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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LAW OFFICES OF BRUCE ALTSCHULD, Plaintiff, Cross-defendant and Appellant, v. WILLIAM G. WILSON, Defendant and Respondent, REALWEALTH CORPORATION, Defendant, Cross-complainant and Respondent; BRUCE ALTSCHULD, Cross-defendant and Appellant.	B227300 (Los Angeles County Super. Ct. No. SC094133)

APPEAL from a judgment of the Superior Court of Los Angeles County. Linda K. Lefkowitz, Judge. Affirmed.

Law Offices of Bruce Altschuld and Bruce Altschuld for Appellants.

William G. Wilson for Respondents.

The Law Offices of Bruce Altschuld ("the Law Offices") sued William G. Wilson and Realwealth Corporation. Realwealth cross-complained against the Law Offices and against Bruce Altschuld personally. The trial court found against the Law Offices on its complaint and in Realwealth's favor on the cross-complaint. The Law Offices and Altschuld appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Page v. Tatco* Litigation and Judgment

In March 1993, the Law Offices entered into a representation agreement with Jones, Day, Reavis & Pogue and Jones Day's assignee, Christopher Page. The Law Offices were retained to act as counsel in *Christopher Page v. Tatco Investments, Inc. et al.*, Los Angeles Superior Court No. BC058756,[1] litigation seeking to recover the assets of Sherman Mazur, a former Jones Day client who had been convicted of criminal activity. In relevant part, the retainer provided that the Law Offices would receive "33 1/3 % of all funds collected on behalf of Clients." Included in the contract was a passage that read, "This Agreement contains the entire agreement between the Clients and the Counsel regarding the representation herein described and the fees, charges, and expenses to be paid relative thereto. This Agreement shall not be modified except by written agreement signed by the Clients and the Counsel. This Agreement shall be binding upon the Clients and their respective heirs, executors, legal representatives, and successors."

In 1994 the Law Offices obtained a judgment in Page and Jones Day's favor in the amount of $2,668,346.

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[1] We follow the parties' convention and refer to this litigation as *Page v. Tatco*.

B. Assignment of the *Page v. Tatco* Judgment and Subsequent Agreements

In 1993, bankruptcy proceedings were begun involving Mazur. After the *Page v. Tatco* judgment was obtained, Jones Day agreed to assign it to Duke Salisbury, the bankruptcy trustee, in exchange for a portion of the proceeds collected based on information provided by Jones Day. Page signed a notarized acknowledgment of assignment of judgment in which he acknowledged that he had assigned his interest in the *Page v. Tatco* judgment to Salisbury.

In 2001, the Jones Day attorney who handled Mazur-related matters, William G. Wilson, left the firm. On July 10, 2001, Jones Day conveyed to Wilson its interest in the *Page v. Tatco* judgment. On August 1, 2001, Wilson transferred the judgment to Realwealth, a corporation he had formed for the purpose of holding the judgment.

The following year, Salisbury, Salisbury's attorney, and Altschuld entered into a letter agreement dated February 28, 2002. The letter "memorialize[d] the new agreement, subject to Bankruptcy Court approval, between Duke Salisbury . . . as Trustee of the Sherman Mazur and Michelle Mazur bankruptcy estates (and in his capacity as the assignee of the Page v. Mazur judgment) and the assignor of the Page v. Mazur judgment." Salisbury and Realwealth agreed to a series of "modifications to the existing agreement regarding the identification of assets and disbursement of proceeds," including a requirement that the letter agreement would be submitted to the bankruptcy court for its approval. The agreement further provided, "The Trustee shall assign the Page v. Mazur[[2]] judgment to Realwealth and shall also assign to Realwealth the judgment recorded against the real property of Diane Breitman relating to the judgment obtained by the Trustee against Mazur and Breitman in the Trustee's fraudulent conveyance action." The letter agreement required Salisbury to assign the judgments in *Page v. Tatco* and *Salisbury v. Breitman* to Realwealth "in accordance with California Code of Civil

[2] In *Page v. Mazur*, Page obtained a judgment determining the *Page v. Tatco* judgment was nondischargeable in bankruptcy proceedings.

Procedure requirements." Altschuld was required to "forthwith prepare for filing by the Trustee a renewal of the Page v. Mazur judgment."

Salisbury filed an ex parte motion under seal in the bankruptcy court for an order approving the letter agreement. In June 2002, the bankruptcy court entered an order stating, "The Trustee's execution, delivery, and performance of the Letter Agreement described in the Motion is hereby authorized and approved, *nunc pro tunc* as of February 28, 2002."

C. 1801 Litigation

In 2003, Realwealth sued Mazur, his attorney Reid Breitman, Khat Holdings, Inc., and others in an action centering on a property located at 1801 San Vicente Boulevard in Santa Monica (often known as the "1801" or the "Khat" case, Los Angeles Superior Court No. SC077690). Realwealth alleged that Breitman controlled Khat Holdings and that Khat Holdings purchased the property with Mazur's money and initiated the process of building a home for him. Realwealth alleged a violation of Civil Code section 3439, sued as a creditor under Code of Civil Procedure section 708.210,[3] and requested a receiver be appointed to enforce the judgment. After a trial, in August 2005 the court found in Realwealth's favor and entered a judgment in the amount of $2,424,603.66. In the court's lengthy statement of decision, the court cursorily noted that Realwealth "holds a judgment against Defendant Mazur."

