CRAIG PETRIK et al., Plaintiffs and Appellants,
v.
DOUGLAS L. MAHAFFEY et al., Defendants and Respondents.
G042114
Super. Ct. No. 05CC10571
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE
Dated: June 9, 2011
NOT TO BE PUBLISHED IN OFFICIAL REPORTS

OPINION

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Berger Kahn, Sherman M. Spitz, Stephan S. Cohn and David B. Ezra for Plaintiffs and Appellants.

Mahaffey & Associates, Douglas L. Mahaffey for Defendants and Respondents.

Craig and Jeanne Petrik and several other homeowners were involved in a lengthy construction defect case. They were represented by Douglas L. Mahaffey and his law firm Mahaffey & Associates (collectively referred to in the singular as Mahaffey). Mahaffey settled the Petriks' case for $400,000 pursuant to a Code of Civil Procedure section 998 offer.[1] The Petriks sought relief from the offer, claiming Mahaffey did not have their authority to make the statutory offer to compromise. The trial court determined the offer was valid and refused to vacate the judgment. This court affirmed the trial court's ruling. (Petrik v. FN Projects, Inc. (April 6, 2005, G033528) [nonpub. opn.].)

The Petriks sued Mahaffey for legal malpractice and breach of contract, and sought declaratory relief with respect to disbursement of the settlement proceeds. The jury issued a special verdict finding in favor of the Petriks on some issues, and in favor of Mahaffey on others. The trial court then held a trial on the equitable accounting and declaratory relief claims. It determined the Petriks had to pay attorney fees and costs.

On appeal, the Petriks launch a multi-level attack on the trial court's cost determination. They assert the trial court erred in (1) denying their motion for directed verdict because their costs were waived as a matter of law, (2) disregarding the jury's special verdict awarding a lower sum of costs, and (3) determining, without sufficient evidence, the costs were not waived. The Petriks also challenge the court's determination Mahaffey was entitled to costs of suit as the prevailing party and pursuant to section 998. Finally, they assert the trial court should have

granted their motion to clarify and correct the judgment. Finding all the contentions lack merit, we affirm the judgment.

I

We need not repeat an entire summary of facts underlying the construction defect case. Suffice it to say, the Petriks and 12 other homeowners were represented by Mahaffey in a lawsuit against a developer, FN Projects, Inc. (FN), a builder, and several subcontractors. Mahaffey's global settlement demand was rejected. He then served 13 separate statutory offers to compromise pursuant to section 998, the total of which equaled the global demand. FN accepted eight of the 13 offers, including the Petriks' offer to settle for $400,000. Mahaffey then objected to judgment being entered, asserting he did not have authority to extend the section 998 offer on behalf of the Petriks. The Petriks also sought relief from the offer under section 473. The trial court determined the offer and FN's acceptance were valid and denied section 473 relief. This court denied the Petriks' petition for a writ of mandate. The court entered judgment on the eight section 998 offers. It denied the Petriks' motion to vacate the judgment. This court affirmed the judgment on appeal. (Petrik v. FN Projects, Inc., supra, [nonpub. opn.].)

In December 2003, FN paid the settlement proceeds ($400,000) to Mahaffey. Mahaffey refused to release any of that money to the Petriks unless they agreed to reach a compromise on their cost obligation for the construction defect case. The Petriks believed they owed no costs, and the parties reached an impasse with respect to the settlement proceeds. In September 2005, the Petriks decided it was time to sue their lawyer.

The Petriks' second amended complaint contained the following 11 causes of action: (1) legal malpractice for the unauthorized section 998 offer; (2) legal malpractice for recommending a fee splitting agreement; (3) legal malpractice for failing to distribute settlement proceeds; (4) legal malpractice for failing to use an interest bearing account for the settlement proceeds; (5) legal malpractice for an unauthorized appeal resulting in a cost award; (6) breach of fiduciary duty; (7) breach of contract; (8) breach of oral contract; (9) an accounting of the money owed to them from the settlement proceeds; (10) declaratory relief regarding the duty to pay settlement proceeds and if the cost waiver provision was triggered; and (11) declaratory relief regarding interest on the settlement proceeds.[2] Mahaffey filed a cross-complaint seeking over $120,000.

Before the jury was impaneled, the parties agreed the trial court would separately consider the ninth, tenth, and eleventh causes of action. After the Petriks presented their case to the jury, Mahaffey filed a motion for nonsuit as to various issues. The court granted a partial nonsuit on the following issues: (1) the first cause of action for legal malpractice for the unauthorized 998 offer, except as to breach of contract claims and breach of implied warranty claims against FN; (2) the second cause of action for legal malpractice for recommending a fee splitting agreement; (3) the sixth cause of action at paragraphs (b), (g), and (h) for breach of fiduciary duty regarding Mahaffey's recommendation the Petriks pay $50,000 in exchange for a 20 percent interest in a contingency fee agreement between Mahaffey and five homeowners (fee splitting) and Mahaffey's request the settlement proceeds be made payable to him individually and Mahaffey's threats the Petriks must pay costs or the retained experts would file liens against their property; and (4) the seventh cause of action for breach of contract at paragraph 61(c) relating to

Mahaffey's failure to notify the Petriks he received the settlement proceeds and failure to deposit the money in an interest-bearing account.

