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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ESE ELECTRONICS, Plaintiff and Appellant, v. JERRY KAPLAN et al., Defendants and Respondents.	B278073 (Los Angeles County Super. Ct. No. BC519620)

APPEAL from a judgment of the Superior Court of Los Angeles County. Deirdre Hill, Judge. Affirmed as modified.

Law Office of John Drooyan and John N. Drooyan for Plaintiff and Appellant.

Kaplan, Kenegos & Kadin and David Scott Kadin; Law Offices of Leslie S. McAfee and Leslie S. McAfee for Defendants and Respondents.

INTRODUCTION

This attorney/client dispute began when the client, E.S.E. Electronics (ESE), suffered a loss due to employee theft. Specifically, one of ESE's agents redirected a shipment of goods away from ESE for the agent's own benefit. ESE then found itself embroiled in two disputes: (1) a lawsuit brought by the supplier, who sought payment for the goods it had sent to ESE; and (2) ESE's action against its insurer, who refused to pay on ESE's theft claim. ESE retained defendant Kaplan, Kenegos and Kadin (the Firm) to defend the first action and prosecute the second. The terms of the retainer were subject to dispute at trial. Both matters settled. As to the supplier's suit, ESE agreed to pay the supplier a certain sum, including the first $80,000 that ESE might recover from the insurer. Eventually, the insurer agreed to pay ESE $135,000. Deducting the $80,000 owed the supplier left $55,000, almost all of which the Firm claimed as its fees and costs.

ESE believed the Firm had agreed to accept a smaller fee, so that ESE would receive a meaningful payment from the settlement. A dispute arose, resulting in the Firm effectively terminating ESE as a client. Nonetheless, the Firm, in ESE's name, declined to give the supplier the $80,000 due, demanding that the supplier contribute toward its fee so that the Firm could retain the entire $55,000 and ESE would receive a small payment. This forced the supplier to pursue settlement enforcement proceedings against ESE, which the Firm fought through appeal without ESE's knowledge or consent. After the supplier enforced the settlement, it successfully recovered its attorney fees from ESE.

ESE then brought this action against the Firm, challenging the fees claimed and kept by the Firm, and asserting breach of fiduciary duty. After a bench trial, the court concluded: (1) neither party established the terms of the fee agreement, but the Firm was entitled to recover in quantum meruit for its services rendered through the insurance settlement only (and not for contesting the supplier's settlement enforcement proceedings); (2) the firm was liable to ESE for breach of fiduciary duty in the amount of the attorney fee award against ESE in the supplier's settlement enforcement proceedings; and (3) the Firm was liable to ESE for punitive damages arising out of that breach of fiduciary duty. Both parties appeal. We affirm the judgment in its entirety, although we modify it to correct two errors.

FACTUAL AND PROCEDURAL BACKGROUND

1. *ESE Suffers a Theft*

ESE's President is David Kazemi. He speaks and understands English, although it is not his first language. ESE is in the business of distributing consumer electronics. When it distributes products abroad, it must document the serial numbers of each item. It hired an independent contractor to do this documentation; ESE gave him a desk in its facility.

One of ESE's suppliers is Lasertone, which manufactures toner cartridges. In late 2007, ESE's independent contractor placed an order with Lasertone, allegedly on behalf of ESE, and redirected the cartridge shipment to his own benefit. The total value of the stolen goods exceeded $330,000.

Lasertone looked to ESE for payment for the cartridges. Kazemi acknowledged the obligation and borrowed money against ESE's property to make an initial payment to Lasertone of $130,000. Kazemi assumed ESE would get the rest of the

money when it made a claim for the loss against its insurer, Travelers. Travelers, however, was not quick to pay; it believed an exclusion applied as the theft had been perpetrated by an ESE agent. But without a payment from Travelers, ESE did not have the money to pay Lasertone the balance owed for the stolen cartridges.

2. *ESE Hires the Firm*

The Firm had been ESE's counsel for over 25 years. Kazemi's main contact at the Firm was Attorney Joan Kenegos, who had represented ESE on a contingency basis multiple times over the years.

In January 2008, Kazemi contacted Attorney Kenegos, and she agreed to look into both ESE's dispute with Lasertone and ESE's dispute with Travelers. As to the compensation the Firm would receive for this, the evidence was disputed. Kazemi testified that he wanted the Firm to agree to handle both representations for a contingency fee of 25 percent of ESE's ultimate net recovery, and that the Firm eventually orally agreed to a rate of one-third of the net recovery. Attorney Kenegos and her partner Attorney Jerry Kaplan *initially* took the position (at deposition) that Kazemi signed a contingency agreement for 40 percent of ESE's gross recovery on January 24, 2008. This testimony was proven to be erroneous – the claimed agreement referenced the case number of the Lasertone action; but Lasertone did not file its suit until October 2008. When faced with this contradiction, Attorney Kenegos then changed her testimony, testifying that she worked on the ESE cases for over a year with no fee agreement whatsoever, and that Kazemi eventually signed the written 40 percent gross contingency

agreement in January 2009.[1] Kazemi, for his part, claims he never signed the 40 percent agreement and that the Firm fraudulently created the document by attaching his signature page from some unidentified prior retainer agreement.