D. Renewal of the Judgment

The record is not clear on the efforts to renew the *Page v. Tatco* judgment. The statement of decision states that "[t]he original Application for and Renewal of Judgment filed in April 2002 does not have any acknowledgment attached therein." The court cites

[3] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

to an attachment to Exhibit 535 (a motion filed May 18, 2006) to support this statement. Unfortunately, appellants' index does not list exhibit numbers; we find no motion among the May 2006 documents listed in the chronological index; and our search for the document by name in the alphabetical index was fruitless. We have located Exhibit 239, an application for renewal of judgment that matches the description in the statement of decision and bears a handwritten April 2002 date, but it is not file-stamped and was admitted pursuant to stipulation rather than after testimony describing and authenticating it. It bears no acknowledgment of assignment.

Renewing the judgment appears to have been difficult. Exhibit 68 is correspondence with a deputy clerk of the Los Angeles County Superior Court dated February 4, 2004, stating that the original application submitted on April 10, 2002, had caused the court to "advise[] that there were flaws in the original application" in October 2002. The application submitted February 4, 2004, purported to "correct those flaws." Altschuld testified to receiving correspondence dated February 20, 2004, from the deputy clerk. The deputy clerk identified problems with the application for the renewal of the *Page v. Tatco* judgment, including improper amounts listed, the failure to identify the judgment creditor, and the failure to submit a copy of the assignment of the judgment.

Ultimately, an ex parte application was filed to renew the judgment. The trial court, Judge Victor Person, granted the application and ordered the clerk to execute the renewal of judgment. The application is included in the record on appeal as part of the notice of renewal, Exhibit 281. No acknowledgment of assignment of the judgment to Realwealth is included in the documents.

E. Challenges to the Renewal of the Judgment

According to the statement of decision, on May 18, 2006, "Mazur filed a motion in which he both challenged renewal of the *Page v. Tatco* judgment and moved to quash enforcement of the judgment[,] raising, inter alia, the failure to file an Assignment of

Judgment and an Acknowledgment of Assignment of Judgment." The court relied on Exhibit 535 to support this assertion.[4]

Judge Person ruled that Mazur's motion to vacate the renewal of the judgment was untimely. However, with respect to enforcement, the court stated, "The right to enforce a judgment is controlled by C[ode of Civil Procedure section] 673. 'An assignee of a right represented by a judgment may become an assignee of record by filing with the clerk of the court which entered the judgment an acknowledgement of assignment of judgment.' [(§ 673, subd. (a).)] Furthermore, an assignee may not enforce a judgment under Title 9 of the [Code of Civil Procedure] (commencing with § 680.010) 'unless an acknowledgment of assignment of judgment to that assignee has been filed under Section 673 or the assignee has otherwise become assignee of record.' [(§ 681.020.)] [¶] Here, there is simply no evidence in the record that Realwealth ever filed an acknowledgment of assignment or otherwise became assignee of record. Since it never filed the acknowledgment, it cannot enforce the judgment under C[ode of Civil Procedure section] 680.010 et seq. [¶] The language of the statute is clear: Realwealth Corporation does not have the right to enforce the judgment under Title 9 of the C[ode of Civil Procedure] since it did not file an acknowledgment of assignment." Mazur appealed the denial of his motion to vacate the renewal.

Realwealth apparently filed a motion to terminate the order quashing enforcement of the judgment, but only the caption page of the motion is included in the record. Judge Person noted in his ruling on that motion that Realwealth had, since the court's earlier ruling, "now followed the proper procedures to become the assignee of record of the underlying judgment," but found the belated effort unavailing: "[T]he fact that Realwealth is now the assignee of record does not alter the fact that it was not previously assignee of record, and had no right to enforce the judgment. Nothing can retroactively validate the actions it previously undertook. [¶] Realwealth's previous failure to become

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[4] Unfortunately, as we have discussed above, we cannot locate Exhibit 535 because appellants' index does not list trial exhibit numbers and we find no documents dated May 18, 2006 in the chronological index.

assignee of record meant that it did not have standing to enforce the judgment. This was not an issue of a lack of capacity, as Realwealth urges, but a matter of standing. Because Realwealth was not the assignee of record, it was not the real party in interest. This involves standing, not capacity." Judge Person issued this ruling on October 23, 2006.

F. Subsequent Developments in Pending Litigation

At the time of Mazur's challenge to the renewal of the *Page v. Tatco* judgment, three lawsuits had been filed to recover his assets based on that judgment: the 1801 case, which was apparently on appeal; *Realwealth v. Gateway* (Los Angeles Superior Court No. SC087721), filed November 23, 2005; and *Realwealth v. Breitman* (Los Angeles Superior Court No. SC088329), filed January 20, 2006.[5]

Judge Person's ruling in *Page v. Tatco* impacted the other litigation. The *Realwealth v. Gateway* action was dismissed in January 2007: "The action is dismissed in its entirety based on collateral estoppel. The Court in Page v. Tatco Investments, case number BC 058756, specifically found that Plaintiff lacked standing to enforce the judgment in that matter prior to 7-24-06. Since the Complaint and First Amended Complaint in this matter were both filed prior to 7-24-06, and this matter was filed to enforce the judgment in Page v. Tatco Investments, this matter is dismissed in its entirety." Realwealth appealed. The appeal was dismissed.

