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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 THREE

UNIVERSITY OF SOUTHERN CALIFORNIA,

Plaintiff,

v.

SARGON ENTERPRISES, INC. and AMERICAN EQUITY INSURANCE COMPANY,

Defendants and Appellants;

BROWNE GEORGE ROSS, LLP,

Defendant and Respondent.

B269714

(Los Angeles County Super. Ct. No. BC464551)

APPEALS from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Adler Law Group and Erwin E. Adler for Defendant and Appellant American Equity Insurance Company.

Law Offices of Kyle P. Kelley and Kyle P. Kelley for Defendant and Appellant Sargon Enterprises, Inc.

Browne George Ross LLP, Eric M. George, Benjamin D. Scheibe and Ira Bibbero for Defendant and Respondent.

This appeal arises out of long-running litigation between appellant Sargon Enterprises, Inc. (Sargon) and the University of Southern California (USC). Sargon prevailed in that litigation, and a judgment for damages of $433,000, plus attorney fees of $4 million, was entered in Sargon's favor in 2007 and affirmed on appeal.

Meanwhile, in 2011, USC interpled the attorney fee award, naming as defendants Sargon, appellant American Equity Insurance Company (AEIC), and respondent Browne George Ross LLP (BGR), among others. At issue in the present appeal is the $440,469 interpleader judgment for AEIC, from which both Sargon and AEIC have appealed.

In its appeal, Sargon contends that (1) AEIC's claim to the interpled funds was time-barred, and (2) the trial court erred in failing to surcharge AEIC under the common fund doctrine. In its appeal, AEIC contends that the trial court erred by (1) awarding AEIC only a portion of the more than $700,000 it spent on Sargon's defense, (2) failing to award AEIC prejudgment interest, and (3) failing to enter a sanctions award against BGR for asserted misstatements made in a prior appeal.

As we now discuss, we find no error, and thus we affirm the judgment in full.

## FACTUAL AND PROCEDURAL BACKGROUND

### I.

### Introduction

As discussed more fully below, three related lawsuits are relevant to the present appeal. The first suit, between Sargon and USC (the Sargon/USC litigation) concluded in 2011 with an award to Sargon of $433,000 in damages and $4 million in attorney fees. The second suit, between Sargon and AEIC (the

AEIC/Sargon litigation), was voluntarily dismissed by the parties without prejudice in 2010. The third suit, out of which the present appeal arises, is an interpleader action (the interpleader action) filed by USC against Sargon, AEIC, and Sargon's attorneys, including BGR, all of whom claimed some of the attorney fees awarded in the Sargon/USC litigation.

Our discussion of the relevant factual and procedural background is drawn in significant part from six prior Court of Appeal and Supreme Court decisions arising out of the litigation described above; these decisions are as follows:

(1) *Sargon v. University of Southern California* (Feb. 25, 2005, B167519, B163707, B169619, B156857, B156587) [nonpub. opn.] 2005 WL 435413 (*Sargon I*);

(2) *Sargon Enterprises, Inc. v. University of Southern California* (Feb. 9, 2011, B202789, B205034) [nonpub. opn.] 2011 WL 437295 (*Sargon II*);

(3) *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon III*);

(4) *Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495 (*Sargon IV*);

(5) *American Equity Insurance Co. v. Browne George Ross LLP* (Oct. 28, 2013, B243367) [nonpub. opn.] 2013 WL 5797736 (*Sargon V*);

(6) *Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, 756 (*Sargon VI*).

## II.
## The Sargon/USC Litigation

### *A. The First Trial and Appeal*

In 1991, Sargon patented a dental implant developed by its president and chief executive officer, Dr. Sargon Lazarof

(Lazarof). In 1996, Sargon contracted with the University of Southern California (USC) to conduct a five-year clinical study of the implant. (*Sargon III*, *supra*, 55 Cal.4th at p. 754.) In 1999, Sargon sued USC for breach of the clinical trial agreement (agreement), and USC cross-claimed against Sargon. (*Ibid*.)

After the trial court excluded Sargon's evidence of lost profits and denied Sargon leave to amend to allege fraud causes of action, a jury found that USC had breached the agreement and awarded Sargon $433,000 in compensatory damages. (*Sargon I*, *supra*, 2005 WL 435413, at p. 1.) The jury also found for Sargon on USC's cross-complaint. (*Ibid*.) Both sides sought prevailing party attorney fees; the trial court concluded that USC had achieved more of its litigation objectives than had Sargon, and thus it awarded USC its attorney fees. (*Id*. at p. 13.)

Sargon appealed. In February 2005, the Court of Appeal in *Sargon I* reversed the in limine ruling excluding evidence of lost profits, reversed the order denying Sargon leave to amend to add fraud claims, and reversed the attorney fee award for USC. (*Sargon I*, *supra*, 2005 WL 435413, at p. 1.) With regard to attorney fees, the Court of Appeal explained that ordinarily the prevailing party issue is moot where an appeal results in a reversal and remand for further proceedings. In the present case, however, "our reversal of the orders excluding evidence of lost profits and denying leave to amend will have no adverse effect on plaintiff's judgment for breach of contract, a final judgment from which USC did not appeal. On remand, plaintiff's judgment will remain intact even if plaintiff fails to recover additional damages for lost profits and fraud. Plaintiff may recover additional damages on remand, but in no event will plaintiff's judgment be reduced. Accordingly, because plaintiff has won a final judgment,

the prevailing party issue is ripe for review." On the merits, the Court of Appeal held that Sargon was the prevailing party as a matter of law, and it directed the trial court on remand to award Sargon its reasonable attorney fees. (*Id*. at p. 14.)

