NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SKULL BASE MEDICAL GROUP, INC.,

Plaintiff and Respondent,

v.

THOMAS MALLO,

Defendant and Appellant.

B287082

(Los Angeles County Super. Ct. No. BC603023)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Alarcon, Judge. Reversed with directions.

Joseph J. M. Lange Law Corporation and Joseph J. M. Lange for Defendant and Appellant.

Zee Law Group, Tappan Zee and Kimberly Barrientos for Plaintiff and Respondent.

Defendant Thomas Mallo appeals from a judgment in favor of plaintiff Skull Base Medical Group, Inc. (Skull Base) on its complaint for breach of contract and common counts. The trial court awarded Skull Base \$157,441.27, consisting of \$72,660.70 in damages, based on money owed for Skull Base's provision of medical services, \$37,743.75 in prejudgment interest, \$45,616.20 in attorney fees, and \$1,420.62 in costs.

Mallo challenges the award of damages, contending there was no basis for the award on either a breach of contract or common counts theory, and damages could not be awarded under both theories. He also challenges the awards of prejudgment interest, attorney fees, and costs. We reverse.

FACTUAL BACKGROUND

In 2007, Mallo's endocrinologist diagnosed him with Cushing's disease. In Cushing's disease, a benign tumor on the pituitary gland causes the pituitary gland to secrete excess levels of the adrenocorticotropic hormone, ACTH, which in turn causes the adrenal glands to release cortisol, which is known as the "stress hormone."

Mallo's endocrinologist referred him to Dr. Hrayr Shahinian, who was the director of Skull Base. Skull Base is a medical institute which specializes in the treatment of Cushing's disease and removal of tumors on the pituitary gland through endoscopic surgery. Dr. Shahinian first performed endoscopic surgery on Mallo to remove the tumor on his pituitary gland in February 2007.

Before the surgery, Mallo discussed with Skull Base staff what his out-of-pocket expenses would be for the surgery. Skull Base sent him an email itemizing the consultation fee, the surgeon fee, the deposit for the surgery and the maximum out-of-pocket expenses he would be responsible for, which was \$14,885. Mallo signed a form titled Office Policies and Procedures, documenting these figures. The form also contained an advisement that if the patient's insurance did not cover costs within 60 days after the surgery, the patient would be asked to pay the amount due. Delays in payment would incur a 6.5 percent interest charge.

Mallo required a second surgery in August 2007. Again, he signed the Office Policies and Procedures form. This form stated that the \$8,500 down payment for the surgery was the maximum amount for which he would be responsible.

Mallo's symptoms returned in 2010. After consulting with his endocrinologist and Dr. Shahinian, Mallo underwent a third surgery in December 2011.

Before the surgery, Mallo spoke to Skull Base's front office manager, Krystal N. Tittle-Carthron, and Hannah Haberfield¹ regarding what his out-of-pocket expenses for the surgery would be. He expressed concern that while Dr. Shahinian had performed the two prior surgeries, Mallo had not been cured. In addition, his endocrinologist had offered other options for the surgery, including options in Nevada, where Mallo lived. Mallo insisted on getting this information because Skull Base was an out-of-network provider, and some of his options were in-network.

On December 9, 2011, Haberfield emailed Mallo a letter from Tittle-Carthron stating that his insurance company had

¹ Neither Tittle-Carthron nor Haberfield testified at trial.

approved the surgery scheduled for December 13. The company had approved a request for in-network consideration, and Skull Base's third party billing company, Rose Billing, was negotiating in-network rates. Tittle-Carthron provided a table of his benefits, which indicated he had met \$1,441.90 of his \$1,500 in-network out-of-pocket expenses, and the total amount due on December 12 was \$58.10.²

Mallo went to Skull Base's office on December 12, 2011. He paid the \$58.10, believing it was the total amount for which he would be responsible. He received a receipt for "Out of Pocket Payment for Surgery on Tuesday December 13, 2011." Mallo also signed another Office Policies and Procedures form. However, the portion of the form specifying fees, including "Out-of-Pocket & Deductible Payment," did not have any numbers filled in.

Believing he had already fulfilled his financial obligation with respect to the surgery, Mallo did not want to sign the form.

Office staff confirmed that the fee section had been left blank because he, in fact, had no additional financial obligation for the surgery. Staff emphasized that the form was a consent form, and the surgery would not proceed if he did not sign the form, so he signed it.

Mallo also executed an Acceptance Contract for Office Policies and Procedures, which stated: "I Thomas Mallo, have read the office policies and procedures form and understand it in its entirety and hereby agree with the terms and conditions which have been presented and explained to me in great detail.

² The letter also indicated that Mallo had met \$216.05 of the \$3,000 out-of-network out-of-pocket expenses, and the amount due on December 12 would be \$2,783.