In the 1801 appeal, appellants Breitman and Khat Holdings requested judicial notice of the proceedings in the *Page v. Tatco* action concerning the renewal of the judgment and its enforcement, and argued in their November 2006 opening brief, inter alia, that Realwealth lacked standing to enforce the judgment. Realwealth renewed settlement efforts with Breitman. Although in April or May 2006 Breitman had offered

[5] The appellants' opening brief fails to provide a cogent description of facts relating to the cross-complaint with citations to the record; and the appellants' appendix fails to include many documents relevant to these issues. We therefore rely on the statement of decision for factual information regarding this aspect of the litigation.

$2,000,000 to settle the matter, in early 2007, Realwealth settled with Breitman for $1,600,000.

G. Dispute between Altschuld and Realwealth/Instant Litigation

Wilson and Altschuld disputed the amount of fees due the Law Offices. By letter dated April 13, 2007, Wilson directed Altschuld to disburse funds to Salisbury and Realwealth and to retain the balance in Altschuld's trust account pending further instructions. Altschuld protested Wilson's instruction not to release funds for payment of the Law Offices' fees.

In May 2007, the Law Offices filed a notice of its attorney lien on all proceeds paid under the *Page v. Tatco* judgment. In June 2007, the Law Offices sued Wilson and Realwealth, alleging two causes of action for breach of contract and causes of action for breach of an oral agreement, quantum meruit, bad faith denial of a contract, fraud, declaratory relief, injunctive relief, and intentional infliction of emotional distress.[6] Realwealth cross-complained against the Law Offices and against Altschuld personally, claiming professional negligence and seeking an accounting and declaratory relief.

After a bench trial, the trial court found that the written contract was the operative contract between the parties and that Altschuld had committed malpractice. The court found in Realwealth's favor and awarded damages of $400,000, representing the difference between the original settlement offer of $2 million and the $1.6 million Realwealth ultimately accepted due to the threat against the enforceability of the *Page v. Tatco* judgment. Altschuld and the Law Offices appeal.

[6] Appellants are silent as to the fate of the intentional infliction of emotional distress cause of action, which had been eliminated by the time of trial.

DISCUSSION

I. Fee Entitlement/Failure to Determine Claims

The Law Offices argues on appeal that the trial court failed to award its fee "and failed to consider any of its other claims." It asserts that we must employ independent review; insists that it is entitled to a damages award; and claims that the trial "court found Realwealth to be in breach of its contract to pay 1/3 of all monies collected," yet failed to make an award of damages based on this breach.

The Law Offices fails to provide any citation to the statement of decision to support its assertion that the court found Realwealth to have breached the contract, and we see no such finding in the statement of decision. The court found that the written retainer agreement, not any purported oral contract, bound the parties. The court, however, did not state that Realwealth breached the contract; to the contrary, it expressly found for the defendants on the Law Offices' complaint. Because the record contradicts the Law Offices' representation of the court's conclusions, the Law Offices has not demonstrated that the court erred by failing to award damages for this purported breach. (See *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [appellant bears the burden of affirmatively demonstrating error].)

The record similarly contradicts the Law Offices' contention that the trial court "failed to consider any of its other claims" or failed to "determine" them. The court expressly found against the Law Offices on all causes of action. The Law Offices has not demonstrated that the court failed to adjudicate all the causes of action presented by the complaint at trial. (See *State Farm Fire & Casualty Co. v. Pietak*, *supra*, 90 Cal.App.4th at p. 610.)

II. Attacks on the Legal Malpractice Finding

Appellants contend that their "defenses" to Realwealth's legal malpractice claim should have prevailed and defeated any recovery. We consider each in turn.

A. Duty

Appellants contend that Altschuld had no duty and could not have committed malpractice. The argument begins, "The operative agreement required that Salisbury was required to prepare and file the acknowledgment of assignment of judgment." Appellants fail to specify which of the many agreements in the record they refer to, and they provide no citation to the record to support their assertion. (*Metzenbaum v. Metzenbaum* (1950) 96 Cal.App.2d 197, 199 ["an appellate court cannot be expected to search through a voluminous record to discover evidence on a point raised by appellant when his brief makes no reference to the pages where the evidence on the point can be found in the record"].) While we infer that appellants refer to the letter agreement between Salisbury and Realwealth that was approved by the bankruptcy court, that agreement does not require Salisbury to prepare and file the acknowledgment of assignment of judgment as appellants contend, only that he assign the judgments in question to Realwealth "in accordance with California Code of Civil Procedure requirements."

Appellants also assert that the trial court had already ruled on this issue at the first demurrer hearing. Again, appellants provide no citation to the record to permit this court to understand what issue the court supposedly ruled on at the first demurrer hearing, and no explanation of what "this issue" is or how any purported ruling at the demurrer hearing was determinative of issues after a court trial.

