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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JUAN BRIBIESCA et al., Plaintiffs and Appellants, v. PACIFIC PERFUSION, INC., et al., Defendants and Respondents.	D063256 (Super. Ct. No. 37-2009-00091932-CU-CL-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Randa Trapp, Judge. Affirmed.

Law Offices of Gregory Hood and Gregory Hood for Plaintiffs and Appellants.

Procopio, Cory, Hargreaves & Savitch, Paul A. Tyrell and Kendra J. Hall for Defendants and Respondents Pacific Perfusion, Inc., Richard Julien and Holly Colavin.

Dummit, Buchholz & Trapp, Scott D. Buchholz, William R. Moore and Amanda N. McCarty for Defendant and Respondent Scripps Memorial Hospital.

Plaintiffs Juan Bribiesca and JB Coastal, Inc. (together Plaintiffs) appeal a judgment entered after a jury trial in favor of defendants Pacific Perfusion, Inc., Richard

Julien, Holly Colavin, and Scripps Memorial Hospital (Scripps) (collectively Defendants). On appeal, Plaintiffs contend: (1) the trial court erred by granting Julien's motion for summary adjudication on their defamation cause of action against him; (2) the court abused its discretion by denying their motion for leave to amend their complaint to add a cause of action against Scripps for false imprisonment; (3) the evidence is insufficient to support the jury's finding for Scripps on their cause of action for intentional infliction of emotional distress; and (4) the court erred by awarding contractual attorney fees against Bribiesca personally.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, JB Coastal, Inc. (JB), represented by its sole shareholder, Bribiesca, and Pacific Perfusion, Inc. (PPI), represented by its two shareholders, Julien and Colavin, entered into a partnership agreement (Agreement) forming La Jolla Perfusion Enterprises (LJPE), a general partnership, to engage in the business of providing perfusion services.[1] PPI owned a two-thirds interest in LJPE and JB owned a one-third interest. The Agreement identified Julien and Colavin as the principals of PPI, and Bribiesca as the principal of JB. Julien, Colavin, and Bribiesca were perfusionists who worked on behalf of their corporations and LJPE to provide perfusion services to Scripps. LJPE also hired perfusionists Michael Meenan and Kelly Brinkman as independent contractors to provide perfusion services to Scripps.

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1 A perfusionist operates a heart-lung machine that oxygenates a patient's blood during cardiac surgery.

During March and April 2009, LJPE and Scripps were negotiating a possible long-term contract for perfusion services after a previous five-year contract had ended in 2008. Lisa Thakur, Scripps's then vice president of operations, had job responsibilities that included maintaining security at the hospital and negotiating contracts with third parties, including contracts for the provision of perfusion services. In March 2009, Judy Kane, Scripps's operating room manager, informed Thakur that Meenan and Brinkman had complained about Bribiesca and Julien, and unidentified nurses had complained they had been sexually harassed by Bribiesca. Thakur also received complaints about Bribiesca from physicians. She heard that Bribiesca carried a gun in his briefcase.

On or about March 27, Thakur met with Julien and Bribiesca and informed them she had received complaints about Bribiesca's inappropriate behavior and wanted it stopped. She advised them the prospects of LJPE obtaining a long-term perfusion contract with Scripps were in jeopardy because of complaints of a hostile work environment at LJPE. Julien and Bribiesca determined Meenan and Brinkman had complained to Thakur about Bribiesca's volatile and disruptive behavior. Julien and Bribiesca met with Meenan and Brinkman to discuss their complaints. Bribiesca apologized for his past behavior and agreed to refrain from any future behavior that could jeopardize LJPE's ability to obtain a new long-term contract with Scripps. Julien subsequently consulted an attorney and was advised to dissolve the LJPE partnership.

On or about April 15, Julien met with Thakur and informed her that he was going to dissolve the partnership. He also gave her copies of written complaints about Bribiesca from three perfusionists. Thakur asked Julien to notify her before he gave

Bribiesca formal notice of dissolution of the partnership. Shortly thereafter, Thakur spoke with Brad Ellis, a Scripps attorney, who advised her she could at any time ask Bribiesca to leave the premises of the hospital and not return.

On April 21, Julien gave Bribiesca written notice of dissolution of the LJPE partnership. Bribiesca replied, "don't do this," and was shocked and confused.

On April 29, Bribiesca asked Aimee Dovidio, a Scripps's security guard, questions she felt were inappropriate and made her uncomfortable. He asked her what she could do "in case something happen[ed]," whether she carried a gun or pepper spray, and what she would do if someone had a bomb. Dovidio reported the conversation to Steve Peterson, Scripps's head of security, and made a written report of it. Peterson told Thakur about Bribiesca's questioning of Dovidio. Concerned about maintaining safety on the hospital's premises, Thakur decided to permanently eject Bribiesca from the premises. Thakur found Bribiesca in a hospital hallway and asked him to follow her. As they walked down the hallway together, Peterson and three security guards followed them. Thakur took Bribiesca to a meeting room in a nearby building. Thakur, Bribiesca, and Peterson sat at a long table, one security guard stood near Bribiesca, and the others stood near the door. Thakur asked Bribiesca whether he had an inappropriate conversation with a security guard. He denied having one, but admitted discussing pepper spray with the guard. Thakur told him she had received multiple complaints about him, people were afraid of him, and he displayed volatile behavior. Stating that he was a threat to the hospital, Thakur asked Bribiesca to leave the hospital's premises and not return unless he had a medical emergency. Bribiesca was given the contents of his hospital locker and was

escorted to his car by Peterson and two security guards. John Spinoza, Scripps's medical chief of staff, subsequently sent Bribiesca a letter informing him that his physician sponsorship as a perfusionist had been withdrawn.