All of my questions have been answered. I understand that if after <u>45 Business Days</u> from my surgical date my insurance company does not cover the surgical fee; I will assume financial responsibility for the remaining balance. [¶] . . . [¶] The Skull Base Institute has informed me of all possible scenarios and situations regarding payment towards the surgery and I will make every effort to assist their third party contracted company, Rose Billing Services with the appeal process if needed." Mallo also signed a Billing Services Information Sheet, which advised him that Rose Billing Services would send him an invoice 45 days after his surgery in the event his insurance company did not cover his bill.

Mallo was not concerned about the 45-day financial responsibility provision, because he "was told that [his] financial responsibility was met," and he had received assurances of that circumstance "multiple times and that's why [he] ended up signing these documents."

Mallo received a February 9, 2012 explanation of benefits from his insurance company, addressed to his post office box in Las Vegas, where he lived. Although it listed the claimant's responsibility as \$72,718.80, Mallo was not concerned and did not telephone anyone to ask about it. As far as he was concerned, his "agreement and . . . contract with Skull Base Institute had been fulfilled."

On February 22, 2012, Rose Billing Service mailed Mallo an invoice for \$72,718.80, consisting of the \$75,653 fee for endoscopic surgery less an insurance payment of \$2,934.20. It sent the invoice to an address in Scottsdale, Arizona and listed a phone number in the 314 area code.

Mallo's Skull Base Demographic Sheet dated December 12, 2011 listed a physical address and his post office box in Las Vegas, Nevada. It listed home and mobile telephone numbers in the 480 and 602 area codes, respectively. The addresses and the mobile phone number were still correct at the time of trial. Mallo had not lived at the Scottsdale, Arizona address on the invoice for many years. He had never used the listed "314" area code telephone number.

Rose Billing Service mailed additional invoices to Mallo at the Scottsdale, Arizona address on March 27, 2012 and May 11, 2012. Mallo never received any of the invoices.

In the weeks and months after his surgery, Mallo spoke to Dr. Shahinian and his staff about a dozen times. No one mentioned an invoice being sent to him. No one from Skull Based ever informed him that he might be responsible for \$75,653 for surgery expenses. The first time he heard that he was responsible for that amount was when he received a telephone call from Dr. Shahinian's attorney, about nine months after the surgery. Had he known that that expense would fall to him, he would have had the surgery performed elsewhere.

Dr. Shahinian testified as to Mallo's medical condition and surgery. He stated that his responsibility was to "see patients." He had no responsibility for Skull Base's billing and did not discuss billing or financial matters with any patients.

Dr. Shahinian did not go over the Office Policies and Procedures form with Mallo or discuss with Mallo his potential financial responsibility for the surgery. He testified this was "usually done by either the billing people or the office manager." He did not know whether Mallo had ever been told about his potential responsibility for \$75,653 for the 2011 surgery.

Karine Sargsyan testified that she was the chief executive officer of Rose Billing Service. She worked on Mallo's case, although she never spoke with him directly. She communicated with Mallo's insurance company in an effort to get a letter of approval for a one-time in-network agreed amount of coverage so that Mallo would not be responsible for the cost of the surgery. According to Sargsyan, the fees portion of the Office Policies and Procedures form that Mallo signed remained blank at the time because she had not yet reached an agreement with the insurance company. She knew, however, at that point, Mallo's maximum potential liability was \$75,653;3 she never notified him of that fact before the surgery.

On January 20, 2012, Sargsyan obtained approval from Mallo's insurance company for Mallo's surgery to be performed by a non-plan provider in a non-plan facility. In February 2012, she received a reimbursement check from the insurance company in the amount of \$2,934.20. The insurance company sent an explanation of benefits listing the amounts paid and stating that the claimant's responsibility was \$72,718.80. It also contained information about appeal rights. Rose Billing Service filed an appeal, but it was denied.

Sargsyan mailed Mallo a letter at the Scottsdale, Arizona address on April 15, 2012 regarding his payment options. He did

³ The cost for the surgery was determined by the CPT codes for the procedures. CPT stands for Current Procedural Terminology, a medical code maintained by the American Medical Association which is designed to provide uniform standards for medical services and procedures. Nationally accepted billing rates are based on CPT codes.

not respond. She attempted to telephone him, but the phone number she used was disconnected.

Further, she did not identify anyone from Rose Billing who claimed to have communicated with Mallo about his financial responsibility for the surgery.

Sargsyan never saw Mallo's Skull Base Demographic Sheet dated December 12, 2011. She never contacted him at the address or telephone number on that sheet. She indicated that she might have obtained the Scottsdale, Arizona contact information from Mallo's file pertaining to his 2007 surgeries.