Appellants then attempt to construe the duty found to exist here as a duty to monitor the bankruptcy trustee. They do not acknowledge the trial court's rationale for a finding of duty: regardless of the original responsibility for preparing the acknowledgment of assignment of judgment, Altschuld undertook to prepare it; and

having done so, he had a duty to prepare it competently. "Although there may be no duty to undertake a specific task, if an attorney does so voluntarily for a client, the task must be done with reasonable care." (1 Mallen & Smith, Legal Malpractice (2011 ed.) Theory of Liability—Common Law, § 8:2, p. 921.) As they have not discussed the actual basis for the trial court's determination of duty, appellants consequently did not demonstrate any error of fact or law in the court's conclusion and have failed to satisfy their burden on appeal of overcoming the presumption of correctness. (*Boyle v. CertainTeed Corp*. (2006) 137 Cal.App.4th 645, 649-650 (*Boyle*).) Accordingly, appellants have not established error in the court's conclusion that the duty element of a claim of legal malpractice had been adequately proven.

B. Evidence of the Prior Settlement Offer

Appellants contest the sufficiency of the evidence that Breitman had been willing to pay $2 million to settle the litigation against him prior to the problems coming to light concerning the assignment and Realwealth's ability to collect on the *Page v. Tatco* judgment. Appellants contend that "[t]he only evidence in the record of Breitman's offer of $2 million" is Breitman's testimony, after an attempt to refresh his recollection with a document known as Exhibit 534, that he did not remember such an offer.

Appellants mischaracterize the record. Exhibit 534, which was admitted into evidence without objection during Altschuld's testimony, described the settlement offer. The document is a May 2006 letter by Altschuld describing a settlement offer made informally by Breitman after an April 2006 settlement conference. Altschuld reported that "Since then Mr. Breitman has offered $2 million dollars [*sic*] to settle his part of the matter." Altschuld testified at trial that he remembered the content of his letter setting forth the settlement offer and that "that content is accurate." When asked specifically about his report of the settlement offer, Altschuld responded, "I wouldn't have written Duke [Salisbury] that letter unless those things happened." The finding that there had been a settlement offer in the amount of $2 million was supported by substantial

evidence. (*Californians for Disability Rights v. Mervyn's LLC* (2008) 165 Cal.App.4th 571, 595.)

Appellants argue that the offer was made at a mediation and that it therefore was inadmissible at trial. Appellants identify no evidence in the record to support this assertion, and Exhibit 534 belies it: Altschuld's letter, which he testified was accurate in content, stated that the settlement offer had been made "since" the settlement conference, and does not state that it was made at a mediation. Appellants have not established error.

C. Absence of Expert Witness Testimony

Appellants next contend that the trial court erred by rendering a decision that they failed to act within the standard of care without any expert testimony to that effect. While expert testimony is ordinarily employed to establish the standard of care, it is not in all cases essential. "The issue of attorney malpractice is in essence a question of fact similar to that involved in other professional negligence. [Citation]. Expert testimony is admissible to establish the standard of care applicable to a lawyer in the performance of the work for which he was engaged by the client, and to establish whether he has performed to the standard. Where the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required." (*Wilkinson v. Rives* (1981) 116 Cal.App.3d 641, 647-648.)

Section 673, subdivision (c)(1) requires that the acknowledgment of an assignment of judgment must be made in the manner of an acknowledgment of a conveyance of real property, which means that it must be notarized. Altschuld prepared the acknowledgment of assignment of judgment. In doing so, he was provided by his client with an excerpt from a prominent legal practice guide that provided a form for the acknowledgment, complete with a reminder that the lawyer should "Attach Certificate of Acknowledgment Executed by Notary Public." Altschuld generally followed the format of the form provided to him, but he failed to attach a certificate of acknowledgment or to communicate in his cover letter that Salisbury's signature needed to be notarized.

The trial court found that no expert testimony was necessary to determine that in failing to properly draft the acknowledgment and to ensure that an acknowledgment meeting statutory standards was filed, Altschuld fell below the standard of care. The trial court explained, "[W]here the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not a necessity. [Citation.] In the instant case, Altschuld failed to comply with simple 'black letter' law requiring that an assignment be filed and that it be accompanied by a notarized acknowledgment. The statutes are clear and unambiguous upon this issue. No expert opinion is required to find that despite Mr. Altschuld's clear dedication to tracking Mazur's funds to their source on his own behalf and that of his clients, in this regard he undertook particularized and simple tasks on behalf of Realwealth and failed to act to perform them properly and/or ascertain that the proper filings in court had been made. In so doing, he failed to act within the standard of care."

Appellants make several points in succession and attempt to distinguish the relevant case law in order to show error here, but they do not establish any error by the trial court. First, appellants state that based on the parties' agreement, Salisbury was required to assign the judgment and that he had previously completed a fully notarized acknowledgment of assignment of judgment. We infer from this assertion that Altschuld contends he had no responsibility for the assignment because Salisbury was ultimately required to assign the judgment and had once been a part of a properly documented assignment. But whether or not Altschuld could properly have refused to prepare the acknowledgment because it was Salisbury's responsibility is not relevant here, for as we have already discussed, Altschuld undertook to prepare the acknowledgment forms and therefore had a duty to perform that task with reasonable care. (1 Mallen & Smith, Legal Malpractice (2011 ed.) Theory of Liability—Common Law, § 8:2, p. 921.)

