alleged against Pierside in the underlying litigation. For example, Fat Face claimed Pierside had improperly charged over $25,000 in fees for use of the south bridge. LZSH argues for the first time on appeal that Fat Face could not have prevailed on that claim; its motion for summary judgment did not address the claim. LZSH's motion also failed to address Fat Face's claim that Pierside had breached its duties to repair the north bridge, and to maintain the common areas of the property. Because LZSH's motion does not address any of these claims, it has failed to make a prima facie showing that Fat Face could not have prevailed on them.

[9] LZSH's motion does not quantify the value of the benefit that it believes Fat Face derived from the settlement. Schmalz's declaration, however, suggests the settlement enabled Fat Face to avoid a potential "six-figure monetary" judgment in favor of Pierside, and over $200,000 in trial costs.

out-of-pocket losses, it contends that Fat Face could not have established the amount of its business losses. According to LZSH, the "sole foundation for Fat Face's lost business damages theory" consisted of the testimony of its damages expert, Mike Leigh. LZSH argues that Leigh's deposition testimony shows he reached his damages estimate by comparing Fat Face's revenue in 2008 ($1.2 million) versus 2012 ($900,000), and then assigning the entire drop in revenue to Pierside's conduct. LZSH contends Leigh's methodology was inherently unreliable, and amounted to "sheer speculation," because he failed to account for a wide array of other factors that may have caused Fat Face's decrease in sales, including the economic downturn in 2008, and competition from newly-opened restaurants in the area.

Even if we were to accept LZSH's contention that Leigh's opinion was insufficient to establish the amount of Fat Face's business losses, this argument fails to address other forms of damages that Fat Face claims it incurred by accepting the settlement with Pierside. For example, Fat Face alleges that, but for the settlement, it would have retained its option to renew the two leases to continue operating its restaurants for an additional five-year period. Fat Face also claims that the leases contained an attorney's fees provision that would have permitted it to recover almost $400,000 in fees and costs it had incurred in the litigation against Pierside. Because LZSH's motion does not address these additional forms of relief in any way, it has failed to make a prima facie showing that Fat Face could not establish that the amount of its recovery at trial would have exceeded the value of the settlement.

c. Fat Face's malpractice claim does not challenge the reasonableness of the settlement

LZSH's motion for summary judgment argues that Fat Face's malpractice claim fails as a matter of law because the undisputed evidence shows "the settlement terms [with Pierside] . . . were reasonable in light of the very real possibility" that Fat Face would have lost at trial. The trial court appears to have relied on this ground in granting LZSH's motion. The court's written order explained that when a plaintiff asserts a malpractice claim after having settled the underlying litigation, the appropriate standard is "whether the settlement [was] within the realm of reasonable conclusions." The court then found that LZSH had submitted evidence showing "[Fat Face's] settlement [with Pierside] was within the range of reasonableness, which is all the law requires." The court further found that Fat Face had provided "no evidence" showing that the settlement fell outside the range of what was reasonable.

Several California decisions have quoted and approved language from Ronald Mallen's treatise on legal malpractice stating that when a plaintiff has challenged an attorney's "competence in settling the underlying case," the "'standard should be whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less." (*Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1463, fn. 13 [citing and quoting 4 Mallen, Legal Malpractice (5th ed. 2000) Error Settlement, § 30.41, pp. 582-585 (Mallen)]; *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 167 (*Filbin*) [quoting *Barnard's* quotation of Mallen]; *Slovensky*, *supra*, 142 Cal.App.4th at p. 1528 [when malpractice claim "alleges an inadequate settlement in the underlying action," the attorney is "held only to the standard of whether the

settlement was within the realm of reasonableness"] [citing *Barnard* and Mallen].) As the text of the Mallen treatise explains: "There are practical concerns whether an attorney should be liable for an allegedly inadequate settlement. Often, the amount of a compromise is an educated guess of the amount that should be recovered at trial, and what the opponent was willing or able to pay or accept. Even skillful and experienced negotiators do not know whether they received the maximum settlement or paid out the minimum acceptable. Thus, the goal of a lawyer is to achieve a 'reasonable' settlement, a concept that involves a wide spectrum of considerations and broad discretion." (4 Mallen, Legal Malpractice (2018 ed.) § 33.89, p. 952.) "In evaluating and recommending a settlement, the attorney has broad discretion and is not liable for a mere error of judgment." (*Id*. at § 33.90 p. 955; see also *Barnard*, *supra*, 109 Cal.App.4th at p. 1463, fn. 13, citing and quoting Mallen, at p. 588; see also 4 Mallen, Legal Malpractice (2018 ed.) § 33.90 p. 955.)