DISCUSSION

As the trial court found, Skull Base, as the plaintiff suing for breach of contract, bore the burden of proving the existence of a contract, its performance, Mallo's breach, and resulting damages. (Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 821; Property California SCJLW One Corp. v. Leamy (2018) 25 Cal.App.5th 1155, 1162.) Formation of a contract requires an offer, acceptance, and mutual consent or assent of the parties. (Apablasa v. Merritt & Co. (1959) 176 Cal.App.2d 719, 726; see Bowers v. Raymond J. Lucia Companies, Inc. (2012) 206 Cal.App.4th 724, 734.) "In order for acceptance of a proposal to result in the formation of a contract, the proposal "must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain." [Citation.]" (Bowers, supra, at p. 734; accord, Weddington Productions, Inc. v. Flick (1998) 60 Cal. App. 4th 793, 811.)

Additionally, "[t]he determination whether [mutual assent] is present is made by the use of an objective test, the manifestations or expressions of assent being controlling. [Citation.] 'Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding.' [Citation.] Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror. [Citation.]" (Russell v. Union Oil Co. (1970) 7 Cal.App.3d 110, 114; accord, Weddington Productions, Inc. v. Flick, supra, 60 Cal.App.4th at p. 811.)

The trial court found "Skull Base's Office Policies and Procedure[s] and Acceptance Contract for Office Policies and Procedures forms constitute an offer. Skull Base offered to perform medical services for Mallo and in exchange, Mallo would be personally responsible for the charges for such surgery. While Skull Base may have offered to assist Mr. Mallo in submitting a claim to Mr. Mallo's insuran[c]e carrier, as expressly set forth in the written agreement signed by Mr. Mallo, Mr. Mallo remained liable for all surgery charges. These terms are definite.

The court thus found "that, on December 12, 2011, Mallo accepted Skull Base's offer that Mallo be financially responsible for the charges for the surgery by consenting-to and signing the Office Policies and Procedure[s] and Acceptance Contract for Office Policies and Procedures forms. [¶] Thus, there is a contract between Skull Base and Mallo."

The court further observed that "[p]reliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59.) It found "that any of the

'terms' that were not incorporated into Skull Base's Office Policies and Procedures which Mallo signed on December 12, 2011, including any prior verbal discussions or extraneous email correspondence amount to nothing more than preliminary negotiations based on conditions that did not occur."

However, the email Haberfield sent to Mallo on December 9, 2011 was not merely "preliminary negotiations." Skull Base's office staff told Mallo at the time he signed the Office Policies and Procedures form that the amount specified in the email, the amount he had already paid to Skull Base, was the amount constituting the "Out-of-Pocket & Deductible Payment." That was why that section of the form was left blank: He had already paid what he owed and did not need to make any further payment. It was the email, which specified the amount for which Mallo would be liable, that provided sufficiently definite terms such that Mallo's performance under the contract was reasonably certain. (Bowers v. Raymond J. Lucia Companies, Inc., 206 Cal.App.4th at p. 734.)

Mallo's testimony as to what the office staff told him was uncontradicted. The email and the staff's statements when Mallo signed the Office Policies and Procedures form were evidence of mutual assent as to the specific amount he owed for the surgery—the \$58.10 he had paid. (Weddington Productions, Inc. v. Flick, supra, 60 Cal.App.4th at p. 811; Russell v. Union Oil Co., supra, 7 Cal.App.3d at p. 114.)

Moreover, the Acceptance Contract for Office Policies and Procedures which Mallo signed at the same time he signed the Office Policies and Procedures form, stated: "The Skull Base Institute has informed me of all possible scenarios and situations regarding payment towards the surgery and I will make every effort to assist their third party contracted company, Rose Billing Services with the appeal process if needed." The two scenarios of which Skull Base informed Mallo were: (1) Mallo had met \$1,441.90 of his \$1,500 in-network out-of-pocket expenses, and the total amount due on December 12 was \$58.10; (2) Mallo had met \$216.05 of the \$3,000 out-of-network out-of-pocket expenses, and the amount due on December 12 would be \$2,783. Skull Base never informed Mallo of a scenario in which he owed \$75,653; Mallo never agreed to pay that amount for his surgery.

Our review of the trial court's findings is governed by the substantial evidence rule. (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 42-43; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630.) We must determine whether there is any substantial evidence, contradicted or uncontradicted, which supports those findings. (*Altavion, Inc., supra*, at p. 43; *Howard, supra*, at pp. 630-631.) Here, there is no substantial evidence to support the trial court's finding that Mallo entered into a contract with Skull Base to pay \$75,653, as the amount of the surgical fee billed which was not covered by his insurance. Accordingly, the judgment must be reversed.

In light of this conclusion, we need not address the remainder of Mallo's claims of error.

⁴ Sargsyan acknowledged that although she knew prior to the surgery Mallo's maximum potential liability was \$75,653, she did not notify him of that fact.

DISPOSITION

The judgment is reversed. The trial court is directed to enter a judgment in favor of Mallo. Mallo is awarded his costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CURREY, J.*

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