Next, appellants point out that the acknowledgment of assignment of judgment was filed with the renewal papers. Appellants do not explain, nor do they cite any authority for, how this fact tends to establish any error in the court's finding of professional negligence. Appellants next state that "the bankruptcy court order is

satisfactory compliance," but this bare assertion is not supported by any further reasoned argument, citations to law, or citations to the record, and it is therefore insufficient to demonstrate any error by the trial court. (*Boyle*, *supra*, 137 Cal.App.4th at pp. 649-650.)

Appellants also "remind[]" the court that Salisbury's attorney sent an acknowledgment of assignment of judgment for Salisbury to sign, but they fail to cite to the record to support this assertion and also fail to develop an argument to demonstrate how this asserted fact establishes an error in the court's finding that Altschuld's performance did not meet the standard of care. "[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's . . . issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.)

Next, appellants state that there was "no evidence of what the standard of care was for an attorney to compel a United States Trustee to comply with his contractual obligations." The trial court, however, did not find that Altschuld had fallen below the standard of care because he failed to compel the trustee to act; it found that his failure to meet statutory standards for the acknowledgment documents he undertook to prepare constituted professional negligence. Accordingly, evidence was not necessary concerning the standard of care for compelling a trustee to fulfill contractual obligations.

Appellants next attempt to distinguish *Wilkinson v. Rives*, *supra*, 116 Cal.App.3d 641, the case on which the trial court relied for the general principle that when an attorney's failure of performance is sufficiently clear, the trial court may find professional negligence without resort to expert testimony. Observing that the *Wilkinson* court concluded that expert testimony was required to determine whether the attorney's failure constituted negligence, appellants contend that the facts of that case are similar to the case here, such that expert testimony was required here as well. We do not agree. In *Wilkinson*, the attorney failed to prepare an optional affidavit in conjunction with a declaration of homestead. (*Id*. at p. 646.) The failure to include the affidavit did not invalidate the declaration of homestead, but merely affected evidentiary presumptions that arise when the optional affidavit is properly completed and included in the

declaration. (*Id*. at p. 647.) The declaration itself, the court observed, "conforms in all respects with the statutory requirements." (*Ibid*.) The question, therefore, was whether due care required the attorney to prepare the further optional affidavit in the course of filing the homestead declaration, and the court concluded that that determination required expert testimony. (*Id.* at pp. 647-648.) Here, the issue is not whether counsel, having prepared a proper and legally effective acknowledgment of assignment of judgment, should nonetheless have prepared an additional, optional document with other evidentiary significance. Instead, the acknowledgment of assignment of judgment failed to meet the statutory requirements for an effective acknowledgment under section 673, subdivisions (a), (b), and (c). Accordingly, *Wilkinson* does not offer any basis for concluding that expert testimony was necessary in this case to determine the standard of care.

Appellants next provide quotations from the decisions in *Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, *Wilkinson v. Rives*, *supra*, 116 Cal.App.3d 641, and *Fergus v. Songer* (2007) 150 Cal.App.4th 552. Appellants' entire analysis of these cases is, "Similarly in the case at bench even if Altschuld had made a mistake in the form of the [acknowledgment of assignment of judgment], the filing it with the renewal papers, failing to compel Salisbury to file it or the lack of the notarization there still was no evidence that such conduct fell below the standard of care of members in the profession." The trial court, however, found that the failure to meet the express statutory requirements for an acknowledgment—particularly when counsel was provided with a form acknowledgment that reminded him of the need to attach the notarized document—fell below the standard of care. Appellants have not established that the court erred in this determination.

Appellants, finally, mention *Barnard v. Langer* (2003) 109 Cal.App.4th 1453 and offer what purports to be a quotation from that decision but which lacks a pinpoint citation and does not in fact appear to be language quoted from that decision. Appellants offer no argument as to the import of this case or how it demonstrates any error by the trial court in its determination that expert testimony was not needed to determine that the legal services provided fell below the standard of care. "An appellant must provide an

argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852; see also *In re Phoenix H.* (2009) 47 Cal.4th 835, 845.)

D. Collectability of the 1801 Judgment

Appellants contend that the trial court's determination that the underlying judgment in the 1801 litigation was collectible was not supported by substantial evidence. Appellants claim that the "entirety of the evidence of the collectability of the underlying judgment" was Breitman's testimony that he would not have been able to pay the judgment and believed it was not collectible against him.

Appellants have failed to acknowledge the evidence that Breitman had discussed settlement possibilities including conveying "stock or securities"; that the 1801 San Vicente property itself had sold during the litigation for $2,424,000 in cash; that the proceeds from that sale went into Khat Holding's bank account; that Khat Holdings held a $1.1 million note from GCH Capital, Inc., that was unpaid as of January 2007 and was considered an asset; and that Breitman had obtained $1.6 million from a trust and had at other times borrowed hundreds of thousands more from that trust. "'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.] Defendants' contention herein 'requires defendants to demonstrate that there is *no* substantial evidence to support the challenged findings.' (Italics added.) [Citations.] A recitation of only defendants' evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if, as defendants here contend, 'some particular issue of fact is not sustained, they are required

to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.' (Italics added.) [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881-882.) While appellants do acknowledge two pieces of evidence—which they characterize as arguments—in their footnotes in this portion of the brief, this is an insufficient presentation of all material evidence on collectability; and appellants have failed to establish by argument that the evidence presented at trial was insufficient to permit the trial court to conclude that the judgment was collectible.