*B. The Attorney Fee Award on Remand*

In July 2005, Sargon made a motion for attorney fees of approximately $1.8 million. Sargon's request included fees incurred by attorneys Heenan Blaikie LLP (Heenan Blaikie), Jay Bloom (Bloom), and Lewis Brisbois Bisgaard & Smith (Lewis Brisbois), both for prosecuting Sargon's claim against USC and for defending USC's claim against Sargon. In May 2006, the trial court awarded Sargon "reasonable attorneys' fees" of just over $1.8 million. Subsequently, in October 2006, the trial court stayed execution of its May 2006 fee order until the final resolution of the case. (*Sargon V*, *supra*, 2013 WL 5797736, at p. 2.)

*C. The Second Trial and Appeal*

Sargon retained Browne, Woods & George LLP (BWG), now known as BGR, to represent it. (*Sargon V*, *supra*, 2013 WL 5797736, at p. 2.) On remand from the Court of Appeal, the trial court again excluded evidence of Sargon's alleged lost profits, and in August 2007, the parties stipulated to entry of judgment for Sargon in the amount of $433,000 on its breach of contract claim. (*Sargon II*, *supra*, 2011 WL 437295, at pp. 1, 21.)

After the stipulated judgment was entered, Sargon sought additional attorney fees of over $5 million—$282,598 for work performed by Lewis Brisbois, and $4,803,215 for work performed by BWG from August 1, 2005 to July 25, 2007—in addition to the $1.8 million already awarded. The trial court said it had "no quarrel with the billable hour rates of any of the attorneys, nor

with the number of hours billed," but noted that in awarding attorney fees, it was required also to consider the parties' "relative success or failure." Given Sargon's limited recovery of $433,000, the court said, a fee award of more than $6 million "would be excessive." Therefore, after balancing all the factors, the court "exercise[d] its discretion and award[ed] [Sargon] $4,000,000 in attorneys fees for The Trial."[1]

Sargon appealed. In February 2011, the Court of Appeal in *Sargon II* again held that the trial court erred in excluding evidence of Sargon's lost profits, and it remanded for a new trial on lost profits. (*Sargon II*, *supra*, 2011 WL 437295 at p. 19.) With regard to attorney fees, the court found no abuse of discretion, and it affirmed the $4 million attorney fee award. (*Id.* at pp. 23–24.)

USC petitioned for review in the California Supreme Court. In November 2012, the Supreme Court reversed the judgment of the Court of Appeal, concluding that the trial court acted within its discretion when it excluded opinion testimony on the issue of lost profits. (*Sargon III*, *supra*, 55 Cal.4th at p. 753.)

On remand from the Supreme Court, Sargon again sought a new trial on lost profits; the Court of Appeal denied Sargon's request and affirmed the judgment of the superior court. (*Sargon IV*, *supra*, 215 Cal.App.4th 1495.)

## III.

## The AEIC/Sargon Litigation

Sargon was insured by AEIC. Early on in the Sargon/USC litigation, Sargon tendered its defense to AEIC, and AEIC paid

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[1] The order defined "The Trial" to include the entire proceeding—that is, the first and second trial.

the defense-related billings (for the defense of the cross-complaint USC filed against Sargon) of both Heenan Blaikie and Lewis Brisbois. (*Sargon V*, *supra*, 2013 WL 5797736, at p. 1.)

On November 17, 2004, AEIC filed a complaint for declaratory relief and unjust enrichment against Sargon, seeking to recover the attorney fees it had paid on Sargon's behalf in the Sargon/USC litigation. Sargon cross-complained against AEIC.

The litigation between AEIC and Sargon continued until 2010, when Sargon and AEIC agreed to dismiss their claims against one another without prejudice, subject to a tolling agreement. The tolling agreement recited, among other things: the court in the Sargon/USC litigation issued an order in May 2006 awarding attorney fees in Sargon's favor in the amount of $1,801,495; Sargon and USC each appealed from the judgment in the USC action, and "the parties to this agreement are uncertain as to the amount of the attorney's fees Sargon may ultimately recover from USC in the USC action;" "the parties do not wish to unnecessarily expend attorney[] fees and expenses in the AEIC action given the uncertainty of the amount of the attorney[] fees Sargon may recover from USC;" and "the parties hereto are amenable to dismissing the AEIC action, including the amended complaint and cross-complaint therein, without prejudice, pending the final resolution of the USC action . . . so that neither party's rights are affected by the entry of such dismissal." Therefore, the parties agreed that the statute of limitations on any claims Sargon had against AEIC, or AEIC had against Sargon, relating to the matters alleged in the Sargon/AEIC litigation, were tolled as of September 13, 2007. Further, "[t]he parties agree the purpose of this Agreement is to toll any applicable statute of limitations together with any

related statutory or common law rule which would bar, in whole or part, a trial on the merits of the dispute between the parties over the entitlement of [AEIC] to recover its payment of attorneys' fees . . . . Should AEIC or Sargon decide to pursue a cause of action or claim against the other, their respective rights to do so are subject to the tolling provisions . . . . [¶] . . . [¶] This agreement shall remain in effect until February 2, 2014, unless it is modified or extended by written agreement of the parties."

AEIC and Sargon dismissed their claims against one another without prejudice on August 11, 2010.

## IV.

## The Interpleader Action

*A. The Initial Interpleader Judgment*

In June 2011, USC filed a complaint in interpleader. The complaint asserted that the attorney fees awarded to Sargon in the Sargon/USC litigation, plus interest, totaled nearly $5 million. Believing there were competing claims to the fees, USC interpleaded the full amount, naming Sargon, Lewis Brisbois, BGR, Bloom, and AEIC as defendants.[2] (*Sargon V*, *supra*, 2013 WL 5797736 at p. 2.)