The jury was asked to render a special verdict with respect to the first, third, fourth, fifth, sixth, seventh, and eighth causes of action. The first special verdict form concerned the construction defect case. It was titled, "Special Verdict Case within a Case." The jury determined FN breached its contract with the Petriks and there was a breach of an implied warranty, but it was not a substantial factor in causing the Petriks any harm.

The second special verdict form related to the first cause of action for legal malpractice concerning the unauthorized section 998 offer. This verdict form stated: "If you returned a verdict on the 'Case within a Case Special Verdict Form in favor of [the Petriks] in an amount in excess of $400,000, then answer the questions on this form. If you did not reach such a verdict, sign and return the form." The jurors elected to sign and return the verdict form, signifying they found in Mahaffey's favor and no additional damages were owed as a result of the unauthorized section 998 offer.

The jury also found in Mahaffey's favor on the third legal malpractice claim, answering Mahaffey did not have a "duty to promptly distribute the judgment and/or settlement proceeds from the underlying case" to the Petriks. Similarly, the jury found for Mahaffey on the fourth legal malpractice claim. It found Mahaffey did not have a duty to the Petriks "to deposit the initial $400,000 settlement check from the underlying case into an interest-bearing account."

The jury found in the Petriks' favor on the fifth cause of action for legal malpractice. In the special verdict form, the jury concluded Mahaffey breached his duty to the Petriks to pay costs incurred for the appeal seeking to reverse the judgment entered as a result of the section 998 offer. The jury determined Mahaffey owed the Petriks $5,032 costs plus $1,100 in interest.

With respect to the sixth cause of action for breach of fiduciary duty the jury determined Mahaffey did not breach his fiduciary duty (1) "as a result of the $50,000 paid by [the Petriks] on behalf of [five] homeowners"; (2) "as a result of failing to distribute" the judgment/settlement proceeds from the underlying case; or (3) "as a result of failing to deposit" the initial $400,000 settlement check into an interest-bearing account. However, the jury concluded Mahaffey breached his fiduciary duty by serving the section 998 offer without authorization or consent from the Petriks. In addition, the jury found Mahaffey breached his fiduciary duty by failing to provide a proper accounting. The jury determined these breaches did not cause the Petriks any emotional distress or economic damage.

The jury concluded Mahaffey's failure to pay $5,032 in appellate costs incurred to challenge the judgment in the construction defect case was a breach of his fiduciary duty. It awarded economic damages to Craig and Jeanne Petrik of $2,516 each (for total costs of $5,032 as in the fifth cause of action). The jury determined the Petriks did not suffer emotional damages from the breach. And finally, the jury determined none of Mahaffey's fiduciary breaches were malicious, fraudulent, or oppressive.

On the seventh cause of action for breach of contract, the jury concluded Mahaffey breached the amended fee agreement with the Petriks, but this breach did not cause them to

suffer any damages. Rather, the jury determined the Petriks owed costs in the amount of $28,000 in the underlying case.

In the special verdict form, the jury concluded Mahaffey had entered and breached an oral contract with the Petriks "with regard to the $50,000 paid on October 16, 2003[.]" The jury determined they were damaged by the breach but concluded nothing over the $50,000 should be awarded to the Petriks for damages. The jury awarded interest in the amount of $21,151 for the breach of oral contract claim.

The last question on the special verdict form related to Mahaffey's cross-complaint. The jury concluded the Petriks authorized Mahaffey "through words and/or conduct, to perform legal services following conclusion of their contingency fee contract including but not limited to preparation, filing, and arguing a motion to vacate judgment, preparing the appeal, argument on appeal, and [the] petition for review to the Supreme Court." The jury determined the Petriks owed Mahaffey $10,000 for these services.

The court then held a trial on the remaining equitable causes of action. It determined the jury special verdict finding the Petriks owed $28,000 in costs for the construction defect litigation was "purely advisory" and the court must make this determination independently when rendering an accounting. The court considered additional evidence and argument from the parties.

In its initial statement of decision the court determined, inter alia, the Petriks actually owed $228,360 in costs. The Petriks raised several objections to the court's statement of decision. The court overruled all of the objections.

The final statement of decision contained the following rulings: The tenth cause of action for declaratory relief regarding the settlement proceeds was already addressed by the jury and the eleventh cause of action regarding interest "has been essentially subsumed by the [ninth] cause of action for [a]ccounting. Accordingly, the [c]ourt will not address those causes of action, but focus on the [ninth] cause of action for [a]ccounting." The court noted the cause of action alleged Mahaffey received settlement money on behalf of five homeowners and settlements from subcontractors and other defendants but the amount due to each plaintiff could not be ascertained without an accounting.