E. Trial Within a Trial

Appellants' next argument is as follows: "The Statement of Decision does not **ever** state that Realwealth would lose the *1801* appeal. There was no evidence presented that had Realwealth pursued the appeal that it would have lost the appeal; nor, does the Statement of Decision reach that conclusion. Indeed the trial court already had held that the results of any appellate ruling were 'irrelevant.' [Citation to elsewhere in the opening brief]." We understand appellants to be arguing that (1) a trial within a trial is always required in order for a client to establish damages and recover for legal malpractice; and (2) if a trial within a trial had been held, Realwealth could not have proven it would have lost the 1801 case appeal.

The trial within a trial is a method by which an aggrieved former client may present evidence of what the outcome of a matter would have been were it not for the attorney's alleged negligence, permitting the client to establish the actual loss caused by the professional negligence. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 832-834.) "In a typical professional negligence case against a litigation attorney, a determination of the merits of the underlying lawsuit must be made in order to adjudicate the elements of causation and damages. [Citation.] The plaintiff is required to prove that but for the defendant's misconduct, '"the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly

occurred."' [Citation.] 'This method of presenting a legal malpractice lawsuit is commonly called a trial within a trial. It may be complicated, but it avoids speculative and conjectural claims.' [Citation.]" (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 934 (*Gutierrez*).)

Appellants appear to argue that a trial within a trial is required in every malpractice action, but this is not accurate. When a cause of action against counsel may be resolved without determining the merits of the underlying claims a trial within a trial is not necessary. (*Gutierrez, supra,* 194 Cal.App.4th at p. 936 [breach of fiduciary duty claim against counsel "must stand or fall without regard to the merits of his underlying claims" and so merits of the underlying case are irrelevant to the cause of action].) Insisting on a trial within a trial in all malpractice litigation "would lead to absurd and inequitable results. For example, suppose a plaintiff retains an attorney to represent him in an employment discrimination action on a contingency basis. After the plaintiff's employer settles the case for $100,000, the attorney absconds with the settlement proceeds without paying the plaintiff anything. [If a trial within a trial were always required], if the plaintiff sued the attorney, the attorney could raise each of the employer's defenses to the plaintiff's settled claims and, if the attorney prevailed in this trial within a trial, he could keep the $100,000 with impunity. That is not, should not be, and never has been the law in this state." (*Id*. at pp. 936-937.)

Here, the trial court concluded that due to the very unusual posture of the litigation, the damages from Altschuld's malpractice could be determined with precision: "[T]he record in this case is unique among cases addressing the certainty of damages in the legal malpractice context because the *Khat* litigation had resulted in a judgment in the sum of $2,795,000. Testimony also revealed that the parties then engaged in settlement discussions and that there was a settlement offer by the *Khat* defendants in the sum of $2,000,000. This latter offer was reduced to $1,600,000 following the [negative] rulings. Realwealth agreed to the settlement in light of these adverse rulings, and the settlement sum was paid." The court acknowledged the ultimate outcome of the appeal of the denial of the motion to vacate the renewal of the *Page v. Tatco* judgment, and continued, "The

state of the then contemporaneous threat to the *Khat* judgment must thus be attributed to Altschuld. Testimony at trial further revealed it was the substantial factor in the *Khat* defendants' reduction of an original settlement offer of $2,000,000 to a reduced sum of $1,600,000 and in Realwealth's acceptance of that amount." Accordingly, the court found Realwealth to be "entitled to the difference between the original settlement offer of $2,000,000 and the $1,600,000 it accepted in light of the threat to the judgment." Appellants, taking the absolute position that a trial within a trial is uniformly required, have not made any arguments that if the trial within a trial approach need not always be used, it nonetheless should have been employed here; nor have they demonstrated any error in the court's analysis of the damages if a trial within a trial was not required. Accordingly, appellants have failed to establish error.

F. Proximate Cause

Appellants appear to argue that there was insufficient evidence that their malpractice proximately caused Realwealth damages, stating, "There was no evidence that Realwealth would have received *or collected* more than it did receive which was proximately caused by Appellants [*sic*] alleged malpractice." Appellants have not demonstrated that the evidence was insufficient for the trial court to conclude that the malpractice here proximately caused Realwealth damages of $400,000, representing the difference between the settlement offer made before the malpractice became known and the settlement offer made after the malpractice threatened Realwealth's ability to collect. As we have previously discussed in greater detail, there was substantial evidence of a settlement offer for $2,000,000. After the malpractice came to light, jeopardizing the actions, Realwealth returned to settlement efforts but was only able to obtain a settlement of $1,600,000. Realwealth took the lower offer because of the threat to the judgment it had obtained. Appellants have demonstrated no error in the court's conclusion that Realwealth was damaged in the amount of $400,000.