Although each of the cases cited above appears to approve of the standard set forth in the Mallen treatise, none of the cases actually relied on that standard in resolving the malpractice claim before it. (See *Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 474 ["The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum. . . ."].) In *Barnard*, for example, the court concluded a grant of nonsuit was proper because the plaintiff had failed to introduce any "expert testimony" or other form of evidence showing what "could have been recovered had the case been tried." (*Id*. at p. 1463.)[10] In

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10 LZSH's appellate brief suggests this case cannot be meaningfully distinguished from *Barnard* because Fat Face has

Slovensky, *supra*, 142 Cal.App.4th 1518, the court held that plaintiff could not establish she would "have achieved a better outcome" at trial because the undisputed facts showed her claims were time-barred under the applicable statute of limitations. (*Id*. at p. 1526.) Finally, in *Filbin*, 211 Cal.App.4th 154, the court found that plaintiffs could not prevail on their malpractice claim because the evidence showed they had not relied on their attorney's erroneous settlement advice.

LZSH has not cited any decision that has actually applied Mallen's "reasonableness" standard to resolve a malpractice claim challenging the adequacy of a settlement. The standard Mallen describes, however, appears to convey the standard of care an attorney owes to his or her client when negotiating and recommending a settlement. In this case, Fat Face has not alleged LZSH breached its duty by recommending an inadequate settlement, nor has it alleged that the settlement fell outside the realm of reasonable conclusions. Instead, Fat Face alleges LZSH attorney Kurt Schmalz breached his professional duty of care by being unprepared to try the case against Pierside, which forced Fat Face to forego trial, and accept a settlement it otherwise

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likewise failed to identify any evidence establishing the amount it would have obtained at trial. *Barnard*, however, involved a motion for nonsuit that was granted following the presentation of the plaintiff's evidence at trial. In contrast, this case is on appeal from an order granting a motion for summary judgment. As the defendant moving for summary judgment, LZSH had an initial burden to make a prima facie showing that Fat Face did not possess, and could not reasonably obtain, sufficient evidence to show it would have obtained a more favorable result had it proceeded to trial against Pierside. For the reasons explained above, LZSH failed to satisfy its initial burden, and thus the burden never shifted to Fat Face.

would have rejected. The fact that the settlement Fat Face entered into with Pierside may have fallen within the realm of reasonable conclusions is, standing alone, insufficient to defeat its claim.[11]

B. We Lack Jurisdiction to Review the Trial Court's Determination of Good Faith Settlement

LZSH has filed a cross-appeal of the judgment seeking review of the trial court's order granting Clark's motion for a determination of good faith settlement. (See Code Civ. Proc., §§ 877, 877.6.) In addition to its cross-appeal, LZSH has filed a separate notice of appeal, assigned Case No. B277256, that seeks direct review of the court's good faith settlement order.[12]

Code of Civil Procedure section 877 "'establishes that a good faith settlement bars other defendants from seeking contribution from the settling defendant. . . .' [Citation.]" (*Dole Food Company, Inc. v. Superior Court* (2015) 242 Cal.App.4th 894, 908.) Section 877.6 permits a party to seek a hearing "on the issue of the good faith of a settlement" (§ 877.6, subd. (a)(1)), and sets forth the procedures for such a hearing. "To determine

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[11] A jury might conclude, for example, that although the settlement with Pierside was reasonable, Fat Face would have rejected the settlement had Schmalz been prepared to try the case, and then obtained a better result at trial.

[12] LZSH appears to have filed this separate appeal based on concerns that the court's determination of good faith settlement was not reviewable by way of an appeal from the final judgment. On July 31, 2017, we issued an order directing that Case No. B277256 would be considered concurrently with LZSH's cross-appeal for purposes of oral argument and decision.

whether a settlement is in good faith a trial court must inquire 'whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries.'" (*PacifiCare of California v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1464 [citing and quoting *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488 (*Tech-Bilt*)].) LZSH argues that, in this case, the trial court should have denied Clark's motion for a good faith determination because the amount of his settlement was "grossly disproportionate to what a reasonable person would estimate [his] liability to be."

Before assessing the merits of LZSH's claim, we must determine whether we have jurisdiction to review the trial court's good faith settlement order. (See generally *Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1189 ["[t]he existence of an appealable judgment is a jurisdictional prerequisite to an appeal. A reviewing court must [address] the issue . . . whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1'"].) As explained above, LZSH's notices of appeal identify two different potential bases for our jurisdiction. In Case No. B277256, LZSH seeks direct review of the court's good faith settlement order; in Case No. B275863, LZSH seeks review of the order based on the the judgment entered in its favor on Fat Face's malpractice claims.