Sargon and BGR entered general denials to the first amended complaint and asserted affirmative defenses. AEIC also answered the complaint and sought affirmative relief, including a right to recover the fees it had advanced to defend Sargon in the USC action.[3]

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[2] The law firm of Greines, Martin, Stein & Richland (Greines Martin) was named in the first amended interpleader complaint, but subsequently disclaimed any right to the deposited funds.

[3] In its affirmative claims, AEIC noted that it had filed a notice of lien in the Sargon/USC litigation on June 26, 2008.

On June 12, 2012, the trial court entered an order dismissing USC from the interpleader action.

BGR moved for judgment on the pleadings with respect to AEIC's claim to a part of the interpleaded funds, urging that while AEIC "may have a *claim* against Sargon," such claim "does not give AEIC a *lien* on the specific proceeds deposited by USC." On August 2, 2012, the trial court granted BGR's motion, finding that AEIC did not have a lien on the interpleaded funds.

The remaining parties to the interpleader action settled their respective claims, agreeing that Bloom would receive $100,000, Lewis Brisbois would receive $440,000, and Sargon and BGR would jointly receive the balance of the funds. The court entered judgment accordingly, noting that AEIC received nothing as a result of the ruling on the motion for judgment on the pleadings. (*Sargon V*, *supra*, 2013 WL 5797736 at p. 5.)

After the entry of judgment, on December 7, 2012, Sargon and BGR entered into an "Agreement Regarding Distribution of Interpleaded Funds" (agreement). The agreement provided that BGR would receive $2,540,202 of the funds; Sargon would receive $2,038,862 of the funds; and $900,000 would be held jointly "until such time as AEIC's claim in the Interpleader Action is fully and finally adjudicated as against BGR."

*B. The First Interpleader Appeal*

AEIC appealed from the interpleader judgment. (*Sargon V*, *supra*, 2013 WL 5797736 at p. 5.) This court reversed, holding that AEIC could state a claim to the interpleader funds on a theory of equitable subrogation. (*Id.* at pp. 6–8.) We explained as follows:

" ' "Subrogation is defined as the substitution of another person in place of the creditor or claimant to whose rights he or

she succeeds in relation to the debt or claim." [Citation.] It provides a " ' "method of compelling the ultimate payment by one who in justice and good conscience *ought* to make it—of putting the charge where it justly belongs." ' " [Citations.]' (*State Farm General Ins. Co. v. Wells Fargo Bank, N.A.* (2006) 143 Cal.App.4th 1098, 1105.) 'In the insurance context, subrogation takes the form of an insurer's right to be put in the position of the insured for a loss that the insurer has both insured and paid.' (*Id.* at p. 1106.) 'Pursuant to the subrogation doctrine, when an insurer has paid an insured the amount of a loss caused by a third party, the insurer may step into the shoes of the insured and pursue the insured's rights and remedies against the third party tortfeasor.' (*Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 908.)

" 'When an insurance company pays out a claim on a first-party insurance policy to its insured, the insurance company is subrogated to the rights of its insured against any tortfeasor who is liable to the insured for the insured's damages. [Citations.] Subrogation has its source in equity and arises by operation of law (legal or equitable subrogation). [Citation.] It can also arise out of the contractual language of the insurance policy (conventional subrogation). [Citation.] The subrogation provisions of most insurance contracts typically are general and add nothing to the rights of subrogation that arise as a matter of law. [Citation.]' (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 272.)

"There are at least two ways in which an insurer can enforce its subrogation right. The subrogation right arises once the insurer pays the debt due its insured. (*Maryland Casualty Co. v. Nationwide Ins. Co.* (1998) 65 Cal.App.4th 21, 26.) Once

the insurer has done so, it may then bring *a direct action against the responsible third party,* in order to recover the payments it made. (*Allstate Ins. Co. v. Mel Rapton, Inc., supra,* 77 Cal.App.4th at p. 908.) Alternatively, the insurance company can wait until its insured has successfully pursued the third party tortfeasor, and then seek relief from its insured. (*Plut v. Fireman's Fund Ins. Co.* (2000) 85 Cal.App.4th 98, 104.)

"When the latter course of action is taken, the insurer's rights are limited by the so-called 'made whole' rule. Under this rule, the subrogating insurer which does not participate in its insured's action against the responsible third-party tortfeasor can recover nothing from its insured's recovery until the insured is itself made whole for its loss. (*Progressive West Ins. Co. v. Superior Court, supra,* 135 Cal.App.4th at p. 273.) Moreover, when the insurer is seeking reimbursement from the insured out of funds obtained by the insured from the third party, the insurer must pay a pro rata share of the insured's attorney fees and costs incurred in obtaining the funds. (*Ibid.*) . . .

"From our discussion of the law above, it should be apparent that AEIC can state a claim to the interpleaded funds on the theory of equitable subrogation. AEIC asserts that it paid, pursuant to its insurance policy, a portion of Sargon's attorney fees incurred in defending the action brought by USC. The doctrine of equitable subrogation therefore gave AEIC a *direct right of action against USC* to recover the attorney fees for which USC was ultimately responsible. As AEIC had a direct right of action against USC for these funds, it follows that AEIC was a proper interpleader claimant when USC interpleaded the selfsame funds. Thus, we will reverse the judgment on the

pleadings against AEIC." (*Sargon V,* 2013 WL 5797736 at pp. 6–8, fns. omitted.)