Bribiesca filed the instant action against Defendants. In his fourth amended complaint, he alleged 13 causes of action, including claims for breach of contract, declaratory relief, defamation, and intentional infliction of emotional distress. Before trial, the trial court granted Julien's motion for summary adjudication of the defamation claim against him.

At trial, the parties presented testimony and other evidence substantially as described above. In addition, Bribiesca presented the testimony of Clark Todd, a hospital practices expert. Todd testified Thakur did not properly investigate the complaints against Bribiesca, and her eviction of Bribiesca from the hospital's premises was unwarranted and could have been accomplished without embarrassing him. He testified Thakur's conduct in evicting Bribiesca, including the use of multiple security guards to escort him out, was outrageous.

After the parties concluded their cases, Bribiesca moved for leave to amend his complaint to add a cause of action against Scripps for false imprisonment. The trial court denied his motion. The jury returned verdicts in favor of Defendants and against Plaintiffs. The court entered judgment in favor of Defendants and awarded PPI, Julien, and Colavin (collectively PPI Defendants) attorney fees and costs against Plaintiffs in amounts to be determined pursuant to posttrial motions.

PPI Defendants filed a motion for an award of attorney fees pursuant to the Agreement's attorney fee provision. Plaintiffs opposed the motion. On January 11, 2013, the trial court awarded PPI Defendants attorney fees in the amount of $370,850 and amended the judgment to reflect that award against Plaintiffs. Plaintiffs timely filed notices of appeal challenging the judgment and postjudgment attorney fee award.

DISCUSSION

I

Summary Adjudication of Defamation Cause of Action Against Julien

Plaintiffs contend the trial court erred by granting Julien's motion for summary adjudication of their defamation cause of action against him. However, rather than presenting a substantive argument in their appellants' opening brief, Plaintiffs merely incorporate by reference the papers filed in the trial court by Plaintiffs and PPI Defendants. Plaintiffs state:

> "Given that this Court must review the entire summary adjudication motion (as it applies to Appellants' seventh cause of action against Richard Julien only) on a de novo basis, Appellants respectfully request that this Court review the PPI Defendants' motion for summary judgment and reply papers [citations], and Bribiesca's Opposition to the Motion for Summary Judgment [citations]. In particular, this Court should focus on whether Bribiesca's evidence establishes triable issues of fact as to whether Julien acted with malice, sufficient to preclude the issuance of summary adjudication against him on this issue. [¶] The argument set forth in Bribiesca's original papers opposing the motion for summary adjudication . . . (for the defamation claim) more than adequately establish[es] that Julien was unentitled [sic] to prevail on his motion."

In their respondents' brief, PPI Defendants argue Plaintiffs forfeited their contention by merely incorporating their trial court arguments and not presenting any substantive

argument in their appellants' opening brief in violation of California Rules of Court, rule 8.204(a)(1)(B). In their appellants' reply brief, Plaintiffs do not attempt to refute that argument, but merely repeat their request that we consider and analyze the summary adjudication papers filed in the trial court and set aside the trial court's order dismissing their defamation cause of action against Julien.

We agree with PPI Defendants that by merely incorporating trial court papers and arguments into their appellants' opening brief, Plaintiffs forfeited their contention that the trial court erred by granting Julien's motion for summary adjudication of their defamation cause of action against him. "An appellant cannot rely on incorporation of trial court papers, but must tender arguments *in the appellate briefs*." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 109; see *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 690, fn. 18 ["We . . . take this opportunity to remind counsel that 'it is entirely *inappropriate* for an appellate brief to *incorporate by reference* documents and arguments from the proceedings below . . . .' "]; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301, fn. 2 ["[I]t is not appropriate to incorporate by reference, into a brief, points and authorities contained in trial court papers, even if such papers are made a part of the appellate record."]; *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334 [same]; *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720-721 [same].) The California Supreme Court stated: "It is well settled that the Court of Appeal does not permit incorporation by reference of documents filed in the trial court." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 294, fn. 20.)

If an appellant merely incorporates by reference arguments made in papers filed in the trial court, the appellant's contention(s) will be deemed forfeited on appeal. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656.) *Keyes* stated:

> "The appellant may not simply incorporate by reference arguments made in papers filed in the trial court, rather than briefing them on appeal. [Citation.] And the appellant must present each point separately in the opening brief under an appropriate heading, showing the nature of the question to be presented and the point to be made; otherwise, the point will be forfeited. (Cal. Rules of Court, rule 8.2041(a)(1)(B); *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4 [41 Cal.Rptr.2d 263].)" (*Keyes v. Bowen, supra,* 189 Cal.App.4th at p. 656.)

One court explained the reasons for the rule precluding incorporation by reference of trial court papers and arguments, stating:

> "Throughout his brief on appeal Parker alludes to arguments he made in the trial court and purports to incorporate these arguments by reference in his appellate brief. It is well established, however, this practice does not comply with rule 8.204(a)(1)(B) of the California Rules of Court, which requires an appellate brief 'support each point by argument and, if possible, by citation of authority.'
>
> "While incorporation by reference might seem to make sense ecologically, by reducing the amount of paper used in appellate briefs, the actual result would be to increase the amount of paper used in an appeal. The rules require an original and four copies of the appellate brief. The original brief stays with the record on appeal. Each of the three justices on the panel deciding the case receive[s] copies of the briefs which they can use at their desks, work on at home, or take with them when traveling for an engagement outside the court. The fourth copy remains in the clerk's office for public inspection. Only one copy of the trial court record is filed in the appellate court, however. If all three justices had to share this single record in order to review, research and evaluate a party's arguments the time it would take for the court to decide the appeal would considerably increase. This would work a hardship on the parties to that appeal and to the parties in other appeals awaiting their turn for consideration and decision. Alternatively, four copies

> of the trial court record would have to be filed with the Court of Appeal. Because these records often consist of thousands of pages it is easy to see how the amount of paper used in the appeal would increase significantly." (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 290-291, fns. omitted.)