3. *The Lasertone Settlement*

Lasertone brought suit against ESE on October 31, 2008. The action settled in January 2010. Pursuant to the written settlement agreement, ESE agreed to entry of judgment against it in the amount of $207,171.74 plus interest of $48,015.80. There was a stay of entry of judgment as long as ESE made $120,000 in installment payments. ESE also agreed to: (1) use its best efforts to pursue recovery from Travelers; (2) "execute all documents necessary to impose a first lien upon any recoveries sought by" ESE; (3) cause all recoveries to be issued by a joint check made payable to Lasertone; and (4) "pay over to [Lasertone] from the first proceeds of any recovery, an additional sum up to a total amount of $80,000.00." The settlement agreement also contained a clause awarding the prevailing party its attorney's fees in any action to enforce the agreement.

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[1] There is no date next to Kazemi's signature on the agreement, but the date of "1-24-08" is next to Attorney Kenegos's signature. At one point, Attorney Kenegos submitted a declaration stating that she misdated the agreement in 2008, when it had actually been signed in 2009. But January 24, 2009 is a Saturday, and Attorney Kenegos agreed that Kazemi did not come to her office on a weekend to sign the agreement. Attorney Kenegos ultimately conceded that she dated the agreement some time after it was signed. This was confirmed by ESE's questioned document examiner expert, who concluded the ink in which the agreement was dated was different from the other two inks for the agreement's signatures.

4. *The Travelers Settlement*

After the Lasertone settlement, ESE continued to pursue Travelers. Represented by the Firm, ESE eventually filed suit against Travelers. This action settled in mediation on April 21, 2011, with the formal settlement agreement executed in May 2011. Pursuant to the agreement, Travelers agreed to pay $135,000 in two checks: (1) an $80,000 check jointly payable to ESE, Lasertone and the Firm; and (2) a $55,000 check jointly payable to ESE and the Firm.[2]

5. *The Attorney-Client Relationship Breaks Down Over The Firm's Fee*

As ESE was a joint payee on both checks, Kazemi had to endorse them. Someone at the Firm telephoned Kazemi and requested he come in and sign the checks. He immediately did so. After he signed, he asked if he could pick up his check right away. Attorney Kenegos told him the check had to clear first, and this would take a week or two. She promised that, after the check cleared, she would call Kazemi. Approximately two weeks later, Kazemi telephoned Attorney Kenegos asking if could pick up his check. She again told him it was not ready yet and that she would call when it was.

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[2] In his complaint in the present action, Kazemi would allege that he settled the action for $135,000 because Attorney Kenegos had both (1) promised that ESE would receive $33,000, less costs, from the Travelers settlement; and (2) threatened that if ESE did not accept the settlement, the Firm would terminate the representation and leave ESE without counsel at the upcoming trial. The Firm successfully demurred to the causes of action arising from the alleged promise and threat on the basis of mediation confidentiality. No evidence as to the purported promise or threat was admitted at trial.

Some time after, Attorney Kenegos telephoned Kazemi and told him that the check was available. Kazemi went to the Firm immediately.

At trial, Attorney Kenegos did not deny that she had telephoned Kazemi and told him he could come pick up ESE's check. However, the Firm took the position that it was entitled to 40 percent of the gross Travelers settlement. Forty percent of $135,000 is $54,000. As costs had exceeded the remaining $1,000, costs and the Firm's fees fully exhausted the check for $55,000, meaning Kazemi would get no share of that check. Attorney Kenegos testified that she had been trying to get Lasertone to agree to give up a percentage of its $80,000 to the Firm as attorney's fees on a "common fund" theory. The Firm planned to give Lasertone's contribution to ESE and keep the entire $55,000 check for itself. Attorney Kenegos testified that when she called Kazemi and told him he could pick up a check, she anticipated that she would be able to work it out with Lasertone. By the time Kazemi arrived, however, Lasertone had become aggressive, and would not accept less than the agreed-upon $80,000.

When Kazemi arrived, Attorney Kenegos seemed "kind of a little bit disturbed." Kazemi asked for his check, and Attorney Kenegos told him they would have to speak to Attorney Jerry Kaplan, Attorney Kenegos's partner.

Attorney Kaplan told Kazemi that he had bad news and good news. "Bad news is you're not picking up shit from me, and the good news is I'm going to fight for you until I get the check from the other attorney." Kazemi responded that this was not part of their deal.

Kazemi and Attorney Kaplan argued. Kazemi said he had been the Firm's client for more than 20 years and asked why they were treating him like this. Attorney Kaplan responded, "This is the way it is," and started swearing at Kazemi. Kazemi responded in kind. Voices were raised. Other attorneys from the Firm heard the commotion and entered the room; at least one of them struck Kazemi on the back of the head. Attorney Kaplan told them not to hit Kazemi and separated them. Kazemi waited outside. Someone called the police.

The arriving officer asked Kazemi if he wanted to press charges. Kazemi declined, he only wanted to pick up his money. The officer told him that he could not return to the Firm any more because they did not want him there.

Kazemi hired Attorney John Drooyan (his current attorney on appeal) on February 10, 2012.