*C. Proceedings on Remand*

On remand, Sargon brought a motion for nonsuit as to AEIC's claims. It asserted that AEIC's subrogation rights accrued either on January 25, 2003 (the day AEIC made its last payment to Lewis Brisbois) or, at the very latest, on May 2, 2006 (the day the court entered an order establishing Sargon's right to recover at least $1.8 million in attorney fees and costs). Sargon contended that the statute of limitations therefore ran on AEIC's equitable subrogation claim against USC no later than May 2, 2010, and that AEIC's claim in the subrogation action, filed in June 2011, was time-barred. The trial court denied the motion.

Prior to trial, the parties stipulated to a number of facts, including that AEIC paid Sargon's attorneys $701,112 ($418,033 to Lewis Brisbois, and $283,079 to Heenan Blaikie) in connection with the Sargon/USC litigation. The case then proceeded to a three-day bench trial, at the conclusion of which the court awarded AEIC $439,986, plus interest, which was approximately two-thirds of the attorney fees (but not the costs)[4] that AEIC paid for Sargon's defense. In its written order, the court explained that the amount of the award was "determined in the exercise of the Court's equitable powers," as follows:

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[4] Although the parties had stipulated prior to trial that AEIC had paid Lewis Brisbois $418,033 and Heenan Blaikie $283,079, for a total of $701,112 in attorney fees and costs, the trial court found that AEIC had not established at trial that Lewis Brisbois's costs were included in the interpleaded funds. Accordingly, as discussed more fully below, the trial court reduced AEIC's claim from $701,112 to $669,242.

"1. The total amount of fees requested by defendant Sargon Enterprises, Inc. . . . in connection with both the 2005 fee motion (decided on May 2, 2006) and the 2007 fee motion (decided on December 7, 2007) in *Sargon Enterprises, Inc. v. University of Southern California*, Los Angeles Superior Court Case No. BC209992 (the 'Underlying Action') was $7,434,822.00. (['Joint Stip.', #18.])

"2. On December 7, 2007, the Court awarded $4,000,000 in attorneys' fees in the Underlying Action for The Trial, which included those matters that were the subject of the attorney's fees claimed in the 2005 and 2007 fee motions. (Joint Stip., # 20.)

"3. AEIC claims a right to a portion of the $4,000,000 in attorney's fees based on the amounts it paid to two of [Sargon's] former law firms, Lewis Brisbois Bisgaard & Smith LLP . . . and Heenan Blaikie.

"4. AEIC paid $283,079.45 to Heenan Blaikie. (Joint Stip., # 32.) At trial, it was shown through the testimony of Deborah Sirias of [Lewis Brisbois] and Exhibit 138 that AEIC paid to [Lewis Brisbois] $386,163.50 for attorney's fees. Although AEIC paid an additional amount to [Lewis Brisbois] for costs, AEIC did not adduce evidence showing that those costs it reimbursed to [Lewis Brisbois] were included in the amount interpleaded by University of Southern California ('USC'), plaintiff herein and defendant in the Underlying Action, for costs. Because this action is adjudicating only the parties' entitlement to the amounts interpleaded by USC, and not to any other claims any party might have against any other party, this Court finds that AEIC's right to recovery from this interpleader is based on a payment to [Sargon's] attorneys totaling $669,242.95.

"5. The amount of funds in the interpleader at the time of the Judgment that was attributable to the Court's December 7, 2007 attorney's fees order of $4,000,000 was $4,887,937.63, inclusive of interest interpleaded by USC, and after deducting the appropriate percentage of the offsets taken from the interpleaded amounts by USC.

"6. $4,887,937.63 is 65.74% of $7,434,822.

"7. The Court finds that AEIC should be subject to the same discount as the other claimants to the interpleaded attorney's fees. Therefore, AEIC is entitled to recover at most from the interpleaded fund 65.75% of $669,242.95, which is $439,986.03. The Court also finds that AEIC is also entitled to the Actual Post-Judgment Interest.

"8. The Court finds that imposing on AEIC the same proportionate reduction as imposed on the other claimants in the aggregate is equitable, fair, and appropriate for many reasons, including the following:

"A. AEIC itself took no action to recover from USC the attorney's fees that comprise the bulk of the interpleaded fund; the motions to recover those fees were brought by [Sargon] and its counsel.

"B. AEIC did not pay the attorney's fees incurred in bringing the two motions that created the interpleaded fund or to defend on appeal the fee awards that comprise that fund.

"C. [Sargon], not AEIC, paid for the successful appeal of the original ruling that had deemed USC (not [Sargon]) to be the prevailing party. Without that expenditure, and that successful appeal, there would have been no fee awards in favor of [Sargon] and no interpleaded fund to distribute to any claimant herein.

"D. The Court's award of an aggregate total of $4 million in attorney's fees in the Underlying Action was based on its view that $4 million was a proper award for the entirety of the Underlying Action, taking into account, *inter alia*, the quality of the legal work performed (which the Court repeatedly has said was uniformly excellent), but also taking into account the limited recovery ultimately generated for [Sargon]. Requiring the other claimants to bear the entire brunt of the Court's reduction while allowing AEIC to recover 100% of its claim would not be equitable in these circumstances.

"8. Although AEIC claims a right to interest on the fees that it paid from the date of each payment to [Lewis Brisbois] or Heenan Blaikie, which dates were shown at trial or by stipulation to range from 1999 through 2003, the Court finds that AEIC is entitled from this action only to (1) the interest actually interpleaded by USC (subject to the offset taken by USC), which interest is included in the $439,986.03 amount stated above, and (2) the Actual Post-Judgment Interest. AEIC is not . . . entitled to interest that no other claimant would receive, especially as any award of interest not actually interpleaded would reduce the recovery of those other claimants."

On January 20, 2016, the court entered judgment for AEIC in the amount of $440,469.12 "consisting of $439,986.03 from the previously-interpleaded funds, plus $483.09 in interest actually earned . . . thereon since the Court disbursed said funds."