We begin with Case No. B277256, which seeks direct review of the court's determination of good faith settlement. Numerous prior decisions have held that an order of good faith settlement is a "nonappealable interlocutory ruling." (See generally *Oak Springs v. Villas Homeowners Assoc. v. Advanced*

Truss Systems (2012) 206 Cal.App.4th 1304, 1307.) As this court explained in *Chernett v. Jacques* (1988) 202 Cal.App.3d 69 (*Chernett*), "a determination that a settlement has been made in good faith is an interloctory decree. Although section 904.1 sets forth several specific instances in which an interlocutory judgment may be appealed, the good faith determination is not among them." (*Id*. at p. 71.) LZSH has cited no case that has held otherwise.[13] Because LZSH's notice of appeal in Case No. B277256 seeks review of a nonappealable order, we dismiss the appeal for lack of jurisdiction.

In Case No. B275863, LZSH seeks review of the good faith determination based on its cross-appeal of the judgment the court entered on May 12, 2016, which states: "As to the Amended Complaint of Plaintiff [Fat Face], the Court entered an order granting summary judgment in favor of Defendant [LZSH], and against Fat Face, dismissing all causes of action against LZSH. . . . Accordingly, Fat Face shall take nothing on its Amended Complaint. LZSH shall be awarded its costs in Fat Face's action. . . ." The judgment does not reference Fat Face's malpractice claims against Clark, which were the subject of the

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[13] In its briefing in Case No. 275863, LZSH appears to concede that the court's good faith settlement order is not directly appealable. In response to Clark's motion to dismiss the cross-appeal in Case No. B275863, LZSH filed an opposition stating, in relevant part: "A good faith determination is a nonappealable interlocutory ruling. . . . [¶] Appellate jurisdiction over judgments and orders in civil cases is governed by [Code of Civil Procedure] section 904.1. This section provides a laundry list of appealable judgments and orders in civil cases. Absent from this list is prejudgment review from an order granting or denying good faith determination under [Code of Civil Procedure] section 877.6(e)."

good faith settlement determination. At oral argument, the parties were unable to confirm whether the trial court ever entered a dismissal of Fat Face's claims against Clark.

LZSH's briefing does not include a statement of appealability[14] explaining why it believes that a judgment that does not dismiss any claim against Clark provides us jurisdiction to review an interlocutory order finding that Clark's settlement with Fat Face was made in good faith. We presume, however, that LZSH is asserting the order is reviewable pursuant to Code of Civil Procedure section 906, which provides: "Upon an appeal [of a judgment or order made appealable under section 904.1], the reviewing court may review . . . any intermediate ruling . . . which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party. . . ."

Despite its broad wording, our courts have clarified that section 906 only permits "an appellate court to review rulings, orders, or other decisions that led up to, or directly related to, the judgment or order being appealed. . . . [¶] . . . . [N]onappealable orders or other decisions . . . not directly related to[] the judgment or order being appealed are not reviewable pursuant to section

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[14] California Rule of Court 8.204(2)(B) provides that an appellant's opening brief must "[s]tate that the judgment appealed from is final, or explain why the order appealed from is appealable." This "statement of appealability serves multiple purposes. First, it requires an appellant to make the preliminary and fundamental determination that the order appealed from is, in fact, an appealable order or judgment. [Citation.] Second, it demonstrates both to other parties and to the Court of Appeal, before work on the merits of a case is begun, why the order is appealable." (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 556.)

906 even though they literally may 'substantially affect[ ]' one of the parties to the appeal." (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 948 (*Cahill*); see also *Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1132-1133 [section 906 "does not apply to interim orders that are unrelated to the appealable judgment or order from which an appeal is taken"].)

The court's order determining that Clark' settlement was made in good faith did not lead up to, or directly relate to the May 25th judgment. As explained above, that judgment does not reference Fat Face's claims against Clark; it pertains only to Fat Face's malpractice claims against LZSH, and was based on the trial court's prior grant of LZSH's motion for summary judgment against Fat Face. Clark's settlement, and the court's subsequent determination that the settlement was made in good faith, had no relevance whatsoever to LZSH's motion for summary judgment, or the dismissal of Fat Face's claims against LZSH. The May 25th judgment therefore provides us no basis to review the court's interlocutory good faith determination pursuant to section 906.