6. *The Firm Unsuccessfully Pursues Lasertone for Fees, Without ESE's Consent*

During the time Kazemi was seeking a new lawyer, the Firm proceeded with its plan to seek common fund recovery against Lasertone. Although the Travelers settlement had been finalized on May 12, 2011, and Kazemi had endorsed the checks shortly thereafter, the Firm did not give Lasertone its $80,000. Lasertone filed an ex parte application for an order directing ESE to turn over the $80,000 check. The Firm, purporting to act on ESE's behalf, opposed the motion, "arguing that Lasertone was not entitled to receive the full $80,000, but rather was entitled to receive only that amount less a 40 percent contingency fee of $32,000 that the Kaplan Firm incurred in obtaining the settlement against ESE's insurer." The Firm relied on the theory that it had an attorney's lien superior to Lasertone's lien. It

further argued that the "common fund theory" mandated "that Lasertone, which benefited from the insurance settlement, pay for the costs of recovery." Lasertone's ex parte application was heard on June 29, 2011 before the Honorable John P. Shook, who denied the application based on the Firm's common fund argument.

On August 10, 2011, Lasertone moved to enforce the settlement under Code of Civil Procedure section 664.6, seeking "entry of judgment in accordance with the terms of the parties' settlement agreement." By the time this motion was heard, Judge Shook had retired, and the Honorable Steven J. Kleifield had inherited the case. The Firm opposed Lasertone's motion, arguing it was essentially the same as the prior ex parte application which had been denied. Judge Kleifield concluded that he was not bound by Judge Shook's prior order and considered Lasertone's motion on its merits. He concluded that the terms of the Lasertone settlement agreement gave Lasertone a first lien on the $80,000 and that the common fund doctrine did not apply. The court ordered judgment entered against ESE for $80,000, but ordered entry of judgment stayed. If the $80,000 were paid, judgment would not be entered. The Firm turned over the $80,000, then – again, purporting to act for ESE – appealed Judge Kleifield's order.

On October 22, 2012, Division Two of this District affirmed Judge Kleifield's order. (*Lasertone v. ESE Electronics* (Oct. 22, 2012, B238589) [nonpub. opn].) By the time of the appeal, the Firm had abandoned any argument that it had a first lien on the settlement proceeds or that the common fund theory entitled it to the money. Its only argument was that, regardless of whether Judge Shook's order was correct, it was binding. The appellate

court rejected the argument, concluding that Lasertone's motion to enforce the settlement was not an improper request for reconsideration, because the early proceeding was by ex parte application, not a noticed motion. Moreover, it was based on different facts. Judge Shook had denied the ex parte in the mistaken belief that ESE had received only $80,000 in settlement from Travelers. By the time Judge Kleifield considered the motion to enforce the Lasertone settlement, it had been made clear to the court that the full settlement amount was $135,000 – enough to satisfy *both* the Firm's claim for a 40 percent attorney fee and Lasertone's claim for $80,000.[3]

When Judge Kleifield granted Lasertone's motion to enforce the settlement, it denied Lasertone attorney's fees. Lasertone, however, had failed to appeal that order, so the Court of Appeal declined to address Lasertone's request for fees, but it did award Lasertone's costs on appeal.

Thereafter, Lasertone sought its attorney fees (for the appeal) in the trial court. The Firm did not oppose the motion, but the trial court nonetheless denied it on May 15, 2013.

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[3] The Firm, which is representing itself on appeal, characterizes the proceedings as follows: "The 'original' assigned trial court judge agreed with the Kaplan firm on the application of the common fund theory; however, the 'original' assigned trial judge retired, and ESE sought 'reconsideration' before a second superior court judge who, acting as an appellate court, reversed the first judge's decision, ruling *inter alia*, that Lasertone had a lien for the full amount of $80,000 and rejecting the common fund theory." This characterization flouts Division 2's decision that Lasertone's settlement enforcement motion was not a motion for reconsideration and that Judge Kleifield did not reconsider Judge Shook's order.

Lasertone appealed that denial of fees. Lasertone's appeal was successful and, in February 2015, the trial court awarded Lasertone $15,320 in attorney's fees against ESE. (*Lasertone v. ESE Electronics* (June 17, 2014, B248908) [nonpub. opn].)

Because there is some confusion in the testimony, we reiterate that the Lasertone settlement enforcement proceedings resulted in two appeals. The first was the Firm's appeal of the order enforcing the settlement agreement. The appeal was taken by the Firm in January 2012 and resolved in Lasertone's favor in October 2012. We refer to it as the "Settlement Enforcement Order Appeal." The second appeal was Lasertone's appeal of the trial court's denial of its postappeal request for attorney's fees. The appeal was taken by Lasertone in May 2013 and resulted in an award in its favor in February 2015. We refer to this as "Lasertone Attorney Fee Appeal."[4]

The chronology of these proceedings is important because ESE's involvement or lack thereof is important to the resolution of ESE's breach of fiduciary duty claim. Before Kazemi was kicked out of the Firm's offices, Attorney Kaplan had told him the "good news" was that the Firm would pursue Lasertone for a share of its fees; the fact that the attorney-client relationship

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[4] The confusion is illustrated by this statement in the Firm's respondent's brief in this appeal, "In the Lasertone matter, Lasertone sought to recover its attorney's fees, which were granted by the trial court. Unbeknownst to ESE, the Kaplan firm appealed that decision which was also unsuccessful." On the contrary, the Firm's unsuccessful appeal was the Settlement Enforcement Order Appeal. Lasertone's attorney fees were *denied* by the trial court; *Lasertone* successfully appealed that order in the Lasertone Attorney Fee Appeal.

broke down immediately thereafter did not change Attorney Kaplan's plans. The Firm withheld the Lasertone settlement check, opposed Lasertone's ex parte application, opposed Lasertone's motion to enforce the settlement, and pursued the Settlement Enforcement Order Appeal all without ESE's knowledge or consent. As Kazemi put it, "They weren't talking to me, I wasn't talking to them. I didn't know what they were doing." Kazemi hired Attorney Drooyan on February 10, 2012 – shortly after the Firm had filed the Settlement Enforcement Order Appeal – but the Firm did not inform Attorney Drooyan of the pending appeal.