That court did not consider the appellant's "incorporated" arguments. (*Parker v. Wolters Kluwer United States, Inc.*, *supra*, 149 Cal.App.4th at p. 291.)

Plaintiffs do not cite, and we are unaware of, any case or other authority allowing them to merely incorporate the trial court papers and arguments relating to an appellate contention without presenting substantive argument in their appellate briefs. Because Plaintiffs merely incorporate into their appellants' opening brief the parties' trial court papers and arguments relating to Julien's motion for summary adjudication of their defamation cause of action against him, we apply the reasoning and holdings in the cases discussed above and conclude Plaintiffs have, in effect, forfeited their contention that the trial court erred by granting Julien's motion for summary adjudication of their defamation cause of action. (*Paterno v. State of California*, *supra*, 74 Cal.App.4th at p. 109; *In re Groundwater Cases*, *supra*, 154 Cal.App.4th at p. 690, fn. 18; *Colores v. Board of Trustees*, *supra*, 105 Cal.App.4th at p. 1301, fn. 2; *Garrick Development Co. v. Hayward Unified School Dist.*, *supra*, 3 Cal.App.4th at p. 334; *Balesteri v. Holler*, *supra*, 87 Cal.App.3d at pp. 720-721; *Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 294, fn. 20; *Keyes v. Bowen*, *supra*, 189 Cal.App.4th at p. 656; *Parker v. Wolters Kluwer United States, Inc.*, *supra*, 149 Cal.App.4th at pp. 290-291.) We decline Plaintiffs' invitation that we independently review the summary adjudication papers filed below to determine whether the trial court erred.

II

Denial of Leave to Amend to Add a Cause of Action Against Scripps for False Imprisonment

Plaintiffs contend the trial court erred by denying their motion for leave to amend their complaint to add a cause of action against Scripps for false imprisonment.

A

The trial court's rulings on the parties' proposed jury instructions apparently were not made on the record. Nevertheless, the record supports an inference that the court tentatively agreed to instruct with CACI No. 1400 on false imprisonment, thereby implicitly granting, on a tentative basis, Plaintiffs' motion for leave to amend the complaint to add a false imprisonment claim. After all parties rested their cases, Scripps asked to be heard on the court's intention to instruct on false imprisonment. Scripps argued that Plaintiffs had since June 2009 to amend their complaint to add a false imprisonment claim, but had not yet done so. Scripps argued the operative complaint did not place it on notice of a false imprisonment claim, because it alleged, at most, that Scripps had forcibly evicted Bribiesca from Scripps's premises as if he were a criminal. Scripps argued it would be inequitable at that stage of the proceedings to allow Plaintiffs to add a false imprisonment claim against it.

Plaintiffs disagreed with Scripps's argument, arguing their complaint gave Scripps adequate notice of a possible false imprisonment claim. The trial court ruled it would not give CACI No. 1400 on false imprisonment, implicitly denying Plaintiffs' motion for

leave to amend the complaint to add a cause of action against Scripps for false imprisonment.

B

" '[T]he trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]' " (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) In exercising that discretion, "[c]ourts must apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial, when no prejudice is shown to the adverse party." (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746.) However, "[t]he law is also clear that even if a good amendment is proposed in proper form, *unwarranted delay* in presenting it *may*—of itself—*be a valid reason for denial*. The cases indicate that the denial may rest upon the element of lack of diligence in offering the amendment after knowledge of the facts, or the effect of the delay on the adverse party [citations]." (*Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939-940, italics added; see *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377; *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345; *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175; *Huff*, at p. 746; *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1097; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613.) Alternatively stated, "a long deferred presentation of the proposed amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court's denial of the amendment

[citation]." (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 136.) "Thus, appellate courts are less likely to find an abuse of discretion where, for example, the proposed amendment is ' "offered after long unexplained delay . . . or where there is a lack of diligence . . . ." ' " (*Melican*, at p. 175.)

" 'The cases on amended pleadings during trial suggest trial courts should be guided by two principles: (1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment. Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory . . . no prejudice can result.' [Citation.] 'The basic rule applicable to amendments to conform to proof is that the amended pleading must be based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded. [Citation.]' " (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 910.) "As stated by a leading treatise, in ruling on a motion to amend a complaint to conform to proof, 'the court is usually guided by whether: [¶] . . . there is a *reasonable excuse* for the delay . . . ; [¶] . . . the change relates to the *facts* or only to legal theories; and [¶] . . . the opposing party will be *prejudiced* by the amendment.' " (*Duchrow v. Forrest*, *supra*, 215 Cal.App.4th at pp. 1378-1379.) On appeal, the burden is on the plaintiff to demonstrate the trial court abused its discretion by denying a motion for leave to amend the complaint. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.)