The court stated the Petriks' lawsuit was settled for $400,000 from FN, and there was no dispute that other defendants also settled. These settlement sums gave the Petriks a total of $407,307.69. However, no interest accumulated on the additional settlement money because those amounts were disbursed immediately to pay costs. Interest of $25,529.88 had accrued on the $400,000 settlement proceeds. The court concluded the total amount of credits was, therefore, $432,837.57 and "[t]he real dispute is over the debits." The court stated the parties agreed Mahaffey was owed 16.67 percent for contingency attorney fees ($72,154.02) but "hotly debated" is whether any money was owed for costs in the underlying litigation due to a cost waiver provision in the parties' amended fee agreement.

In the statement of decision, the court recited the cost waiver provision of the amended fee agreement: "'Attorney will advance any and all of such costs and expenses on [c]lient's behalf. When the total homes in the Tract represented by [a]ttorney exceed thirteen (13), all costs

allocated to [c]lient will be waived.'" The court explained an important issue in the case was whether or not the total number of homes represented in the underlying lawsuit ever exceeded 13.

The court concluded, "Unfortunately, this imperative issue of whether or not the costs were waived did not fit squarely within any of the causes of action pled by [the Petriks], nor was it clearly set forth as a matter for the jury to determine. This is perhaps because all parties agreed the costs issue was to be reserved for an accounting. [¶] For instance, the [seventh] cause of action for [b]reach of [w]ritten [c]ontracts states many 'breaches' one of which is [Mahaffey's] failure to waive costs and expenses on [the Petriks'] behalf." The court noted the special verdict form asked if Mahaffey breached the amended fee agreement. The jury found he had breached it "[h]owever, nowhere on the [s]pecial [v]erdict [f]orm is it suggested how or why [he] breached. The [s]econd [a]mended [c]omplaint lists [six] specific breaches. . . . The [j]ury found that although [Mahaffey] breached the agreement, the breach(es) did not cause any damages to [the Petriks]. Again, breach of the amended fee agreement for failure to comply with cost waiver is not something that was spelled out to the jury."

The court reasoned, "So, the fact that the jury was then asked 'What is the amount of costs that you find that are owed by [the Petriks] in the underlying case?' on the same [s]pecial [v]erdict [f]orm appears to be a mistake or rogue question. [¶] The jury did in fact find [the Petriks] owed [Mahaffey] $28,000.00 in costs. However, the [c]ourt opts to treat this figure as purely advisory as it overlaps [with] the equitable nature of the task reserved for the court, this accounting. Since the jury's verdict is simply 'advisory' the judge retains ultimate responsibility for [a] decision. . . . Furthermore, it appears to be based on a monthly average equating to rank speculation. Although the [c]ourt understands ultimately how the [j]ury came to this conclusion, the question should not have been posed as it interferes [with] the [c]ourt's ability to render its decision herein."

The court then determined, "[T]here is no evidence that the total homes in the Tract exceeded [13]. [Note: Although an employee of [Mahaffey] sent out a letter indicating costs had been waived, there was no evidence that she actually had authority to do so; and again, no evidence the total homes in the Tract exceeded [13]. Hence, the letter was apparently a mistake from which the [Petriks] are not entitled to a windfall, especially here, where the court sits in equity.]" Based on this factual determination, the court concluded there was no costs waiver, and the Petriks were responsible for costs in the underlying litigation.

The court calculated costs to equal $228,360. In doing so, it rejected the Petriks' argument $75,000 in paralegal and law clerk costs should not be allowed, reasoning the fee agreement specifically allowed for them. It rejected Mahaffey's argument the Petriks should pay all the costs, holding costs "should be allocated by 1/13th representing the number of clients in the underlying lawsuit represented by Mahaffey . . . ."

The court stated the Petriks' other arguments relating to equity were all rejected as meritless. The court found both of the Petriks "lacked credibility" and to award them any more money "would only reward their manifest incredulity. For instance, they argue[d] [Mahaffey had] no standing to bring an accounting, yet forget the [c]ourt [was] doing an accounting based on their [ninth] cause of action. Also, they argue[d] that [Mahaffey was] not entitled to any costs under

equitable principles because [he had] not actually paid any costs" and he was not entitled to recover them out of settlement proceeds. The court stated the fee agreement provided the Petriks were "on the hook for 'all costs and expenses incurred'" and although the agreement provided Mahaffey may advance those costs on his client's behalf, he did not have to pay the money before recovering costs. It noted "it makes sense [he has] been unable to pay the costs since the settlement money has been tied up." In addition, the court found "disingenuous" the Petriks' argument the accounting did not require a calculation of costs. The court referred to the Petriks' complaint that requested the court determine how much was ultimately owed and to order distribution. "The [a]ccounting, therefore, would be wholly incomplete, unnecessary, and inequitable if the court simply added together the various settlement proceeds and called it a day. . . . [C]osts for the underlying lawsuit, and whether any are necessarily owed by [the Petriks], are part and parcel of [their] request for funds withheld. Any argument to the contrary is absurd given the history of this lawsuit, what was presented to the jury, and what has now been ultimately . . . presented to the [c]ourt."