On the other hand, the Firm did inform ESE of the Lasertone Attorney Fee Appeal. At trial, the Firm testified to several letters it sent to Attorney Drooyan keeping him informed of the progress of that appeal; all of the letters are dated May 2013 or later.

7. *ESE and Kazemi Sue Attorney Kenegos, Attorney Kaplan and the Firm*

ESE and Kazemi brought suit against Attorney Kenegos, Attorney Kaplan and the Firm. They proceeded to a bench trial on their first amended complaint (as modified by an order sustaining a demurrer to multiple causes of action). A second amended complaint conforming to proof was filed after trial.

The first amended complaint attempted to allege numerous causes of action arising out of the Firm's conduct at the Travelers mediation; the Firm successfully demurred to these causes of action.[5] Specifically, ESE alleged that Attorney Kenegos made

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[5] See footnote 2, *ante*. We mention the causes of action based on the mediation only to the extent they illuminate ESE's remaining causes of action.

specific promises as to its fee at the mediation; ESE alleged that the Firm breached the promises and had, in fact, fraudulently made those promises with the intent not to perform. As we have noted, the court ruled that those causes of action were barred by mediation confidentiality. The present appeal does not address that ruling.

The only causes of action which survived demurrer were the following: (5) fraud, for relying on a written 40 percent contingency agreement which Kazemi had never signed; (10) breach of fiduciary duty, for the same; (11) breach of fiduciary duty, for not informing ESE of the progress of the Lasertone Settlement Enforcement Order Appeal; and (12) for violation of the Rules of Professional Conduct. The plaintiffs sought punitive damages.

8. *The Trial*

The matter proceeded to a bench trial. A great deal of ESE's evidence at trial was directed toward challenging the purported written 40 percent gross contingency agreement and establishing it was fraudulent. It could not be disputed that the January 24, 2008 date on the document was incorrect; it could also not be disputed that Attorney Kenegos and Attorney Kaplan had both given deposition testimony (now, concededly incorrect) that they remembered seeing Kazemi sign it on that date. But Kazemi conceded that his signature appeared on the signature page, and was unable to identify any prior document from which the Firm could have taken his signature page and fraudulently attached it to the first page of a 40 percent contingency agreement. Attorney Kenegos admitted that she dated the agreement some time after it had been signed, but still testified

that Kazemi had, in fact, signed the 40 percent written contingency agreement.

The question arose as to what fee should govern if the 40 percent written contingency agreement was struck down. Kazemi testified to an oral one-third contingency agreement. The firm argued that, in the absence of a written contingency agreement, it would be entitled to the reasonable value of its services in quantum meruit. Attorney Kenegos testified to spending a total of 240 hours on both cases. Her hourly rate is $450.

At the end of the trial, the court indicated its tentative decision that ESE had failed to establish the 40 percent written retainer agreement was fraudulent, but also that the Firm had failed to establish there had been a meeting of the minds on a 40 percent gross contingency agreement. The court thought the case was appropriate for a quantum meruit fee. The Firm represented that it had never filed a cross-complaint and was not seeking a greater fee than the $54,000 it had already retained as a fee, even though it believed it would be entitled to more under quantum meruit. In contrast, ESE argued that the $54,000 should be returned to it. At this point, the court suggested that it could not reach the issue of the Firm's right to retain a quantum meruit fee on the causes of action before it, and suggested ESE file an amended complaint to raise the issue.

9. *ESE's Second Amended Complaint*

ESE filed a second amended complaint adding a first cause of action for breach of contract – specifically, breach of an oral one-third contingency agreement. This operative complaint stated five causes of action: (1) breach of contract; (2) fraud for keeping the $55,000 in reliance on a fraudulent 40 percent

written contingency agreement; (3) breach of fiduciary duty for falsely attaching Kazemi's signature page to the written contingency agreement; (4) breach of fiduciary duty for not keeping ESE informed of the Settlement Enforcement Order Appeal; and (5) violation of the Rules of Professional Conduct.

10. *Tentative Statement of Decision*

After further briefing, the court issued its tentative decision as follows. On the first cause of action for breach of contract, the court concluded that ESE had not established the existence of a one-third contingency agreement. However, the court concluded that when Attorney Kenegos telephoned Kazemi to pick up his check, there was a tacit understanding that the Firm would get something less than $54,000 as its fee, although the specific amount was not clear. In the absence of an agreement, the Firm would be entitled to compensation in quantum meruit. The court concluded the Firm could not recover any fees for the work it did on the Lasertone matter following the settlement – the Firm would get nothing for its pursuit of a share of its fees from Lasertone.[6] The court concluded that the reasonable value of the Firm's services for the Lasertone matter through settlement and the Travelers matter was $51,322.50.

On the second cause of action for fraud, the court concluded ESE had not established the written 40 percent gross contingency agreement was fraudulent. In addition to not establishing the document was fraudulent, the court specifically found that ESE had not introduced evidence that it had relied on the 40 percent gross contingency agreement to its detriment.