C

Based on our review of the record on appeal, we conclude the trial court did not abuse its discretion by denying Plaintiffs' motion for leave to amend their complaint to add a cause of action against Scripps for false imprisonment. First, the operative complaint did not give Scripps adequate notice that a false imprisonment claim might be made against it. As Scripps argued below, the complaint stated a cause of action for intentional infliction of emotional distress that did not notify it of any possible false imprisonment claim, alleging, at most, that Scripps "[f]orcibly evicted [Bribiesca] from [Scripps's] business premises as if he were [a] criminal." "The tort of false imprisonment is the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." (*City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 810, cited with approval in *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1123.) "Restraint may be effectuated by means of physical force [citation], threat of force or of arrest [citation], confinement by physical barriers [citation], or by means of any other form of unreasonable duress." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715.) Plaintiffs' mere allegation that Scripps forcibly evicted Bribiesca from its premises is insufficient to allege, or put Scripps on notice of a possible allegation, that Scripps had intentionally confined Bribiesca without his consent. Furthermore, none of the trial witnesses' testimony gave Scripps adequate notice of a false imprisonment claim. Bribiesca testified he followed Thakur to the meeting room, accompanied by security guards, was then asked to leave the hospital's premises and not return unless he had a medical emergency, and was escorted to his car by security guards. Although that

testimony may have been sufficient to support his claim he suffered severe emotional distress, it did not place Scripps on notice of a false imprisonment claim.

Even if Bribiesca's trial testimony was sufficient to give Scripps notice of a possible false imprisonment claim, Plaintiffs did not make any attempt to explain why they waited over three years after filing the instant action before moving for leave to amend their complaint to add a false imprisonment claim. Because Bribiesca was present during, and later testified at trial regarding, the April 29, 2009, incident, Plaintiffs had knowledge of all facts necessary to allege a possible false imprisonment cause of action against Scripps, yet waited until after the evidentiary portion of the trial was completed before moving for leave to amend to add that cause of action. Because of the lengthy period of delay and Plaintiffs' failure to give any explanation for that delay, we conclude the trial court did not abuse its discretion in the circumstances of this case by denying their motion for leave to amend the complaint to add a false imprisonment cause of action. (*Roemer v. Retail Credit Co.*, *supra*, 44 Cal.App.3d at pp. 939-940 ["even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial"]; cf. *Duchrow v. Forrest*, *supra*, 215 Cal.App.4th at p. 1377 [midtrial amendment made after three-year delay and without a reasonable excuse or explanation]; *P&D Consultants, Inc. v. City of Carlsbad*, *supra*, 190 Cal.App.4th at p. 1345; *Melican v. Regents of University of California*, *supra*, 151 Cal.App.4th at p. 176 [no explanation for five-year delay before moving to amend]; *Huff v. Wilkins*, *supra*, 138 Cal.App.4th at p. 746 [no explanation for delay in seeking leave to amend]; *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.*, *supra*, 130

Cal.App.4th at p. 1097 [no excuse provided for delay in moving for leave to amend complaint]; *Leader v. Health Industries of America, Inc.*, *supra*, 89 Cal.App.4th at p. 613; *Bedolla v. Logan & Frazer*, *supra*, 52 Cal.App.3d at p. 136.)

Assuming arguendo a defendant must also be prejudiced by a plaintiff's unexplained delay in moving to amend a complaint (see, e.g., *Garcia v. Roberts*, *supra*, 173 Cal.App.4th at p. 910), we nevertheless conclude Scripps likely was prejudiced by Plaintiffs' delay in moving to amend their complaint. Had Plaintiffs timely moved to amend the complaint or otherwise given Scripps notice they were alleging a false imprisonment cause of action, Scripps presumably would have had an opportunity to focus its discovery on the issue of whether Bribiesca was intentionally confined without his consent during the April 29, 2009, incident. Furthermore, had Scripps been given notice of that claim before trial, Scripps's examination of Thakur and its other witnesses, as well as its cross-examination of Bribiesca, during trial presumably would have included specific questions regarding the physical and other circumstances of the April 29, 2009, incident. That additional evidence likely would have changed the set of facts before the jury regarding the April 29, 2009, incident. Plaintiffs' false imprisonment claim would not have simply presented a different legal theory based on the same set of facts. (*Id.* at p. 910.) Furthermore, had Plaintiffs timely moved to amend their complaint, Scripps's examination and cross-examination of the trial witnesses could have focused on the issue of false imprisonment and provided Scripps with evidence to support an argument to the jury that Bribiesca was not intentionally confined without his consent. Because Plaintiffs merely speculate that Scripps was not prejudiced by their unreasonable

delay in moving for leave to amend their complaint to add a false imprisonment claim against Scripps, we conclude they have not carried their burden on appeal to show the trial court abused its discretion by denying that motion. (*Berman v. Bromberg*, *supra*, 56 Cal.App.4th at p. 945.)

III

Sufficiency of the Evidence to Support the IIED Verdict

Plaintiffs contend the evidence is insufficient to support the jury's finding for Scripps on their cause of action for intentional infliction of emotional distress (IIED). They assert the evidence was insufficient to support the jury's finding that Scripps's conduct was "consistent with community standards" as required for the jury to find Scripps was entitled to the affirmative defense of privilege to the IIED cause of action.

A

Plaintiffs' operative complaint alleged an IIED cause of action against Scripps arising out of its conduct in forcibly evicting Bribiesca from its premises. At trial, Thakur, Peterson, and Bribiesca gave percipient testimony, and Todd (Plaintiffs' expert) gave expert testimony, regarding the April 29, 2009, incident during which Scripps evicted Bribiesca from its premises. The trial court instructed the jury on the elements of an IIED cause of action, including the element that Scripps's conduct be outrageous. The court instructed that "outrageous conduct" is "conduct so extreme that it goes beyond all possible bounds of decency. Conduct is outrageous if a reasonable person would regard the conduct as intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings, or bad manners that a

reasonable person is expected to endure." The court then instructed with a modified version of CACI No. 1605 on Scripps's asserted affirmative defense of privilege to that IIED claim, stating:

> "[Scripps] claims that it is not responsible for [Bribiesca's] harm, if any, because [its] conduct was permissible. To succeed, [Scripps] must prove all of the following:
>
> "One, that [Scripps] was exercising its legal right to ensure the safety of its employees, patients, and visitors;
>
> "Two, that Scripps'[s] conduct was lawful and *consistent with community standards*;
>
> "Three, that Scripps had a good faith belief that it had a legal right to engage in the conduct.
>
> "If you find all of the above, then [Scripps's] conduct was permissible."[2] (Italics added.)