Sargon and AEIC timely appealed from the January 20, 2016 judgment.

**SARGON'S APPEAL**

Sargon makes two claims in its appeal. First, Sargon contends that because AEIC became aware that Sargon was

seeking attorney fees no later than September 9, 2005, the four-year statute of limitations on AEIC's subrogation claim against USC ran no later than September 9, 2009. Because AEIC did not file its claim until 2011, its claim is time-barred.

Second, Sargon contends that it incurred nearly $200,000 in attorney fees to appeal the judgment that resulted in the prevailing-party determination by the Court of Appeal in *Sargon I*. Sargon urges that under the common fund doctrine, AEIC should have been charged with a portion of those attorney fees.

## I.
## AEIC's Claim to the Interpled Funds Is Not Time-Barred

Sargon suggests that the statute of limitations on the exercise of subrogation rights arising out of a contract is four years, and thus that the limitations period on AEIC's subrogation claim against USC ran four years from the time AEIC first became entitled to seek attorney fees from USC, or no later than September 9, 2009. Because AEIC did not file its claim in the interpleader action until December 19, 2011, Sargon contends the claim is time-barred.

For the reasons that follow, we conclude that AEIC's claim to the interpleaded funds is not barred by the statute of limitations.

*A. Legal Principles Governing Interpleader Actions*

The rules governing interpleader actions are set out in Code of Civil Procedure section 386. "Any person, firm, corporation, association or other entity against whom double or multiple claims are made, or may be made, by two or more persons which are such that they may give rise to double or multiple liability, may bring an action against the claimants to compel them to interplead and litigate their several claims." (Code Civ. Proc., § 386, subd. (b).) "The action of interpleader may be maintained although the claims have not a common origin, are not identical but are adverse to and independent of one another." (*Ibid.*)

"Once [the interpleader plaintiff] admits liability and deposits the money with the court, he or she is discharged from liability and freed from the obligation of participating in the litigation between the claimants. [Citations.] The purpose of interpleader is to prevent a multiplicity of suits and double vexation. [Citation.]' (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1122, fn. omitted.) 'In an interpleader action, the court initially determines the right of the plaintiff to interplead the funds; if that right is sustained, an interlocutory decree is entered which requires the defendants to interplead and litigate their claims to the funds. Upon an admission of liability and deposit of monies with the court, the plaintiff may then be discharged from liability and dismissed from the interpleader action. [Citations.] The effect of such an order is to preserve the fund, discharge the stakeholder from further liability, and to keep the fund in the court's custody until the rights of potential claimants of the monies can be adjudicated. [Citations.] Thus, the interpleader proceeding is traditionally viewed as two

lawsuits in one. The first dispute is between the stakeholder and the claimants to determine the right to interplead the funds. The second dispute to be resolved is who is to receive the interpleaded funds. [Citations.]' (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 42–43; see also 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 216–237, pp. 280–298; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) §§ 2:470 to 2:497, pp. 78–85.)" (*Principal Life Ins. Co. v. Peterson* (2007) 156 Cal.App.4th 676, 682.)

*B. Analysis*

We begin by noting what Sargon has *not* contended. Presumably because AEIC and Sargon agreed in 2010 to toll the statute of limitations "on any claim that Sargon has against AEIC, and/or AEIC has against Sargon, relating to the matters alleged in the AEIC action, . . . as of September 13, 2007," Sargon does not suggest that the statute of limitations has run as to AEIC's claim *against it*. Instead, Sargon suggests that AEIC's claim to the interpleaded funds is time-barred because the statute of limitations has run on AEIC's claim *against USC*.

The unstated premise of Sargon's statute of limitations claim is that *Sargon* has standing to assert a statute of limitations defense arguably available to *USC* in a claim between AEIC and USC—even though USC has never asserted it. Sargon cites no authority for the proposition that it has standing to bring such a defense, however. " 'When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary.' [Citation.] '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.]" (*Okorie v. Los Angeles Unified School*

*District* (2017) 14 Cal.App.5th 574, 600 (*Okorie*).) Because Sargon has failed to cite authority for the proposition that it has standing to assert a statute of limitations defense to a plaintiff's claim against another party, we deem it forfeited.

Sargon's claim also fails on the merits. " 'It is well established that the statute of limitations is a *personal privilege* which is waived unless asserted at the proper time and in the proper manner, whether it be a general statute of limitations or one relating to a special proceeding.' " (*Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373, 382, italics added; see also *Salton Bay Marina, Inc. v. Imperial Irrigation Dist*. (1985) 172 Cal.App.3d 914, 940, fn. 4 ["In civil actions, the statute of limitations is a personal privilege and must be affirmatively asserted or it is deemed waived."].) USC has never asserted a statute of limitations defense against AEIC, and thus any such defense is deemed waived.

Further, as we have said, while ostensibly a single action, an interpleader suit is essentially "two suits in one. [Citations.] . . . . 'The first step is a trial or hearing by the court on the issue of the plaintiff's right to interplead. If the proof is sufficient (or the right is admitted by failure to object or by stipulation [citation], the court makes an *interlocutory order*. This directs the plaintiff stakeholder to deposit the amount or deliver the property, and requires the defendant claimants to interplead and litigate their claims among themselves.' " (*Lincoln Nat. Life Ins. Co. v. Mitchell* (1974) 41 Cal.App.3d 16, 19.) Thus, "[w]hile ostensibly a 'third party suit,' interpleader is in reality a dispute between the claimants to the stake. The stakeholder is only a *nominal* third party who has no interest in the outcome." (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter

Group 2017) § 3:113, p. 3-25, citing S*chneider v. Friedman, Collard, Poswell & Virga* (1991) 232 Cal.App.3d 1276, 1281–1282.) Given the dual nature of an interpleader action, we can conceive of no reason why, once the stakeholder has dropped out of the action and the remaining litigation is between the claimants, one claimant (Sargon) should be permitted to raise against another (AEIC) a statute of limitations defense arguably viable *only* as between the stakeholder and claimant (USC and AEIC). This is especially true in the present case, where claimants Sargon and AEIC have agreed to toll the statute of limitations as between themselves, and thus Sargon could not raise a statute of limitations defense on its own behalf to bar AEIC's claims against *it*.