The court ruled the final total due to the Petriks is $146,323.18. It restated the calculation as follows: $432,837.57 was the total settlement proceeds including interest. It subtracted from this figure $72,154.02 representing attorney fees and $228,360.37 for the Petriks' share of the costs (1/13th of $2,968,685). The court added to that figure $50,000 the Petriks had already paid for costs during the litigation. This equaled $182,323.18. Finally, the court subtracted $36,000 representing the amount the court already ordered Mahaffey to pay the Petriks. The final total was therefore $146,323.18.

In its final statement of decision, the court addressed two other issues. First, the court acknowledged it entered a stipulation and order regarding the good faith settlement of co-defendants David G. Epstein and The David Epstein Law Firm (hereafter collectively referred to in the singular as Epstein). Accordingly, the court stated the Petriks' "recovery is reduced by $142,000." It noted no good faith settlement finding was made as to co-defendant Sean McGee. Second, the court ordered the Petriks owed Mahaffey $10,000 based on the jury's verdict on his cross-complaint. It awarded costs of suit to cross-complainant Mahaffey in the amount of $274,594.27.

II

A. Directed Verdict Denied

After all the evidence was presented to the jury, the Petriks filed a motion for directed verdict on the third, fourth, ninth, tenth, and eleventh causes of action. With respect to the accounting claims (ninth and tenth causes of action), the Petriks argued, among many things, the amended fee agreement contained a cost waiver provision that had been triggered and, accordingly, they owed no costs in their construction defect case. In their motion, the Petriks asserted interpreting the terms of the fee agreement was a question of law for the court to decide unless there was a dispute over the meaning of the contract language. They maintained the fee agreement clearly and plainly stated costs were waived once Mahaffey represented more than 13 homes in their housing "Tract." They asserted the provision was not reasonably susceptible to another interpretation and because Mahaffey represented over 20 of their neighbors in various lawsuits, the cost waiver issue should be decided in their favor.

In their motion, the Petriks recognized Mahaffey interpreted the clause to mean costs were waived only if he represented 13 other clients in the Petriks' lawsuit. They argued this interpretation "should not be permitted to be presented to the jury, unless the [c]ourt first finds that the word 'Tract' is 'reasonably susceptible' to Mahaffey's interpretation," which they believed would be absurd.

The court's ruling is not contained in our record and the Petriks' opening brief states, in a footnote, the court did not prepare an order reflecting the denial. Nevertheless, we can infer the motion was denied: Although the jury was not asked to resolve this issue, interpretation of the cost waiver was considered during the subsequent court trial on the accounting causes of action. The record shows the court considered extrinsic evidence submitted by both parties before interpreting the contract provision to mean costs would be waived when there were more than 13 homeowners in the Petriks' construction defect case. The court also made the factual finding there were not 13 other homeowners joined in the Petrik lawsuit, i.e., the cost waiver provision was not triggered and the Petriks must pay their allocation of the costs for the construction defect case.

On appeal, the Petriks criticize the court for failing to direct entry of the verdict in their favor on the cost waiver issue. We conclude the court properly denied the motion. The function of a motion for directed verdict, "like a motion for nonsuit, operates as a demurrer to the evidence. [Citations.] [¶] It challenges the legal sufficiency of the opposing party's evidence—i.e., whether such evidence makes out a prima facie case of the claim or defense asserted. [Citation.] [¶] 'A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party.' [Citations.]" (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2010) ¶ 12:323, p. 12-66.1.)

The Petriks framed their contract issue as a question of law, and sought to resolve the issue by means of a motion for directed verdict. But the function of a directed verdict is to challenge the legal sufficiency of the opposing party's evidence. As will be discussed in more detail later in this opinion, the trial court correctly determined the cost waiver provision was ambiguous and because there was disputed extrinsic evidence, as well as substantial evidence supporting Mahaffey's interpretation of the contract, the court could not direct a verdict in favor of the Petriks.

B. Accounting Causes of Action Reserved for the Court Trial

In disregarding the jury's special verdict awarding Mahaffey $28,000 for costs, the court determined the special verdict question was an advisory opinion as it overlapped with the court's task of rendering a complete and equitable accounting in the court trial. The court also noted the jury was not asked to determine if the cost waiver provision was triggered, and therefore it was a mistake to ask the jury to calculate a cost award.

The Petriks argue this was error because they had a constitutional right to have a jury trial on the cost waiver issue, their equitable claims did not extinguish their jury trial rights, and the

special verdict forms were approved by both parties and the court. In addition, they challenge the trial court's decision to consider additional documentary evidence not introduced during the jury trial and maintain, in any event, the court's decision is not supported by sufficient evidence. As we will explain, all these contentions lack merit.