G. Breitman's Standing

In another brief argument, appellants quote from Civil Code section 954.5 and *Fjaraen v. Board of Supervisors* (1989) 210 Cal.App.3d 434, and then write, "Simply put Breitman could not have raised the issue of the lack of the acknowledgment of assignment of judgment. This was the position the trial court took in its earlier demurrer ruling but seemingly overruled itself." Here again, appellants have failed to present a legal argument analyzing and applying relevant legal principles to supporting facts, and they have therefore failed to present a legally cognizable argument on appeal. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.) Moreover, a demurrer is an attack on the pleadings, and a ruling on the demurrer does not preclude the court from considering issues raised at the demurrer stage in subsequent proceedings in the case. (*De La Beckwith v. Superior Court of Colusa County* (1905) 146 Cal. 496, 499-501 [trial court may revisit issues ruled upon at demurrer later in the case and is not bound by demurrer ruling]; see also *Valvo v. University of Southern California* (1977) 67 Cal.App.3d 887, 892, fn. 3 [prior to entry of judgment, a ruling on a demurrer is not res judicata, and the trial court may decide that it was erroneous].)

H. Section 681.020

Appellants argue that section 681.020 is a statutory condition precedent to litigation, such that it may be waived and was waived in the 1801 litigation. To the extent that this argument depends on the resolution of contested facts, appellants have not demonstrated that the evidence was insufficient to support the judgment. To the extent that this is presented as a matter of law, appellants have failed to provide any authority to support their interpretation of section 681.020.

The statute in question does not tend to support appellants' assertion, as it speaks not in terms of conditions precedent but in terms of entitlement: Section 681.020 states that an assignee "is not entitled" to enforce a judgment under the Enforcement of

Judgments Law unless an acknowledgment of assignment of judgment has been filed under section 673 or the assignee has otherwise become an assignee of record. Similarly, the Law Revision Commission Comments to the statute offer insight into the reason the statute was enacted and similarly do not suggest that compliance with the statute would be subject to waiver: it codifies the former practice that an assignee "was not permitted" to obtain a writ of execution unless the assignment was made a matter of record. (Cal. Law Revision Com. com., 16B West's Ann. Code Civ. Proc. (2009 ed.) foll. § 681.020, p. 142.)

Contesting the effect of the statutory language, appellants assert without authority that "the 'assignee of record' requirement should be nothing more than a statutory condition precedent which may be waived by a failure to raise the same." The only cases appellants rely upon in this portion of the brief concern various aspects of jurisdiction and estoppel in entirely different factual and legal contexts (*In re Griffin* (1967) 67 Cal.2d 343 [probationer estopped from challenging court's action on a jurisdictional basis when he had requested a continuance past the probationary term]; *Los Angeles v. Cole* (1946) 28 Cal.2d 509 [when parties stipulate to a retrial, they may not contest the court's authority to conduct a retrial], overruled on other grounds in *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672; *Redlands High School Dist. v. Superior Court* (1942) 20 Cal.2d 348 [judgment in favor of a plaintiff who had failed to file a claim within the time period specified under the former School Code was erroneous but not in excess of jurisdiction]; *Spence v. State* (1961) 198 Cal.App.2d 332 [failure of a plaintiff to file claim in compliance with Government Code requirements did not deprive the court of jurisdiction]). Appellants have not established that compliance with section 681.020 may be waived.

I. Bankruptcy Court Order

Appellants contend that any failure to secure an acknowledgment of assignment of judgment that met the statutory requirements of section 673, subdivision (a), is irrelevant

because the bankruptcy court order of June 21, 2002, satisfied the requirements of section 673, subdivision (d), making Realwealth the assignee of record. The record does not support this contention.

The record shows that once bankruptcy trustee Salisbury and Realwealth reached an agreement to assign the judgments to Realwealth so that Realwealth could undertake enforcement efforts, the parties reduced their agreement to a writing dated February 28, 2002. One of the provisions of the agreement was that it would be submitted under seal to the bankruptcy court for the court's approval. Salisbury duly filed an ex parte motion under seal seeking an order "approving the Trustee's Letter Agreement with Realwealth Corporation . . . and authorizing the Trustee to assign the Judgments" to Realwealth pursuant to the agreement.

In a brief ruling, the bankruptcy court ordered that "The Trustee's execution, delivery and performance of the Letter Agreement described in the motion is hereby authorized and approved . . . ." By that order, the court authorized Salisbury to perform the duties contemplated by the letter agreement: most relevant for purposes of this appeal, he was authorized to assign the judgments to Realwealth "in accordance with California Code of Civil Procedure requirements." The bankruptcy court did not make any order establishing Realwealth as the assignee of record; it did not make any factual finding that Realwealth had become the assignee of record; and it did not make any order that could be interpreted as having effectuated the obligations that were allocated to the parties by the letter agreement. The bankruptcy court authorized Salisbury to assign the judgments; it did not accomplish the assignments.

Not only does the record not support appellants' interpretation of the court orders, but their construction also is inconsistent with the purpose and interpretation of section 673 as presented by appellants in their opening brief. Appellants observe that the purpose of section 673 is to ensure that the assignee pursuing the claim is not an interloper but a bona fide assignee, and it establishes a "public record chain of title requirement" to protect judgment debtors. Here, no public record of the chain of title was created by the order that appellants attempt to rely on—it is an order of the federal

bankruptcy court, under seal, not filed in the California state court proceedings that makes no specific findings or rulings assigning the judgment. While section 673, subdivision (d) contemplates other ways for a party to become an assignee of record beyond that set out in section 673, subdivision (a), even by appellants' own argument concerning the objectives of the statute there is no basis for concluding that the bankruptcy court order established Realwealth as assignee of record within the meaning of that provision.