The jury returned a special verdict finding all three elements of that affirmative defense of privilege existed. The jury answered "Yes" to the question, "[w]as [Scripps's] conduct lawful and consistent with community standards[?]"

B

A defendant may be "privileged, in pursuing its own economic interests, to assert in a permissible way its legal rights and to communicate its position in good faith to [the plaintiff] even though it is substantially certain that in so doing emotional distress will be

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2 Although the appellant's appendix does not include the trial court's written jury instructions, the court's oral instructions included in the reporter's transcript closely track the language of CACI No. 1605. We presume the trial court's instruction on Scripps's affirmative defense of privilege is a modified version of CACI No. 1605.

caused. [Citations.] . . . [¶] . . . It is well established that one who, in exercising the privilege of asserting his own economic interests, acts in an outrageous manner may be held liable for intentional infliction of emotional distress." (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 395; see 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 455, p. 674.)

C

Plaintiffs assert the evidence is insufficient to support the jury's finding that the privilege under CACI No. 1605 applied to bar their IIED cause of action because Scripps did not present any expert testimony or other evidence showing that its conduct was "consistent with community standards." They argue the only evidence on that issue was presented by Todd, their expert, who testified that Scripps's conduct in escorting Bribiesca off its premises was outrageous and therefore implied it was not consistent with community standards within the meaning of CACI No. 1605.

We are not persuaded by Plaintiffs' assertion and conclude there is substantial evidence to support the jury's finding that Scripps's conduct was consistent with community standards within the meaning of the CACI No. 1605 privilege. As Plaintiffs concede, expert opinion testimony is not required to prove that the privilege, including its "consistent with community standards" requirement, applies in any particular case. Rather, we conclude the jury may consider the testimony of both expert and percipient witnesses, together with all other evidence, in determining whether a defendant's conduct in the circumstances of a particular case was consistent with community standards within the meaning of the CACI No. 1605 privilege. As the selected representatives of the

community, the jurors were, in effect, instructed to make that determination on behalf of the community. Because of their collective life experiences in the community, the jurors presumably considered all of the evidence presented at trial and reasonably found Scripps's conduct was consistent with community standards. The evidence they considered included Thakur's testimony regarding her reasons for deciding to have Bribiesca escorted off the premises and her description of what was said and done in the process of escorting him off the premises. The jurors also considered the percipient testimony of Peterson and Bribiesca regarding what was said and done. The jurors presumably concluded Todd's expert opinion that Scripps's conduct was outrageous was not persuasive and, instead, found its conduct was not outrageous. Based on the evidence regarding the circumstances of Scripps's conduct toward Bribiesca on April 29, 2009, we conclude there was substantial evidence to support the jury's finding that Scripps's conduct was consistent with community standards within the meaning of the CACI No. 1605 privilege. Plaintiffs have not carried their burden on appeal to persuade us to reach a contrary conclusion.[3]

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[3] Plaintiffs do not cite, and we are not aware of, any case or other authority defining or otherwise explaining in detail the meaning of "consistent with community standards." Because that requirement appears to have been first used in relation to the economic- or self-interest privilege on adoption of CACI No. 1605 in 2003 and apparently has not yet been discussed in any published case, we apply a common meaning standard to the phrase and believe the jurors, as the community's representatives, were in the best position to determine whether Scripps's conduct was "consistent with community standards."

IV

Award of Contractual Attorney Fees

Plaintiffs contend the trial court erred by awarding PPI Defendants contractual attorney fees against Bribiesca personally. They assert he did not have adequate notice that PPI Defendants were seeking an award of attorney fees against him personally. They further argue the Agreement's attorney fee provision cannot, as a matter of law, support an award against Bribiesca personally.

A

On September 25, 2012, after the jury had returned its verdicts, the trial court entered a judgment in favor of all Defendants and against Plaintiffs, stating:

> "Judgment shall enter in favor of Defendants [PPI], [Julien], and [Colavin] (collectively the 'PPI Defendants') and against Plaintiffs Juan Bribiesca and [JB]. The PPI Defendants *shall recover from Plaintiffs* costs in the amount of $ TO BE DETERMINED and attorney's fees in the amount of $ TO BE DETERMINED pursuant to post-trial memorandum of costs and motion for attorney's fees." (Italics added.)

On or about October 15, PPI Defendants filed a motion for an award of attorney fees pursuant to the Agreement's attorney fee provision and Civil Code section 1717.[4] They sought contractual attorney fees for their successful defense of Plaintiffs' claims, citing section 6.05 of the Agreement, which states:

> "If *any litigation* is commenced *between the Partners or their personal representatives concerning any provision of this Agreement or the rights and duties of any person in relation thereto*, the

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4 All statutory references are to the Civil Code unless otherwise specified.

> prevailing party or parties shall be entitled, in addition to such other relief as may be granted, to a reasonable sum for their attorneys' fees in that litigation. The amount of this sum shall be determined either by the court or in a separate action brought for that purpose." (Italics added.)