We note finally that in *Sargon V*, we explained an insurer historically could enforce its subrogation right in "*at least* two ways"—by bringing a direct action against the responsible third party (USC), or by waiting until the insured has successfully pursued the responsible third party and then seeking relief from its insured (Sargon). (*Sargon V*, *supra*, 2013 WL 5797736 at p. 7, italics added.) *Sargon V* suggested a third way that an equitable subrogation claim could potentially be enforced by an insurer such as AEIC in an appropriate case: by filing a claim to funds interpleaded by a stakeholder pursuant to a judgment in favor of the insured. (*Ibid*.) This result, we explained, was mandated by the nature of the equitable subrogation remedy *itself:* Because AEIC had a direct right of action against *either* USC *or* Sargon to recover the attorney fees for which USC was ultimately responsible, "it follows that AEIC was a proper interpleader claimant when USC interpleaded the selfsame funds." (*Ibid*.) Our analysis in *Sargon V* leads logically to the conclusion in this

appeal that AEIC's claim to the interpleaded funds is not barred by the statute of limitations. Because AEIC could have waited to file suit until the funds to which it claimed a right were "in the hands of its insured" (*Sargon V*, *supra*, 2013 WL 5797736 at p. 8), its earlier-filed claim to those funds in the interpleader action cannot, as a logical matter, be time-barred.

## II.
## The Trial Court Did Not Err by Declining to Surcharge AEIC for a Portion of the Appellate Fees Incurred in *Sargon I*

Sargon contends that the trial court erred in refusing to surcharge AEIC pursuant to the "common fund" doctrine for a portion of the appellate fees incurred to litigate *Sargon I*. Sargon's claim is without merit.

### *A. Facts Relevant to the Common Fund Claim*

The parties stipulated that prior to January 2003, AEIC paid Sargon's lawyers $701,112 in attorney fees and costs to defend Sargon in the Sargon/USC litigation. AEIC did not fund any of the underlying litigation after 2003, when USC elected not to appeal the judgment for Sargon on USC's counterclaims, and it did not fund or participate in the *Sargon I* appeal.

As a result of the *Sargon I* appeal, Sargon was declared the prevailing party in its litigation with USC, and in May 2006, the trial court awarded it approximately $1.8 million in attorney fees. That award included, among other fees, the $701,122 that AEIC had paid Sargon's attorneys, and the $194,785 Sargon had paid to Greines Martin in connection with the *Sargon I* appeal. Subsequently, in December 2007, the court awarded Sargon an additional $2.2 million in attorney fees, such that the total fee award was $4 million. In 2011, USC interpleaded approximately

$5 million, which included the initial $1.8 million attorney fee award, the later $2.2 million attorney fee award, and interest of nearly $1 million.

When AEIC sought to recover from the interpleader fund the fees it had paid to Sargon's attorneys for its defense, Sargon urged that the court should deduct from AEIC's recovery a portion of the attorney fees Sargon had incurred in connection with *Sargon I*. The trial court declined to hold AEIC responsible for any portion of Greines Martin's bill under the common fund doctrine, but it nonetheless awarded AEIC only about 65 percent of the attorney fees it requested. Among the factors the court said supported its reduction of AEIC's fees were the following: "AEIC itself took no action to recover from USC the attorney's fees that comprise the bulk of the interpleaded fund; the motions to recover those fees were brought by [Sargon] and its counsel;" "AEIC did not pay the attorney's fees incurred in bringing the two motions that created the interpleaded fund or to defend on appeal the fee awards that comprise that fund;" and "[Sargon], not AEIC, paid for the successful appeal of the original ruling that had deemed USC (not [Sargon]) to be the prevailing party. Without that expenditure, and that successful appeal, there would have been no fee awards in favor of [Sargon] and no interpleaded fund to distribute to any claimant herein."

*B. No Error in Failing to Surcharge AEIC's Recovery Under the Common Fund Doctrine*

"The common fund doctrine originated in the class action context. [Citation.] Under the doctrine, ' "[w]hen a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or

plaintiffs may be awarded attorney's fees out of the fund." ' [Citation.]" (*21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511, 520.) " ' "The bases of the equitable rule which permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, appear to be these: fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful." ' [Citation.]" (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 275.)

In the present case, Sargon urges that by denying application of the common fund doctrine, the trial court "saddled [Sargon] with the whole $194,785.00 bill to create a fund in which AEIC was permitted to participate"—a result, Sargon suggests, that "[e]quity does not countenance." The problem with this argument is that the trial court did *not* "saddle" Sargon with Greines Martin's fees—it ordered *USC* to pay them. Thus, Sargon effectively has already been compensated for Greines Martin's appellate fees, and surcharging AEIC for these fees would permit Sargon to recover twice. Equity does not require such a result.

Moreover, although the trial court did not surcharge AEIC for a portion of Greines Martin's fees pursuant to the common fund doctrine, it nonetheless awarded AEIC only about two-

thirds ($439,986) of the total attorney fees ($669,242), and none of the costs, AEIC had paid for Sargon's defense. As noted above, AEIC's failure to participate in the *Sargon I* appeal was one of the reasons the court gave for the $261,126 "discount" it applied to AEIC's reimbursement request. Thus, although the trial court did not cite the common fund doctrine as a basis for reducing the fees it awarded AEIC, it did reduce those fees because AEIC had not participated in the *Sargon I* appeal.