We first note the cause of action for an accounting is a proceeding in equity. An accounting, "usually" analyzing "debits and credits [and] showing a balance due, if any" (Peoples Finance etc. Co. v. Bowman (1943),58 Cal.App.2d 729), is for the purpose of obtaining an equitable judicial settlement of the accounts of the parties and rendering complete justice. (Verdier v. Superior Court (1948),88 Cal.App.2d 527.) Such an equitable proceeding is necessary where "'the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable.'" (Civic Western Corp. v. Zila Industries, Inc. (1977),66 Cal.App.3d 1.) The trial court may even appoint a referee to conduct a formal accounting. (§ 639, subd. (a).)

The Petriks do not dispute the accounting was an equitable claim. In their complaint they alleged Mahaffey received settlement money on behalf of five homeowners, and settlements from subcontractors and other defendants in the Petriks' action. They asserted the amount of money due "is unknown and cannot be ascertained without an accounting."

Nevertheless, the Petriks maintain they had a right to have the jury consider the cost issue, suggesting it could have been carved out of the accounting claim. The Petriks reason their causes of action for legal malpractice, breach of fiduciary duty, and breach of contract were all legal actions where a right to a jury trial is constitutionally guaranteed. They maintain because those three causes of action put their cost responsibility at issue, their right to a jury trial on this issue is also guaranteed. Not so.

The Petriks forget the gist of their accounting claim was to invoke the equitable powers of the court to sort out the complicated debts and credits between the parties. As found by the trial court, this equitable determination necessarily would require resolution of whether costs were waived. Indeed, the tenth cause of action expressly requested the court to "appropriately determine" if the Petriks were entitled to the "prompt payment of settlement proceeds and to determine the related issue as to whether [they] are entitled to withhold costs or not." They specifically requested an accounting and resolution of the costs issue as a separate form of relief in equity. The accounting was not alleged as simply a way to remedy their other legal claims (such as breach of contract). As noted in the court's statement of decision, the Petriks raised several equitable defenses in the court trial that could not have been brought before the jury. We conclude, the court correctly determined the special verdict on costs should be disregarded because it overlapped with its equitable duty to render a fair and balanced accounting.

Moreover, the record shows that before trial the Petriks willingly turned over the accounting issue to a separate court trial. The special verdict did not ask the jury to interpret the cost waiver provision or determine facts relating to whether the cost waiver provision was triggered. The Petriks cannot now be heard to complain the jury should have been permitted to decide the issue they agreed would be reserved for a later court trial.

The Petriks are unwilling to acknowledge the special verdict question asking the jurors to allocate costs could properly be ignored by the trial court on the grounds it was a "rogue question" and the amount was based on "rank speculation." The Petriks note any objections to

the special verdict must be made before the forms are submitted to the jury. They assert the special verdict forms were approved by both parties and the court. True, the parties must object beforehand, but we find no authority similarly limiting the court's power, as it sits in equity, to disregard the jury's special verdict factual finding for good cause.

To the contrary, there are many equitable maxims that support the court's decision. For example, when a court is sitting in equity, and "[w]here the jury's verdict is special, adoption by the court of the verdict is equivalent to a finding by the court to the extent to which the verdict covers the issues. A further finding on those issues is not necessary, but the court must make a finding on issues not covered by the special verdict, unless a finding thereon has been waived. [Citations.] There is some support for the view that findings must be made whether the court adopts or rejects the verdict. [Citation.] The court is not, of course, bound to adopt the jury's findings. It is free to adopt or reject them. [Citation.] If it rejects them, it may make findings contrary to the verdict. [Citation.]" (Cal. Jur. 3d, Trial § 136, pp. 652-653)

The Petriks complain that if the parties intended to remove the cost obligation issue from the jury's province, and instead turn over the issue to the trial court, "one would have expected an unequivocally clear record in this regard before the commencement of the jury trial and certainly no later than submission of the special verdict form to the jury." (Italics and fn. omitted.) But the record is clear. The parties submitted the three equity claims for a court trial following the jury trial. The jury was not asked to render an accounting in the special verdict. Nor were the jurors asked to interpret the cost waiver provision, determine if it had been breached, or award the resulting damages. These issues were clearly reserved for the court trial.

We do not agree with the Petriks' assertion it was an enormous waste of time, money, and resources to present evidence of the cost waiver issue to the jury. Equitable findings made by the court may be based on "evidence already taken at the trial, or from new evidence taken on a reopening of the case for further evidence, and a new trial need not be had. [Citation.]" (Cal. Jur. 3d, Trial § 136 p. 652.) Some of the legal claims being considered by the jurors related to the same evidence relevant to the accounting. And although California law permits and actually prefers that an equitable claim such as an equitable accounting be tried first (Connell v. Bowes (1942),19 Cal.2d 870), it is not error to conduct the court trial on the equitable accounting second. This is not a case where trying the equitable issues first would obviate the necessity for a subsequent trial of all the legal issues. (Raedeke v. Gibraltar Sav. & Loan Assn. (1974),10 Cal.3d 665; see also American Motorists Ins. Co. v. Superior Court (1998),68 Cal.App.4th 864.)