PPI Defendants argued that provision entitled them, as the prevailing parties, to an award of attorney fees incurred in defending all claims, including contract and noncontract claims, alleged by Plaintiffs against them in the litigation. They argued that Julien and Colavin, as the "personal representatives" of PPI, were entitled to an award of their attorney fees in defending the claims against them under that contractual provision. They further argued that although "*Plaintiffs* may oppose" their attorney fee motion, "*Plaintiffs* must now accept the consequences of their decision to force PPI, Julien and Colavin to conduct extensive discovery and go to trial on a broad range of claims." (Italics added.) In support of their motion, PPI Defendants submitted the declaration of Paul Tyrell, one of their attorneys, who stated his firm had billed PPI Defendants $385,430.75 through September 2012 in defending them against Plaintiffs' action and requested that the trial court, pursuant to section 6.05 of the Agreement and section 1717, add an award of attorney fees to the judgment against Plaintiffs in an amount that includes the fees billed through the hearing on the instant motion.

Plaintiffs opposed the motion, arguing that because section 1717 did not apply to noncontract causes of action and PPI Defendants did not provide detailed billing records apportioning work done between contract and noncontract claims, the trial court should exercise its discretion to reduce or deny the attorney fees requested by PPI Defendants. However, Plaintiffs did not address the effect of section 6.05 of the Agreement on PPI

Defendants' request for fees. Plaintiffs concluded their opposition, stating: "Based on the foregoing, *Plaintiffs* request that this Court exercise its discretion and reduce or deny attorney's fees to the PPI Defendants as there is no legal support for such an award." (Italics added.) PPI Defendants filed a reply, arguing Plaintiffs did not dispute their assertion that the Agreement provides for an award of attorney fees to the prevailing party, including the partners' respective personal representatives, in any lawsuit arising from partnership business.

On January 10, 2013, the trial court issued a tentative ruling awarding PPI Defendants attorney fees in the amount of $370,850, citing section 1717 and Code of Civil Procedure section 1021. The tentative ruling quoted section 6.05 of the Agreement and underlined its language referring to litigation between the partners or their personal representatives.

At the January 11 hearing on PPI Defendants' motion for attorney fees, Plaintiffs' counsel asked the trial court whether its tentative ruling applied against JB only or also against Bribiesca personally. He argued that JB and PPI were the parties to the Agreement and Bribiesca signed the Agreement only on behalf of and as an officer of JB. Nevertheless, he conceded Bribiesca sued not only PPI, but also Julien and Colavin personally. PPI Defendants' counsel argued that Plaintiffs did not object to the form of the judgment, which clearly stated PPI Defendants shall recover from "[P]laintiffs, plural—that's [JB] and Mr. Bribiesca— . . . attorney's fees in the amount of to be determined pursuant to [posttrial] memorandum." He argued that the attorney fee award was to be against both of Plaintiffs (i.e., JB and Bribiesca personally). He further argued

that Plaintiffs themselves had sought an award of contractual attorney fees against PPI Defendants in their operative complaint. He argued Bribiesca believed he was a beneficiary of the Agreement's attorney fee provision. Plaintiffs' counsel replied, arguing that JB and PPI, as the partners in the partnership, were the only parties to the Agreement and Bribiesca did not have a separate contractual relationship with Julien or Colavin. The court concluded, pursuant to the judgment and the Agreement, the award of attorney fees was against both Bribiesca and JB. The trial court confirmed its tentative ruling and amended the judgment to add the amount of attorney fees (i.e., $370,850) that PPI Defendants "shall recover from *Plaintiffs*." (Italics added.)

B

"Each party to a lawsuit must pay his or her own attorney fees except where a statute or contract provides otherwise." (*Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962, 966 (*Cargill*).) Code of Civil Procedure section 1021 expressly acknowledges that parties to a contract may provide for the shifting of attorney fees incurred in litigation, stating: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ."

Section 1717 applies to contractual attorney fee provisions, making them reciprocal even when they purport to apply to only one party. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610.) Section 1717, subdivision (a), provides:

> "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the

> prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.
>
> "Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.
>
> "Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. . . ."

"The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions." (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 610.) Section 1717 also provides that the "prevailing party on the contract" shall be "the party who recovered a greater relief in the action on the contract." (§ 1717, subd. (b).) Under section 1717, " 'equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction.' " (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1091.) Parties to a contract may also agree the prevailing party may recover attorney fees relating to contract claims as well as tort and other noncontract claims, although section 1717's reciprocity requirement will not apply to the noncontract claims. (*Santisas*, at p. 608; *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1832.)

In *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, we stated:

> "Ordinarily attorney fees can only be awarded when the lawsuit (1) involves a claim covered by a contractual attorney fee clause [citation] and (2) is between the parties to that contract [citation]. The first issue (the claims issue) essentially involves interpreting the parties' contract, and requires the court to examine the language of

> the contractual clause to determine whether the nature of the claims asserted by the plaintiff fall within the intended scope of the attorney fee clause. [Citation.]
>
> "The second issue (the parties issue) also requires that we examine the operative contract to determine if the parties to the lawsuit were also parties to the attorney fee clause covering the disputed claims. In some cases, however, the parties issue also involves the reciprocity principles embodied in Civil Code section 1717, because *under some circumstances a nonsignatory to the contract will be deemed entitled to the benefits of the attorney fee clause*." (*Id*. at p. 544-545, italics added.)

"As a general rule, [contractual] attorney fees are awarded only when the lawsuit is between signatories to the contract. [Citation.] However, under some circumstances, the Civil Code *section 1717 reciprocity principles will be applied in actions involving signatory and nonsignatory parties*. [Citation.] [¶] Two situations may entitle a nonsignatory party to attorney fees. First is where the nonsignatory party 'stands in the shoes of a party to the contract.' [Citation.] Second is *where the nonsignatory party is a third party beneficiary of the contract*." (*Cargill*, *supra*, 201 Cal.App.4th at p. 966, italics added.)