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[6] The court also excluded some work the Firm claimed for opposing a motion for summary judgment in the Travelers case, as not supported by substantial evidence.

On the third and fourth causes of action for breach of fiduciary duty, the third cause of action fell with the fraud cause of action. The fourth, however, was established. The court concluded that Kazemi had not authorized the Firm to pursue the Settlement Enforcement Order Appeal, nor had the Firm advised Kazemi that the Firm's pursuit of that appeal could subject ESE to an order requiring it to pay Lasertone's attorney's fees. The court stated that it "concludes that Kaplan made the ill-advised decision to withhold remittance of the $80,000 to Lasertone and any proceeds to ESE above the agreed fees and costs, if there were any, alone." The court awarded ESE $15,320 in damages – the amount of the adverse attorney's fee award in the Lasertone matter. The court noted that this breach also justified its denial of quantum meruit fees to the Firm for any work it did in the Lasertone settlement enforcement proceedings. Further, the court set the matter for a hearing on punitive damages in connection with this cause of action.

On the fifth cause of action for breach of the Rules of Professional Conduct, the court concluded that such a breach is not independently actionable.

11. *Hearing on Punitive Damages*

At the hearing on punitive damages, Attorney Kaplan conceded that he should have kept Kazemi informed that he was pursuing the Settlement Enforcement Order Appeal, but added "And so I was going to appeal because I believed in the appeal one way or the other." The court responded that the decision should have been Kazemi's to make, not Attorney Kaplan's. Attorney Kaplan agreed with the point, and conceded it may have justified damages of $15,320, but he argued against punitive

damages because his "mindset was we had a winner, and I was going to appeal."

Attorney Kaplan also argued that Attorney Drooyan knew of the appeal and let him proceed with it, but the evidence on which Attorney Kaplan relied addressed the subsequent Lasertone Attorney Fee Appeal, not the Firm's Settlement Enforcement Order Appeal.

Attorney Kenegos argued that the Firm's intentions were pure; the Firm did not pursue Lasertone for the Firm's benefit but "to get money for him [Kazemi] out of the money that we got from Travelers." Attorney Kenegos argued that she could not communicate with Kazemi because he had counsel – Attorney Drooyan. (See Rules Prof. Conduct, rule 2-100.) The court responded that on the Settlement Enforcement Appeal, *the Firm* was ESE's counsel, and that "if there was that much of a breakdown, inability to communicate, or a conflict," it raised a question as to whether the Firm should have continued the representation at all.

The court concluded that the decision to not pay Lasertone its $80,000 and to cause additional law and motion practice, and an appeal, in the hope of obtaining additional funds, was a decision the Firm improperly took from ESE. The court further concluded the Firm never advised its client that pursuing these efforts risked an adverse attorney's fee award.

12. *Final Statement of Decision*

The trial court issued a final statement of decision adopting, in large part, its tentative. It added to the decision a section on punitive damages, as follows: "Plaintiff in fact never authorized the appeal and was never fully informed of the risks and consequences of losing the appeal. It was Defendant Kaplan

who made the decision to pursue the appeal and Kenegos who acquiesced in that decision without the concurrence of the client. In fact the meeting when all of this was discussed degenerated into an altercation in which Plaintiff reports he was cursed at, yelled at and hit by one of the firm's lawyer[s] resulting in the police being called to the scene. Kaplan's strategy for Plaintiff's further recovery was a gamble – a calculated risk which in this court's opinion did not have a high likelihood of succeeding were it to be decided on the merits. Nonetheless, Kaplan moved ahead to refute Lasertone's entitlement in the trial court and appeal on the firm's own initiative. This act amounts to oppression and malice in light of the fact that the firm continued to pursue legal action in Plaintiff's name without Plaintiff's prior approval, without meaningful communication and concurrence with Plaintiff, despite a breakdown of the attorney client relationship, while there was an actual conflict and dispute with the client over fees, and all motivated by the firm and its partners' interest rather than that of the client. The court finds Kaplan the most culpable in this course of action and Kenegos to a lesser extent given her apparent tepid concurrence in this regard given that she had invited Plaintiff over to the firm to pick up a settlement check prior to Kaplan interceding." The court awarded punitive damages against the Firm in the amount of $48,000, of which $6,000 was jointly and severally awarded against Attorney Kenegos and the Firm, and $42,000 was jointly and severally awarded against Attorney Kaplan and the Firm.

13. *Appeals*

ESE and Kazemi filed a timely notices of appeal, as did the Firm and Attorneys Kenegos and Kaplan.[7]

DISCUSSION

On appeal, ESE challenges: (1) the court's conclusion that the oral one-third net contingency agreement was not established by the evidence; (2) the court's decision to award quantum meruit fees to the Firm; (3) the court's conclusion that ESE did not establish fraud in connection with the written 40 percent gross contingency agreement; and (4) the court's failure to rule in its favor on its third cause of action for breach of fiduciary duty. For its part, the Firm argues punitive damages were improperly awarded because its conduct was not malicious.

1. *Standard of Review*

"When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the

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[7] When discussing appellate arguments, we use "ESE" to refer to ESE and Kazemi collectively, and "the Firm" to refer to the Firm and Attorneys Kenegos and Kaplan collectively.

judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

2. *The Court Did Not Err in Finding the Purported One-Third Contingency Agreement Was Not Established By the Evidence*

ESE first argues that the court erred in not enforcing the oral one-third net contingency agreement to which Kazemi had testified. ESE notes that the court's statement of decision indicated that the parties' contingency agreement "was not memorialized in writing even though contingency agreements are required to be set forth in writing to be collectable." ESE infers from this that the court found a one-third contingency agreement, but failed to enforce it because it erroneously believed the agreement had to be in writing.