The Petriks also fault the court for considering additional documentary evidence in the court trial of the equitable claims. They claim this evidence was not submitted to the jury and therefore they could not cross-examine Mahaffey "in the presence of the jury—the [fact finder] on the cost obligation issue." (Fn. omitted.) As explained above, the court sitting in equity may consider evidence presented at trial or new evidence. We cannot find any fault with the trial court's efforts to consider all the available evidence before rendering a full and complete accounting of all the monies relating to these parties.

The above reasoning and ruling also answers the Petriks' claim the court's $228,360 award was "strikingly inconsistent" with the jury's intent. The court's decision there were additional costs that totaled more than those designated by the jury is not a sign of inconsistency. It is

consistent with the jury's determination the Petriks owed costs. The court simply had more evidence, experience, and information available to render a complete equitable accounting.

The final issue on the accounting/cost issue is whether the evidence supported the trial court's legal and factual conclusions the cost waiver was not triggered. The record shows the court considered the parties' extrinsic evidence, which suggests it found ambiguous the cost waiver provision, i.e., was it triggered when more than 13 plaintiffs "in the Tract" were represented in the Petriks' lawsuit versus other lawsuits filed by Mahaffey. Our dissenting colleague concludes the contract is unambiguous and compels a result in the Petriks' favor. We respectfully disagree, and conclude the trial court correctly determined the language ambiguous and considered extrinsic evidence to aid in its interpretation.

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible." (Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc. (2003),109 Cal.App.4th 944 (Founding Members))

"Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. [Citations.] If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract. [Citations.] Thus, '[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' [Citation.] [¶] The threshold issue of whether to admit the extrinsic evidence—that is, whether the contract is reasonably susceptible to the interpretation urged—is a question of law subject to de novo review. [Citations.] [¶] The ultimate construction placed on the contract might call for different standards of review. When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract. [Citations.] When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld if it is supported by substantial evidence." (Founding Members, supra, 109 Cal.App.4th at pp. 955-956.)

"California recognizes the objective theory of contracts [citation], under which '[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation' [citation]. The parties' undisclosed intent or understanding is irrelevant to contract interpretation. [Citations.]" (Founding Members, supra, 109 Cal.App.4th at p. 956.) Indeed, "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.) Moreover, "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

Applying the above principles, we start with the threshold issue of whether the court properly considered extrinsic evidence. The court had before it a narrowly drafted attorney-client contingency fee agreement only two pages long. The first paragraph stated, in relevant part, "This CONTINGENCY FEE AGREEMENT ('Agreement') is entered into . . . between [the

Petriks] ('Client') and Mahaffey . . . ('Attorney') . . . ." Listed below this first paragraph were several numbered paragraphs.

The paragraph designated No. 1 was titled "Matter Covered," and provided, "Client retains [a]ttorney to represent [c]lient in connection with a claim for damages, injury, or loss . . . arising out of the following transaction: lawsuit against Interamerican Builders Corporation and [FN] . . . for construction defects and related claims at Lot 3, Tract 10103." Thus, the scope of matters covered by the agreement was expressly limited to one lawsuit.

Paragraph No. 2 discussed "Services to be Performed by Attorney" and Mahaffey agreed to prosecute or settle only the Petriks' construction defect case. The agreement specified, "No other services are covered by this Agreement," and Mahaffey would not be obligated to move for a new trial, render services on appeal, or take steps to enforce the judgment. The next paragraph, No. 3, specified Mahaffey "had made no guarantee" as to the outcome of the Petriks' construction defect claim. These provisions also related only to litigation of the Petriks' lawsuit.

Paragraph No. 5 specified the Petriks "shall be responsible for all costs and expenses incurred by [a]ttorney in connection with [c]lient's claim, including, without limitation, the following: . . ." The agreement listed 11 different types of costs and fees, including court filing fees, private investigator fees, jury fees, photocopying fees, and mailing fees. In short, the Petriks agreed to pay all costs incurred in their lawsuit.

Following this laundry list of costs associated with the Petriks' case was the cost waiver provision at issue in this appeal. The paragraph stated in its entirety: "Attorney will advance any and all of such costs and expenses on [c]lient's behalf. When the total homes in the Tract represented by [a]ttorney exceed thirteen (13), all costs allocated to [c]lient will be waived."

Paragraph No. 6 concerned the calculation of the contingency attorney fees for working on the Petriks' construction defect claim. It specified "no appeal . . . or other representation will be undertaken or is contemplated under this Agreement." Once again, the language unequivocally limits the scope of representation covered by the agreement.

Paragraph No. 7 stated, "Costs and expenses incurred in connection with the prosecution or settlement of [c]lient's claim shall be reimbursed after the contingency fee is computed." Paragraph No. 8 concerned when the contingency fee was due. The remaining paragraphs contained general contract provisions.