Regarding the third party beneficiary exception to the general rule, the test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. (*Cargill*, *supra*, 201 Cal.App.4th at p. 967, citing *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1232.) A third party beneficiary need not be named in the contract if the agreement reflects the intent of the contracting parties to benefit that unnamed party. (*Cargill*, at p. 967; *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000)

84 Cal.App.4th 671, 680 (*Sessions*).) "The unnamed third party may enforce the contract if that party can show that he or she is a member of a class for whose benefit the contract was made." (*Cargill*, at p. 967.)

Nonsignatories to a contract may be entitled to an award of attorney fees if the other party would have been entitled to an attorney fee award against them had that party prevailed. (*Cargill*, *supra*, 201 Cal.App.4th at p. 967.) "A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed. Where a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed." (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382 (*Real Property Services*).) In *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, the California Supreme Court concluded that section 1717 "provide[s] a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (*Reynolds,* at p. 128.) In *Reynolds*, the court held that shareholders and directors who were nonsignatory defendants could recover attorney fees they incurred in defending against the signatory plaintiff's alter ego contract claims against them because the plaintiff would have been entitled to a fee award against them had it prevailed. (*Id*. at pp. 128-129.)

On appeal, we review a determination of the legal basis for an award of attorney fees de novo as a question of law. (*Sessions*, *supra*, 84 Cal.App.4th at p. 677.) In interpreting a contract, including any attorney fee provision, we apply the general rules of contract interpretation with the objective of giving effect to the mutual intent of the parties at the time of contracting. (*City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 382.) If possible, such intent is to be inferred solely from the written provisions of the contract. (§ 1639.) Unless interpretation of the contract depends on the credibility of extrinsic evidence, the interpretation of a written contract is solely a judicial function and we therefore interpret it independently as a question of law. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1267; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.)

C

Plaintiffs initially assert the trial court's attorney fee award must be reversed because Bribiesca was not given adequate notice that he may be held personally liable for that award in violation of his rights to due process. Citing *City of Tulare v. Superior Court* (2008) 169 Cal.App.4th 373, Plaintiffs argue Bribiesca was not given sufficient time to oppose PPI Defendants' motion for attorney fees in a meaningful manner. They argue Bribiesca did not have any idea that PPI Defendants were seeking an attorney fee award against him personally until the hearing on their motion when *his* counsel first raised that issue.

Based on our review of the record on appeal, we conclude Bribiesca had adequate notice that PPI Defendants were seeking an attorney fee award against him personally

and an opportunity to oppose that motion in a meaningful manner. Contrary to Plaintiffs' assertion, Bribiesca had notice he might be held personally liable for the fee award long before the hearing on PPI Defendants' motion. As discussed above, the judgment initially entered on September 25, 2012, expressly stated "PPI Defendants shall recover from *Plaintiffs*" attorney fees in the amount to be determined pursuant to a posttrial motion for attorney fees. (Italics added.) The only plaintiffs in the instant action were JB and Bribiesca. Therefore, if the trial court had intended its judgment to award attorney fees against JB alone, the court presumably would have used the singular term "plaintiff" and then identified JB as the sole plaintiff responsible for that award. However, because the court's initial judgment identified both "Plaintiffs" (i.e., JB and Bribiesca) as the parties liable for the attorney fee award, Bribiesca was placed on notice as early as September 25, 2012, that he would be held liable for the fee award.

Furthermore, although PPI Defendants' motion papers did not expressly state they sought a fee award against both JB and Bribiesca personally, Plaintiffs do not cite any case holding such an express statement was required. PPI Defendants' motion could, and did, implicitly seek an award against both Plaintiffs (i.e., JB and Bribiesca personally). Their motion argued that although "*Plaintiffs* may oppose" their attorney fee motion, "*Plaintiffs* must now accept the consequences of their decision to force PPI, Julien and Colavin to conduct extensive discovery and go to trial on a broad range of claims." (Italics added.) By so arguing, PPI Defendants implicitly sought an award of fees against both Plaintiffs for requiring them to defend the claims Plaintiffs alleged against them. Furthermore, Tyrell, one of PPI Defendants' attorneys, requested in his declaration that

the trial court, pursuant to section 6.05 of the Agreement and section 1717, add an award of attorney fees to the judgment against Plaintiffs in an amount that included the fees billed through the hearing on the instant motion. Therefore, long before the January 11, 2013, hearing on PPI Defendants' attorney fee motion, Plaintiffs had sufficient notice that they sought an award of attorney fees against both JB and Bribiesca personally. If PPI Defendants had sought an award of fees against JB alone, they presumably would not have used the plural term "Plaintiffs" in their moving papers and the trial court in its initial judgment presumably would not have also used the plural term "Plaintiffs." Because Bribiesca received adequate notice that he might be held liable for an attorney fee award and had an opportunity to meaningfully oppose PPI Defendants' attorney fee motion, we conclude Bribiesca's rights to procedural due process were not violated.[5]

D

Plaintiffs assert the trial court erred by awarding PPI Defendants attorney fees against Bribiesca personally (in addition to JB) because he was not a party to the Agreement and therefore was not subject to its attorney fee provision. Although we agree Bribiesca was not a signatory to the Agreement, we disagree with Plaintiffs' assertion that he was not liable to PPI Defendants for an award of attorney fees under the Agreement's attorney fee provision.

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[5] Assuming arguendo Bribiesca did not receive adequate notice, we nevertheless conclude the error was harmless beyond a reasonable doubt based on our conclusion below that he was liable for attorney fees under the Agreement's attorney fee provision even though he was not a signatory to the Agreement. (*Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921, 928.)