LZSH, however, argues that two prior decisions, *Maryland Casualty Co. v. Andreini & Co.* (2000) 81 Cal.App.4th 1413 (*Maryland Casualty*) and *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627 (*Wilshire*), make clear that a non-settling defendant may obtain review of a good faith settlement order based on an appeal of a final judgment. In *Maryland Casualty, supra,* 81 Cal.App.4th 1413, the plaintiff sued his insurer and his insurance broker for refusing to cover a damage claim. The insurer and the broker then filed cross-claims against each other for indemnity. The plaintiff settled his claims against the broker, and the court found the settlement was made in good

faith. Based on its determination of good faith settlement, the court entered a dismissal of the insurer's indemnity claim against the broker. The parties' remaining claims were tried, and a final judgment was entered in the matter. The insurer then sought "review of the trial court's good faith settlement determination by way of appeal after judgment." (*Id.* at p. 1419.) The court concluded it had jurisdiction to review the good faith settlement order under section 906 because the order had resulted in the judgment dismissing the insurer's indemnity claim.

Wilshire, supra, 86 Cal.App.4th 627, found a determination of good faith settlement to be reviewable under analogous circumstances. The plaintiffs in *Wilshire* were the heirs of a motorist who was killed in a collision with a truck. Plaintiffs filed a wrongful death action against the truck driver, his insurer and the manufacturer of a trailer that was attached to the truck. The insurer filed an indemnity action against the trailer manufacturer. The plaintiffs settled their claims against the manufacturer, who then obtained an order of good faith settlement that barred the indemnity claims of any joint tortfeasor. Based on that order, the insurer and the manufacturer agreed to enter into a stipulated judgment dismissing the insurer's indemnity claim. The insurer then filed an appeal seeking review of the good faith determination. As in *Maryland Casualty*, the court found the "good faith settlement determination [wa]s subject to appellate review on appeal from the judgment." (*Id.* at p. 637.)

Maryland Casualty and *Wilshire* are clearly distinguishable from this case. In both of those decisions, the trial court's determination of good faith settlement operated to preclude the indemnity claims that were the subject of the

judgments that had been appealed from. The good faith settlement orders were therefore "directly related to" (*Cahill*, *supra*, 194 Cal.App.4th at p. 948) those judgments, and thus reviewable pursuant to section 906. Here, however, LZSH never asserted an indemnity claim against Clark, and the judgment it has appealed from only pertains to Fat Face's claims against LZSH, which were dismissed pursuant to the grant of a motion for summary judgment that had no relation to Fat Face's claims against Clark, or Clark's settlement of those claims. It does not appear that the court ever entered a dismissal with respect to Fat Face's claims against Clark. Because the good faith settlement order had no effect on, or relationship to, the claims dismissed in the May 25th judgment, we have no authority to review the order under section 906.[15]

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[15] In his briefing, Clark argues that we should dismiss LZSH's appeal because Code of Civil Procedure section 877.6, subdivision (e), which provides expedited writ review procedures for a good faith settlement order, precludes any form of postjudgment review. There is currently a split of authority with respect to whether section 877.6, subdivision (3) operates as a bar to any form of postjudgment review. As Clark notes, several decisions have held that review of "[a] good faith settlement determination is . . . obtainable only by a timely writ petition pursuant to . . . section 877.6[, subdivision (e)]." (*Oak Springs, supra,* 206 Cal.App.4th at p. 1307; see also *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal.App.4th 1130, 1135; *O'Hearn v. Hillcrest Gym and Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 499.) In *Maryland Casualty* and *Wilshire*, however, the courts concluded that subdivision (e) does not preclude postjudgment review of a good faith settlement order that is otherwise appealable pursuant to section 906. (See *Maryland Casualty*, *supra*, 81 Cal.App.4th at pp. 1420-1426;

DISPOSITION

In Case No. B275863, the trial court's judgment in favor of LZSH is reversed; LZSH's cross-appeal is dismissed. In Case No. B277256, the appeal is dismissed. Fat Face and William Clark shall recover their costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.*

Wilshire, *supra*, 86 Cal.App.4th at pp. 636-637; see also *Cahill, supra,* 194 Cal.App.4th at p. 956; *Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 827, fn. 1; *Chernett, supra,* 202 Cal.App.3d at p. 71.) Because we conclude that the court's determination of good faith settlement does not directly relate to the May 25th judgment, and is therefore not appealable pursuant to section 906, we need not resolve whether section 877.6, subdivision (e) precludes postjudgment review.

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