The above contingency fee agreement was obviously narrowly drafted to encompass matters concerning Mahaffey's representation and litigation of the Petriks' construction defect case. Several of the paragraphs specifically warned the terms of the agreement related only to the prosecution/settlement of the Petriks' case and not other representations. The Petriks agreed they would be responsible for all costs, expenses, and attorney fees relating to litigation of their case, unless their allocation of the costs was waived. The cost waiver provision was to be triggered simply whenever Mahaffey represented more than 13 neighbors living in the Petriks' housing tract.

At first glance, the cost waiver language appears to be clear on its face, but the parties sought to introduce extrinsic evidence to clarify their intent at the time of contracting. The parties

disputed whether the cost waiver was triggered. Specifically, was representation of homeowners "in the Tract" limited to the Petriks' lawsuit or intended to encompass any other lawsuits filed or defended involving neighbors in the Petriks' Tract? We conclude the trial court properly recognized the triggering event was not clearly defined and it considered extrinsic evidence relevant to determining the parties' intent.

Before analyzing the threshold issue of whether the court should have admitted extrinsic evidence, we note our dissenting colleague agrees with the Petriks' interpretation, reading the plain language of the contract as a generous deal to waive costs if Mahaffey represented 13 clients "in the Tract" in the Petriks' case or any other lawsuit. In short, our dissenting colleague concludes the plain language bars the taking of extrinsic evidence. He concludes, "the phrase 'in the tract' does pertain to something outside the lawsuit. It pertains to other homes in the tract, presumably with the same flaws and issues, and therefore worth the sacrifice of the cost bill to sign up." (Dis. opn., post, at p. 3.)

When the majority first reviewed the contract, we reached a different conclusion reading the same plain language. Looking at the waiver purely in the context of a narrowly drafted fee agreement, we determined the waiver would not be triggered unless Mahaffey represented plaintiffs "in the Tract" who would join the Petriks' construction defect case and offset those costs. The terms of Mahaffey's "representation" throughout the agreement referred only to litigation of the Petriks' lawsuit, so too would the term "represented" contained in the cost waiver provision. In addition, we saw the agreement did not provide for a simple waiver of all costs but rather a waiver of "all costs allocated to [c]lient." The term "allocated" in this context is not reasonably susceptible to another meaning. Costs would only be "allocated" if there were other plaintiffs in the litigation to share the costs. Costs would not need to be allocated if the Petriks were the sole plaintiffs. Moreover, the Petriks would receive a cost "allocation" only if other plaintiffs were sharing the costs incurred in the Petriks' case. If the Petriks referred their neighbor's family law case to Mahaffey, they would not expect these plaintiffs to share in the costs of construction defect litigation.

In any event, this panel's reasonable disagreement over the waiver's "plain meaning" suggests the triggering event was not clearly defined and extrinsic evidence was properly considered by the court to aid in its interpretation. As stated above, "[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (Founding Members, supra, 109 Cal.App.4th at p. 955.)

On one hand, there is the Petriks' interpretation the parties intended that costs would be waived if Mahaffey represented 13 of their neighbors in some fashion and it did not matter if those representations occurred in different lawsuits. In explaining this interpretation of the cost waiver, the Petriks focus solely on the word "Tract" and assert it necessarily meant the homes built in their Tract. We agree the word "Tract" is not reasonably susceptible to another meaning. However, the cost waiver was not broadly written to expressly encompass litigation and costs beyond those associated with the Petriks' construction defect case. As discussed by the dissent, to reach outside the Petriks' lawsuit one must presume the other lawsuits filed by Mahaffey involved similar construction defect issues that would justify a waiver of the cost bill. However,

this presumption is necessarily based on extrinsic evidence about the nature of the other lawsuits and the parties' unexpressed intent when they executed the contract.

The Petriks claim that if the cost waiver depended on the number of homes included in their lawsuit only, Mahaffey would have used terminology other than "the Tract." They suggest phrases like "the Petrik lawsuit" or "the lawsuit to which you are a party" would have been used. They are right: The parties could have more clearly defined the nature of the trigging event. Just as Mahaffey could have insisted on inclusion of the phrase "the Petrik lawsuit," the Petriks could have defined representation as including "any other lawsuit related (or unrelated) to the Petriks' lawsuit." Such language would clearly signify that the cost waiver, unlike the rest of the agreement, pertained to something other than representation in the Petriks' lawsuit.

On the other hand, Mahaffey contends his interpretation is supported when one views the cost waiver in the context of the entire fee agreement because both related only to his representation in the Petriks' construction defect case. Mahaffey also presented extrinsic evidence supporting his interpretation, showing he never would have agreed to waive costs in litigation unrelated to the Petriks' construction defect action. He testified the cost waiver was offered as an incentive for the Petriks to find and join more plaintiffs into their lawsuit. Representing the Petriks' neighbors in another lawsuit simply would not financially justify waiving the Petriks' cost bill (which exceeded $200,000).