This is not what happened. The court concluded that there was *some* meeting of the minds on a contingency agreement, given the facts that: (1) the Firm represented ESE on a contingency basis in numerous prior matters; (2) the Firm represented ESE on these matters for at least one year without any written agreement; and (3) when Attorney Kenegos telephoned Kazemi and told him to pick up a check, she believed that there would be a check for him to pick up. The court concluded from this evidence "that as of the date of the Traveler's settlement Kazemi and the Kaplan Firm in fact necessarily had at least a tacit agreement that entailed the Kaplan Firm being paid something less than 40% of the $135,000. However, the specific terms of the agreement did not come into evidence." The

court specifically indicated that it was "not convinced that there was a definitive oral agreement at the outset of case, instead finding the parties began working through the issues in a course of continued conduct akin to what had occurred in the past." In short, the court rejected Kazemi's testimony that there was a one-third net contingency agreement from the start of the representation, concluding instead that there had been *some* agreement later, but a failure of proof as to the terms of the agreement. This is supported by the testimony.

3. *The Court Did Not Err in Awarding the Firm Partial Fees in Quantum Meruit*

ESE next contends that the trial court erred as a matter of law in awarding the Firm any amount for its fees in quantum meruit, given the court's finding that the Firm breached its fiduciary duty. ESE relies on authority that permits a trial court to refuse an attorney any fee for a representation in violation of ethical rules. Our Supreme Court has held that "a court may refuse to allow an attorney any sum as an attorney's fee if his relations with his client are tainted with fraud. 'Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; as will acts in violation or excess of authority, and acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties.' [Citation.]" (*Clark v. Millsap* (1926) 197 Cal. 765, 785; see also *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 618 [holding it is "settled law in California that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility"].)

This rule, however, is not absolute. The Supreme Court has more recently explained that those cases which have disallowed quantum meruit recovery to attorneys who have violated the Rules of Professional Conduct "involved violations of a rule that proscribed the very conduct for which compensation was sought, i.e., the rule prohibiting attorneys from engaging in conflicting representation or accepting professional employment adverse to the interests of a client or former client without the written consent of both parties. [Citations.]" (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 463.) Subsequent authority has explained *Huskinson* as "recognizing a distinction between the type of violations that may render an agreement voidable, but still allow the attorney compensation for the reasonable value of his or her services, and the type of violation that precludes such recovery: Attorneys who violate a rule of professional conduct may recover in quantum meruit where they do not act in violation of an express statutory prohibition when providing legal services and where the subject services are not otherwise prohibited. [Citation.] On the other hand, violation of a rule that constitutes a serious breach of fiduciary duty, such as a conflict of interest that goes to the heart of the attorney-client relationship, warrants denial of quantum meruit recovery. [Citations.]" (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1161.)

If an attorney commits an ethical violation during an otherwise proper representation, it may be appropriate for a court to award quantum meruit recovery for the attorney's services rendered prior to the violation, but deny fees for the services after the violation. (*Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 12.) This is an issue akin to that of severability of contracts – voiding that portion of the contract which is

unlawful, but permitting recovery for the portion which is lawful. (*Fair v. Bakhtiari, supra,* 195 Cal.App.4th at pp. 1156-1157.) Whether a case is an appropriate one for severability is a decision left to the trial court's discretion based on equitable factors. (*Id.* at p. 1157.)

Here, the trial court concluded the Firm was entitled to quantum meruit recovery for the services it provided up through the Travelers settlement, but barred from recovery after it chose to retain Lasertone's $80,000 and fight the settlement enforcement proceedings. This was well within the court's discretion; ESE did not establish any ethical violation or breach of fiduciary duty up to that point. The court's decision to allow the Firm quantum meruit for the services it properly provided, but to deny recovery for all services when it was in breach of its fiduciary duty, had a basis in equity which we do not disturb.

4. *The Court Did Not Err in Concluding ESE Had Not Established Fraud*

ESE takes issue with both of the court's reasons to deny recovery on the fraud cause of action: that ESE did not prove the purported written 40 percent gross contingency agreement was fraudulent and that ESE did not prove reliance.

A. *ESE Did Not Establish the Document was Fraudulent*

ESE contends the court erred in concluding it did not establish the purported 40 percent gross contingency agreement was a fraud – intentionally and falsely created by the Firm by attaching Kazemi's signature page from an unknown prior agreement to a first page setting forth a 40 percent gross contingency agreement in this case.

The court's determination was supported by the evidence. To be sure, the date on the document was admittedly false; and

the initial deposition testimony of Attorney Kenegos and Attorney Kaplan was admittedly wrong. But, on the other side, Kazemi admitted that his signature on the signature page was genuine; he could not identify any prior agreement from which the signature page was purportedly taken; and his questioned documents examiner expert could not definitively say whether the signature page had originally been attached to the first page or was a later addition.