J. Attorney's Lien

In May 2007, the Law Offices filed a notice of attorney's lien in the *Page v. Tatco* action. In its complaint, the Law Offices alleged that Realwealth and Wilson refused to release any of its fees unless it released its attorney's lien and requested a declaration from the court that Realwealth and Wilson could not interfere with the Law Offices' right to its fee to force it to release its attorney's lien. In the cross-complaint, Realwealth sought a judicial declaration that Altschuld and the Law Offices were "not entitled to assert or impose any lien for attorney fees and costs in the *Page v. Tatco* or any related matter; and that any lien heretofore filed, or to be filed in the future, in . . . *Page v. Tatco* or any related matter, is deemed to be null, void, invalid and of no force or effect." The trial court invalidated the attorney's lien, noting that the retainer agreement was silent on the subject of attorney's liens, and concluding, "There is no basis for such a lien." The court cited *Fletcher v. Davis* (2004) 33 Cal.4th 61 (*Fletcher*), in which the California Supreme Court ruled that an attorney's charging lien to secure payment of hourly fees is unenforceable unless the attorney has complied with rule 3-300 of the Rules of Professional Conduct of the State Bar of California. (*Id*. at pp. 71, 72.)

As appellants observe, the trial court here appears to have understood *Fletcher, supra*, 33 Cal.4th 61, to require an express contractual statement of any attorney's lien. *Fletcher*, however, concerned only a charging lien to secure hourly fees, and the Supreme Court expressly declined in that case to extend its decision to the kind of contingency-fee

arrangement present here: "We . . . do not decide whether rule 3-300 applies to a contingency-fee arrangement coupled with a lien on the client's prospective recovery in the same proceeding." (*Id*. at p. 70, fn. 3.) Moreover, while it is true that attorney's liens are created only by contract, the Supreme Court has recognized that an express statement of a lien is not always a prerequisite to the creation of a lien. An attorney's lien "may be created either by express contract . . . , or it may be implied if the retainer agreement between the lawyer and client indicates that the former is to look to the judgment for payment of his fee [citations]." (*Cetenko v. United California Bank* (1982) 30 Cal.3d 528, 531; see also *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 291 ["Although contingency fee agreements do not automatically create an attorney's lien, they impose a lien when 'the parties have manifested an intention that the attorney shall look to the judgment as security for his fee.' [Citation.] Alternatively, an attorney's lien may be created by an agreement under which the attorney defers his or her fee. [Citation]"].)

To the extent that the trial court limited its analysis to the question of whether the retainer agreement expressly provided for an attorney's lien, the trial court erred by failing to review the retainer agreement to determine whether an attorney's lien was created by implication. The court, however, was correct in its ultimate ruling that there was no basis for such a lien. We generally review a trial court's ruling, not its reasoning (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 182), and here the ruling was correct.

The language of the retainer agreement precludes a conclusion that the contract created an attorney's lien by implication in the event of a termination of representation. The provisions of the contract concerning the determination of fees are contained in Section II.A and II.B of the contract: Section II.A. sets forth the contingency fee of 33 1/3 percent of the funds collected on behalf of the clients, and Section II.B provides for the payment of fees and charges of those hired by counsel to perform services related to the representation, as well as the payment by the clients of costs incurred that are customarily charged to clients. Section III.A.(2) of the retainer agreement addresses the termination of the representation under the contract. It reserves to the client the right to terminate the representation as permitted under California law, including but not limited

to terminating the representation for cause if counsel failed to honor the agreement. If the client terminates the representation, the contract provides, "Counsel waives any further rights to compensation relative to the representation; provided however that the Clients shall properly reimburse the Counsel for all other fees, charges and expenses incurred pursuant to Section II.B of this Agreement prior to the date of such termination." Counsel, therefore, entered into a contract that precluded its recovery of any portion of the contingent fee set forth in Section II.A if the representation were terminated, entitling it only to the reimbursement of costs and expenses in the litigation as provided by Section II.B. The Law Offices' express contractual surrender of any future right to contingency fees in the event of a termination[7] precludes any determination that an attorney's charging lien was created here by implication.

None of the cases relied upon by appellants requires a different result. *Bartlett v. Pacific National Bank* (1952) 110 Cal.App.2d 683 provides that an attorney lien may be created by a contingency fee contract even when it does not employ the word "lien," but in that case there was no contractual language disavowing a future right to compensation. In *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 the retainer agreement at issue included an express lien and therefore its holding has no bearing on the issue here. (*Id*. at p. 47.) *Epstein v. Abrams* (1997) 57 Cal.App.4th 1159 contains general language quoted by appellants that is consistent with this discussion, but the case concerned an order approving a settlement and the court specifically did not address the validity of the asserted attorney's lien. (*Id*. at pp. 1166, 1169.)

As the express language of the contract here precludes a finding of an implied attorney's lien under the circumstances of this case, the trial court's ruling that appellants were not entitled to an attorney's lien was correct.

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[7] Appellants admit that Realwealth terminated the representation.

DISPOSITION

The judgment is affirmed. Wilson and Realwealth shall recover their costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.