For all of these reasons, we find that the trial court's failure to apply the common fund doctrine was not an abuse of discretion.

## AEIC'S APPEAL

In its appeal, AEIC contends the trial court erred by: (1) awarding AEIC less than the $701,112 it spent on Sargon's defense, in violation of principles of collateral estoppel and law of the case; (2) denying AEIC prejudgment interest; and (3) denying AEIC attorney fees as sanctions.

### I.

### The Trial Court's Award Did Not Violate Principles of Collateral Estoppel or Law of the Case

AEIC contends that by limiting AEIC's award to $439,986. rather than the $701,112 it spent on Sargon's defense, the trial court violated principles of collateral estoppel and law of the case. According to AEIC, our prior opinions in *Sargon I*, *Sargon II*, and *Sargon V* established that AEIC was entitled to "full recovery of its payments" for Sargon's defense, and that by subjecting AEIC to "a 'haircut' " (i.e., a fee reduction), the trial court "revise[d] the holdings of those decisions." As we now discuss, AEIC's claim is without merit.

*A. Collateral Estoppel*

" ' "Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." [Citation.]' [Citation.] There are five threshold requirements for collateral estoppel. ' "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]" ' [Citation.] The burden of proving each of these elements of collateral estoppel rests with the party asserting it. [Citation.]" (*ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd*. (2016) 5 Cal.App.5th 69, 79.)

AEIC's collateral estoppel claim founders on the first element—that the issue sought to be precluded from relitigation "must be identical to that decided in a former proceeding"—because the Court of Appeal has never decided the allocation of attorney fees as between the various claimants:

*Sargon I* (Feb. 2005): In *Sargon I* (which AEIC refers to as the "2005 Fraud/'Prevailing Party' Decision"), the court held that Sargon was the prevailing party under Civil Code section 1717, and it directed the trial court "on remand to enter a new order finding plaintiff [Sargon] to be the prevailing party under Civil Code section 1717 and awarding plaintiff its reasonable attorney fees as the prevailing party." (*Sargon I*, *supra*, 2005 WL 435413 at p. 14.) The court neither ordered that any particular sum be awarded as attorney fees, nor ordered any payment of attorney fees *to AEIC*.

*Sargon II* (Feb. 2011): In *Sargon II* (which AEIC refers to as the "2011 Components of Fee Award Decision"), the Court of Appeal rejected USC's contention that the $4 million attorney fees award to Sargon was excessive. Because the issue was not before it, the court did not consider the proper allocation of fees among the various claimants, nor did it award any fees *to AEIC*. (*Sargon II*, *supra*, 2011 WL 437295 at p. 23.)

*Sargon V* (Oct. 2013): In *Sargon V* (which AEIC refers to as the "2013 Subrogation Decision"), we held that AEIC "*can state a claim to*" the interpleaded funds in equitable subrogation, and we therefore reversed the judgment on the pleadings against AEIC. (*Sargon V*, *supra*, 2013 WL 5797736 at p. 7, italics added.) We explicitly did *not* resolve the parties' competing claims to the interpleaded funds, noting that such issues are "precisely what must be litigated in the interpleader action." (*Id.* at p. 4, fn. 17.) And we specifically noted that we could not, in the present posture, grant AEIC's request for judgment in its favor, explaining as follows: "AEIC requests that this court direct that judgment be entered in its favor on the supposedly undisputed evidence, despite the fact that it never placed any evidence before the trial court or this court establishing that it actually paid the attorney fees it claimed it has paid. That the trial court may have assumed AEIC's factual assertions were true for the purpose of ruling on the motion for judgment on the pleadings does not mean that AEIC will not ultimately be required to prove its assertions." (*Id.* at p. 5, fn. 19.) In short, while we held that AEIC could *state a claim to* a portion of the interpleaded funds, we expressly did not decide, as AEIC suggests, that AEIC had the right to "be *fully reimbursed* for its payments."

For all of these reasons, AEIC's right to recover attorney fees from the interpleaded funds has never been decided by any Court of Appeal, including this one. The issue now on appeal, therefore, is not "identical to" the issue decided in any former proceeding, and AEIC's collateral estoppel claim accordingly fails.

*B. Law of the Case*

" ' "The doctrine of 'law of the case' deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." [Citation.]' [Citation.]" (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1127.)

AEIC contends that our prior decisions "established AEIC's right . . . to . . . obtain reimbursement of its payment of Sargon's defense fees" *in full*, and that such holding was binding on the trial court under the doctrine of law of the case. But as we have just discussed, *none* of this court's prior decisions ever decided the allocation of attorney fees as among the various claimants—and none held that that AEIC was entitled to recoup all (or any) of the sums it expended to defend Sargon. Accordingly, AEIC's law-of-the-case claim is wholly without merit.

## II.
## AEIC Was Not Entitled to an Award of Prejudgment Interest from the Date It Paid Sargon's Defense Counsel

It is undisputed that between 1999 and 2005, AEIC paid Sargon's attorneys for the costs of Sargon's defense. AEIC contends that under Civil Code section 3287, it is entitled to prejudgment interest on its claim to be reimbursed for these

payments "running from the date AEIC issued each check to the date of trial." BGR disagrees, urging that prejudgment interest did not begin to run "until judgment was entered in August 2007 and fees were liquidated in December 2007."

As we now explain, AEIC's claim is without merit.

Civil Code section 3287, subdivision (a) provides, in relevant part: "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt."