In 2003, JB, represented by Bribiesca, and PPI, represented by Julien and Colavin, entered into the Agreement forming LJPE. Julien and Colavin were identified as PPI's principals and Bribiesca was identified as JB's principal. Therefore, JB and PPI clearly were the only signatory parties to the Agreement. Nevertheless, as discussed above, in certain circumstances nonsignatory parties may be held liable for attorney fee awards under contractual attorney fee provisions. In this case, section 6.05 of the Agreement provided:

> "If *any litigation* is commenced *between the Partners or their personal representatives concerning any provision of this Agreement or the rights and duties of any person in relation thereto*, the prevailing party or parties shall be entitled, in addition to such other relief as may be granted, to a reasonable sum for their attorneys' fees in that litigation. The amount of this sum shall be determined either by the court or in a separate action brought for that purpose." (Italics added.)

Therefore, the Agreement expressly provided for awards of attorney fees to not only signatory parties (i.e., JB and PPI), but also to the "personal representatives" of those parties. Based on our review of the Agreement as a whole, the only reasonable interpretation of its term "personal representatives" is an interpretation making Bribiesca JB's personal representative and Julien and Colavin PPI's personal representatives.

Under section 6.05 of the Agreement, Julien and Colavin, as PPI's personal representatives, are entitled to awards of their attorney fees as prevailing parties in any litigation commenced "between the Partners or their personal representatives concerning any provision of this Agreement or the rights and duties of any person in relation thereto." Plaintiffs do not dispute that the instant action concerned provisions of the

Agreement or the rights and duties of any person in relation thereto. More importantly, Bribiesca, as JB's personal representative, likewise would have been entitled under section 6.05 to an award of his attorney fees had he prevailed in the instant action.

Under the third party beneficiary exception to the general rule limiting contractual attorney fee awards to only signatory parties, prevailing defendants (both signatory and nonsignatory) may recover attorney fees against a nonsignatory plaintiff if that plaintiff would have been entitled to a fee award against them had he or she prevailed in the action. (*Cargill*, *supra*, 201 Cal.App.4th at p. 966; *Real Property Services*, *supra*, 25 Cal.App.4th at p. 382.) Applying the third party beneficiary definition discussed above, Bribiesca clearly was an intended third party beneficiary of the Agreement. Bribiesca was expressly named in the Agreement as JB's principal and personal representative. The Agreement further obligated Bribiesca, Julien, and Colavin to devote their undivided time and attention to the business of LJPE. As JB's sole shareholder, Bribiesca would necessarily benefit (albeit indirectly) from LJPE's payments and other cash distributions to JB pursuant to the Agreement. Because the Agreement's provisions show an intent to benefit Bribiesca, a nonsignatory third person, he is an intended third party beneficiary of the Agreement. (*Cargill*, *supra*, 201 Cal.App.4th at p. 967; *Prouty v. Gores Technology Group*, *supra*, 121 Cal.App.4th at p. 1232.) Because Bribiesca, as JB's personal representative, is implicitly named in section 6.05 of the Agreement, he also is an intended third party beneficiary of that attorney fee provision. Had Bribiesca prevailed in his action against PPI Defendants, he would have been entitled to an award of his attorney fees incurred in that litigation pursuant to section 6.05 of the Agreement.

Alternatively stated, under section 6.05 of the Agreement, PPI Defendants, both signatory (i.e., PPI) and nonsignatory (i.e., Julien and Colavin), would have been liable to Bribiesca had he prevailed in his action against them.

Therefore, applying section 1717 and the third party beneficiary exception to the general rule, we conclude that because Bribiesca would have been entitled to an award of contractual attorney fees had he prevailed on his claims, he is liable to PPI Defendants for their fees as the prevailing parties in this action even though he is not a signatory to the Agreement. (*Cargill*, *supra*, 201 Cal.App.4th at pp. 967-970; *Real Property Services*, *supra*, 25 Cal.App.4th at pp. 382-384; *Reynolds Metals Co. v. Alperson*, *supra*, 25 Cal.3d at pp. 128-129; *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 343-345; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111; *Brusso v. Running Springs Country Club, Inc.* (1991) 228 Cal.App.3d 92, 108-111; cf. *Sessions*, *supra*, 84 Cal.App.4th at pp. 680-681 [reversed attorney fee award because contract expressly precluded any third party rights and attorney fee provision expressly limited recovery to "either party"].) We conclude the trial court did not abuse its discretion by awarding PPI Defendants attorney fees against both JB and Bribiesca personally.[6]

E

PPI Defendants request that we find they are the prevailing parties in this appeal and are therefore entitled to an award of their reasonable attorney fees and costs incurred

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6 Because we do not rely on the doctrine of judicial estoppel in disposing of this contention, we need not, and do not, address Plaintiffs' assertion that the doctrine was inapplicable in the circumstances of this case.

in responding to Plaintiffs' appeal and remand to the trial court for a determination of the reasonable amount of fees and costs to be awarded against Plaintiffs. Applying our reasoning above to the circumstances of this appeal, we conclude PPI Defendants are the prevailing parties in Plaintiffs' appeal and are therefore entitled to an award of their reasonable attorney fees and costs on appeal against both Plaintiffs pursuant to section 1717 and section 6.05 of the Agreement. After the remittitur is issued, PPI Defendants may file a motion in the trial court requesting that it determine the reasonable amounts of attorney fees and costs they incurred on appeal and issue an order awarding them such fees and costs against Plaintiffs. (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 250; *SASCO v. Rosendin Electric, Inc.* (2012) 207 Cal.App.4th 837, 849; *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 358.)

DISPOSITION

The judgment is affirmed. PPI Defendants shall recover their reasonable attorney fees and costs incurred on appeal and Scripps shall recover its costs on appeal.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.