ESE argues that the finding that ESE did not establish fraud cannot be reconciled with the court's finding that the Firm did not establish the agreement was what they purported it to be. ESE argues, "Either the evidence testimony, of the witnesses establishes that the second signature page of the Written Retainer Agreement was executed in conjunction with the first page, or it was not." ESE's argument has a commonsense appeal; but not a legal one. ESE had the burden to establish the document was fraudulent; the Firm had the burden to establish Kazemi executed it. The trial court concluded both parties failed in their burdens; the evidence was not conclusive enough for the court to make a decision. There is nothing inherently contradictory about this conclusion.[8]

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[8] Nor is ESE's implied premise correct. ESE is right that either the second page was executed in conjunction with the first page or it was not, but it does not follow that this means that either the agreement was a valid enforceable contingency agreement or it was intentionally fraudulent. Other alternatives exist. For example, perhaps, one year into the representation, the Firm sent the agreement to Kazemi to sign in a stack of other documents and Kazemi absent-mindedly signed it without truly knowing what it was.

B. *ESE Did Not Establish Reliance*

The trial court also concluded that ESE had not established detrimental reliance. Specifically, Kazemi did not do any act in reliance on the Firm's 40 percent contingency agreement. This is supported by the evidence and ESE does not challenge it. Instead, ESE argues, as it did in opposition to the court's tentative statement of decision, that it could establish reliance with the fact that the Firm *concealed* the purported 40 percent agreement until after ESE agreed to the Travelers settlement and endorsed the settlement checks.

This is a theory which ESE never pleaded, not even when it filed a second amended complaint after trial to conform to proof. Moreover, the theory confuses two forms of fraud: intentional misrepresentation ("The suggestion, as a fact, of that which is not true, by one who does not believe it to be true") and concealment ("The suppression of a fact, by one who is bound to disclose it"). (Civ. Code, § 1710, subds. 1 and 3.) The fraud which ESE pleaded was intentional misrepresentation; it depends on a false fact being presented as true. Concealment depends on a true fact being hidden. ESE cannot get around its failure to prove reliance on an intentional misrepresentation by saying it relied on a *false* fact having been suppressed. ESE's "reliance on concealment" argument comes down to an assertion that it settled the Travelers action in reliance on the Firm's promise that ESE would receive funds from the settlement – a cause of action for fraud by promise made without any intention to perform, which was barred by the mediation privilege.

5. *The Court Did Not Err in Rejecting ESE's Third Cause of Action for Breach of Fiduciary Duty*

ESE pleaded two causes of action for breach of fiduciary duty. The third cause of action was based on the same facts as its fraud cause of action; and the fourth cause of action was based on the Firm's opposition to Lasertone's settlement enforcement efforts without ESE's consent. ESE prevailed on the latter but not on the former. On appeal, ESE challenges the court's ruling on its third cause of action.

As with its reliance argument, ESE changes the cause of action on appeal. ESE argues that the Firm breached its fiduciary duty by concealing its intent to rely on the written 40 percent gross contingency agreement until after ESE had settled the Travelers action and endorsed the settlement checks. This was not the basis on which this cause of action was pursued at trial, and ESE cannot change its theory on appeal.

6. *The Court Did Not Err in Awarding Punitive Damages Against the Firm*

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) "As used in this section, the following definitions shall apply: [¶] (1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. [¶] (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious

disregard of that person's rights. [¶] (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c).)

In this case, the trial court specifically found that Attorney Kaplan's decision to pursue legal action against Lasertone in ESE's name without ESE's approval and without "meaningful communication," while "motivated by the firm and its partners' interest rather than that of the client" constituted "oppression and malice."[9] The Firm takes issue with this conclusion on three bases: first, that the finding that the Firm pursued Lasertone for its own benefit was "demonstrably untrue"; second, that its pursuit of Lasertone was not, as the trial court described it, "ill-advised"; and third, that even if it put its interests ahead of its client, this was not sufficient to justify punitive damages as a matter of law.

A. *The Evidence Supports the Finding that the Firm Pursued Lasertone for its Own Benefit*

The Firm takes the position that the court erred in concluding the Firm pursued Lasertone for its own benefit because, if the Firm had been successful in obtaining the sought-after money from Lasertone, "ESE would have realized a recovery

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[9] In its reply brief on appeal, the Firm inexplicably argues that "the trial court expressly found respondents did NOT act out of 'oppression, fraud or malice' " within the meaning of Civil Code section 3294. Yet on the very next page, the Firm quotes the court's finding that Attorney Kaplan's conduct amounted to oppression and malice.

and this litigation would have been avoided." We are not persuaded by this oversimplification. The trial court found, with respect to the breach of contract cause of action, that, at the time of the Travelers settlement, there had been a tacit agreement between Attorney Kenegos and Kazemi that the Firm's fee would be such that ESE would receive funds from the settlement (although there was a failure of proof of the terms of the agreement). This agreement lasted all the way through the time Attorney Kenegos telephoned Kazemi and told him to come pick up his check. When Kazemi arrived at the office, Attorney Kaplan reneged on the agreement, stated with absolute certainty that the Firm would keep the entirety of the $55,000 check, and told Kazemi that ESE's only recovery would come from the Firm's pursuit of Lasertone. In other words, the trial court found that while the Firm pursued Lasertone to obtain money for ESE, such pursuit was only necessary because the Firm had breached its prior agreement with Kazemi. That the Firm breached its fee agreement and took the entirety of the $55,000 check, leaving ESE to the fate of litigation against Lasertone, does not mean the Firm altruistically pursued Lasertone for ESE's benefit; it means that the Firm pursued Lasertone in an after-the-fact effort to sanitize its own contractual breach.