Our Supreme Court has explained that "in order to recover prejudgment interest under this language, 'the claimant must show: (1) an underlying monetary obligation, (2) damages which are certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day.' (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1022; *Tripp v. Swoap* (1976) 17 Cal.3d 671, 682, overruled on other grounds in *Frink v. Prod* (1982) 31 Cal.3d 166, 180.)" (*Flethez v. San Bernardino County Employees Retirement Assn.* (2017) 2 Cal.5th 630, 640.)

We assume without deciding that AEIC has made an adequate showing as to the first two elements. It plainly has *not* made such a showing as to the third—that its right of recovery vested on the day each payment was made. Indeed, AEIC's appellant's opening brief cites *no* legal authority for this proposition, and we therefore may treat the contention as forfeited. (*Okorie*, *supra*, 14 Cal.App.5th 574, 600.)

AEIC's claim also fails on the merits. "Subrogation is the right of an insurer *to take the place of its insured* to pursue recovery from legally responsible third parties for losses paid to the insured by the insurer." (*Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479, 488, italics added.) Thus, a subrogated insurer "stands in the shoes of the insured and has no greater rights than the insured." (*Truck Ins. Exchange v. Superior Court (Transco Syndicate No. 1)* (1997) 60 Cal.App.4th 342, 350, citing *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799.)

To state a cause of action for equitable subrogation, an insurer must establish, among other things, that " '(1) [t]he insured has suffered a loss for which the party to be charged is liable, either because the latter is a wrongdoer whose act or omission caused the loss or because he is legally responsible to the insured for the loss,' " and " '(2) the insurer, in whole or in part, has compensated the insured for the same loss for which the party to be charged is liable.' " (*AMCO Insurance Company v. All Solutions Insurance Agency, LLC* (2016) 244 Cal.App.4th 883, 897.)

In the present case, USC (the "party to be charged") was not liable for Sargon's attorney fees until either February 2005, when the Court of Appeal held that Sargon was the prevailing party in the Sargon/USC litigation (*Sargon I*, *supra*, 2005 WL 435413, at p. 14), or, at the latest, in December 2007, when the trial court entered an attorney fee award against USC. In either event, USC was not liable for Sargon's attorney fees *when AEIC paid them*. Accordingly, AEIC's subrogation claim against USC—and thus its right to recover prejudgment interest—did not accrue at the time of payment.

*City of Pasadena v. County of L.A.* (1965) 235 Cal.App.2d 153, 158–160, which AEIC cites in a footnote to its appellant's reply brief, does not compel a different result. In that case, the substantive claim between the plaintiff and the defendant was breach of a contract to make a payment on a date certain. Because the right to recovery thus attached on the date defendant failed to make the contractually required payment, prejudgment interest ran from that date. *City of Pasadena* thus is distinguishable from the present appeal because, as discussed above, AEIC's right to recover from USC did *not* attach at the time AEIC made the attorney fee payments, but only upon the trial court's subsequent attorney fee order.

For all of these reasons, the trial court was neither obligated nor permitted to award prejudgment interest from the time AEIC made attorney fee payments. The trial court did not err in so concluding.

## III.
## The Trial Court Did Not Err in Denying Attorney Fees as Sanctions

In *Sargon V*, this court made the following observation with regard to BGR's contention that its efforts had resulted in a substantial attorney fee for Sargon: "BGR . . . stated . . . that it was responsible for [Sargon's] recovery of [attorney] fees [from USC], while AEIC did nothing. *This assertion is demonstrably false*. AEIC's claim [in the interpleader action] is based on the attorney fees which were awarded in May 2006, which apparently included the attorney fees AEIC paid to defend the USC action. BGR was not substituted in the case until the following year; the May 2006 fee award itself was obtained by Lewis Brisbois, whose fees, in part, had been paid by AEIC.

While it may be possible that some of BGR's work resulted in orders *upholding* and *enforcing* the fee award and USC's ultimate interpleading of the funds, it is simply chronologically impossible for BGR's work to have resulted in the judicial finding that Sargon prevailed on the contract or in Sargon being awarded the initial $1,801,495 in fees for doing so." (*Sargon V*, *supra*, 2013 WL 5797736, at p. 4, fns. omitted, first italics added.)

On remand, AEIC argued to the trial court that it should sanction BGR for its misrepresentations to Court of Appeal. In connection with the sanctions request, AEIC offered evidence that it had incurred attorney fees of $169,060 in connection with the *Sargon V* appeal, and sought an additional $31,145 in interest, for a total of $200,206. The trial court denied the request for sanctions.

On appeal, AEIC contends that the trial court abused its discretion by refusing to sanction BGR in the amount of $169,060, plus prejudgment interest. As we understand it, AEIC's analysis is as follows: In *Sargon V*, this court found that BGR's representations to the court were "demonstrably false;" all of this court's determinations, express and implied, "bind the parties and the trial court under law-of-the-case and collateral estoppel principles;" and "[n]umerous appellate decisions . . . indicate sanctions should be imposed if a lawyer misrepresents facts or law." In other words, AEIC seems to suggest that our prior finding that BGR misrepresented the record compelled the trial court to sanction BGR, and to do so in the amount that AEIC paid its attorneys to prosecute the *Sargon V* appeal.

There are many flaws in AEIC's analysis, but the most significant is the following: Although our prior opinion noted that BGR's representation that it was responsible for recovering

attorney fees from USC was untrue, *we neither sanctioned BGR nor ordered the trial court to do so on remand*. Accordingly, the choice to sanction BGR, or not, was entirely within the trial court's discretion. We find no abuse of that discretion.

**DISPOSITION**

The judgment is affirmed. All parties shall bear their own appellate costs.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

LAVIN, J.

CURREY, J.*

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