B. *Whether the Pursuit of Lasertone was Ill-Advised is Irrelevant*

The Firm argues that the trial court erred in concluding that it was "ill-advised" to pursue Lasertone for a share of the fees. Specifically, the Firm argues that since a trial court judge (Judge Shook) initially sided with the Firm on its common fund theory, the pursuit of the theory could not have been ill-advised as a matter of law. Preliminarily, we note that, in the Settlement

Enforcement Appeal, the Court of Appeal found that Judge Shook made his decision on incorrect facts – believing that the full Travelers settlement was $80,000, rather than $135,000.[10] But that is beside the point. The trial court in this case did not award punitive damages because the Firm pursued a questionable legal theory; the court awarded punitive damages because the Firm pursued that legal theory without informed client consent – indeed, without any client consent at all.

C. The Firm's Pursuit of Lasertone to Cover its Own Wrongdoing and Without Client Consent was Malicious

The Firm argues that even if it put its own interest ahead of ESE's in its pursuit of Lasertone, this does not constitute malice. This argument is too narrow a construction of the factual basis for the trial court's finding of malice.

Even if the common fund theory had a likelihood of prevailing, there was a potential downside to it. The Lasertone settlement agreement included an attorney's fee clause for the party prevailing in any proceedings to enforce the settlement. The Firm knew this; it had approved the agreement as to form. By withholding the $80,000 check and fighting Lasertone in court, the Firm risked an adverse award of attorney's fees against ESE, which, in fact, ultimately came to pass. But the Firm never warned ESE of that potential risk and never obtained ESE's consent to pursue Lasertone despite the risk. Instead, Attorney Kaplan announced to Kazemi that Kazemi would not receive a

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[10] We also note that, by the time of the Settlement Enforcement Order Appeal, even *the Firm* was not pursuing its common fund theory on the merits, and argued only Judge Shook's ruling, even if incorrect, was binding.

check from the Firm and the Firm would instead fight Lasertone for more money. When Kazemi balked at this, the argument became physical, with the result that Kazemi left the building. The idea that this conversation constituted informed consent is nonsense. Despite the Firm's argument to the contrary, it did not subsequently obtain the consent of Attorney Drooyan, on behalf of ESE, to pursue the Settlement Enforcement Order appeal.[11] That, even at the hearing on punitive damages, Attorney Kaplan represented that he had believed his argument had merit, so was going to pursue the Settlement Enforcement Order Appeal "one way or the other" only confirmed that the Firm was acting with zero regard for the risks to ESE.

We repeat one of the statutory definitions of malice: "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." The Firm had breached its fee agreement with its client, and attempted to find extra money by dishonoring its client's settlement with a third party – a course of action that posed a financial risk to the client. The Firm pursued that course of action with utter disregard for both the client's right to control the litigation and the financial risks. More than that, the Firm pursued litigation in the client's name despite a breakdown in the attorney-client relationship and without the client's consent. The court did not err in concluding this was malicious.

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[11] Kazemi retained Attorney Drooyan *after* the Firm had filed the Settlement Enforcement Order Appeal. All of the documentary evidence on which the Firm relies to demonstrate it kept Attorney Drooyan in the loop on the appeal was from 2013 and therefore relate to the Lasertone Attorney Fee Appeal, not the Settlement Enforcement Order Appeal.

7. *The Judgment Must Be Modified*

There are two errors in the judgment which must be corrected.[12] First, the court's statement of decision concludes that the Firm was not entitled to fees under any contingency agreement, but was instead entitled to the reasonable value of its services under quantum meruit. This was calculated as 114.05 hours at $450 per hour, for a total of $51,322.50. The court's judgment states that, with respect to the first cause of action, "the court awards Defendants the reasonable value of services rendered in the amount of $51,322.50." However, it is undisputed that the Kaplan Firm retained the entire $55,000 check for its costs and fees. Of that $55,000, the court determined the firm was entitled to $51,322.50 for fees, and ESE conceded the firm was entitled to costs of $3,353.85. Offsetting these amounts, plaintiff should be awarded a net of $323.65 for the overpayment. The judgment should reflect an award on the first cause of action of $323.65 in favor of plaintiff instead of an award of $51,322.50 in favor of defendants. (The judgment does not direct the Firm to disgorge the $55,000.)

Second, the court's award of punitive damages was modified by interlineation, but does not appear to unambiguously set forth the award. The court's statement of decision explains the total punitive damage award was to be $48,000 against the Kaplan Firm, of which $6,000 was to be awarded jointly and severally against the Firm and Attorney Kenegos, and $42,000 was to be awarded jointly and severally against the Firm and Attorney Kaplan. Yet the judgment still contains lines indicating awards of $16,000 individually against Attorney Kenegos and

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[12] We raised both issues with the parties on our own motion. ESE agreed the judgment should be modified on appeal.

$24,000 individually against Attorney Kaplan. These lines must be deleted.

DISPOSITION

The judgment is modified to: (1) reflect an award on the first cause of action of $323.65 in favor of plaintiff instead of an award of $51,322.50 in favor of defendants; and (2) strike the lines awarding $16,000 in punitive damages against Attorney Kenegos individually and $24,000 in punitive damages against Attorney Kaplan individually. As modified, the judgment is affirmed. The parties are to bear their own costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

ROGAN, J.*

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