In light of the above, we conclude the court properly considered extrinsic evidence because the cost waiver's triggering event was ambiguously defined. We turn next to the trial court's ultimate construction of the waiver provision. And because the extrinsic evidence was in conflict, we apply a deferential standard of review: "When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld if it is supported by substantial evidence." (Founding Members, supra, 109 Cal.App.4th at p. 956.)

The Petriks' extrinsic evidence consisted of documents Mahaffey sent to the Petriks before and after the amended fee agreement was executed. Surprisingly, the Petriks offer very few details about the other cases Mahaffey filed representing their neighbors. The briefing on appeal discusses the number of cases and plaintiffs overall. However, the record does not contain copies of the complaints or any declarations attesting to the flaws or indicating the issues were exactly the same.

Rather, to support their interpretation of the cost waiver, the first document the Petriks discuss is a letter Mahaffey sent a few weeks before the agreement was signed. They claim it advised the Petriks their fee agreement would be modified and they would get a full cost waiver if Mahaffey represented "three additional homes in your project" that were "above the [10] that are currently being represented." Because at the time only four of the 10 homes were in the Petriks' case, they assumed the focus was on the number of homes Mahaffey represented "Tract wide."

After reviewing the record, we have determined the letter merely represents a snapshot of the negotiations that took place leading to modification of the fee agreement. The Petriks fail to acknowledge the letter also promised a one-third reduction in costs if the Petriks referred one additional home and two-thirds reduction in costs if they referred two homes. Neither of these

terms were ultimately included in the final version of the fee agreement. Indeed if just "three additional homes" was the final agreed-upon trigger for a cost waiver, the parties would have included that unambiguous language in the agreement. The record shows that following further negotiations, the parties drafted language entirely different from that contained in the letter.

Moreover, the Petriks fail to acknowledge their extrinsic evidence was disputed. Mahaffey testified that after sending the letter, the parties discussed and clarified the cost waiver over a one-month period. He stated there was disagreement about the cost waiver and "finally [Craig Petrik] signed the new deal which I sent him 30 days later, because I said I would not, would not waive his cost for any case other than his. I had already cut deals on the other cases, I was already representing those people, and the goal was to expand the Petrik case, not anything else, and if I had caused confusion to begin with, we sorted it out, and I said, that's not the deal, period, and if we can't do anything, we'll live with the old agreement. He came back to me and we modified it." We cannot disturb the trial court's determination Mahaffey's testimony was more relevant to the parties intent when they made the agreement especially in light of the court's specific finding the Petriks were "not credible." Substantial evidence supported the court's conclusion the letter was not relevant to prove the cost waiver was reasonably susceptible to the interpretation urged by the Petriks.

The Petriks assert "the most compelling evidence" proving they owed no costs for the construction defect case is "correspondence sent by Mahaffey to the Petriks "confirming this very fact." They appear to have forgotten the test for determining whether to admit extrinsic evidence to explain the meaning of the cost provision. The issue is not whether the evidence proves their case but rather whether the evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. Like the trial court, we do not find this correspondence relevant.

The letters were sent in March and May of 2000. The two letters were written by Mahaffey's employees and both letters stated costs "will be" waived. The May 2000 letter specified that pursuant to the April 1999 amended contingency fee agreement, "as the number of homes in [the Tract] currently represented by Mahaffey . . . now exceeds thirteen (13) in total, all costs allocated to you in [the Petrik case] will be waived." Mahaffey testified he did not authorize his employees to send these letters because 13 neighbors had not joined the Petriks' case. Mahaffey stated that although the letters should not have been sent he would have honored them if the case had settled.

On appeal, the Petriks argue the letter proved the parties always intended the costs would be waived if 13 neighbors were represented in any litigation because everyone knew 13 neighbors had not joined their case. However at trial, there was conflicting evidence on how the Petriks interpreted the letters. Craig Petrik testified he distrusted Mahaffey after he settled the case and believed the letters were sent to avoid a legal malpractice action. He stated, "I believed he was simply making overtures of these monies when they were not founded. I believe I had a case of legal malpractice against him . . . ." In light of the disputed evidence surrounding these letters, we conclude they do not clearly reflect the parties' intent regarding the cost waiver. There was substantial evidence to support the trial court's construction of the cost waiver, determining extrinsic evidence reasonably supported the interpretation the waiver was triggered only after the Petriks joined at least 13 other plaintiffs to their lawsuit.

C. The Cost Waiver Was Not Triggered

The trial court made the factual determination that in the Petriks' construction defect case, "there [was] no evidence that the total homes in the Tract exceeded [13]." The Petriks point to evidence the lawsuit exceeded 13 homes for approximately six months. They argue the cost waiver was triggered at that time, and there was nothing in the provision suggesting the waiver would vanish if the total number of plaintiffs later dipped below 13. This argument is unpersuasive. The cost waiver provision must be read in the context of the other provisions regarding costs. The parties agreed Mahaffey would advance all costs, and "costs incurred in connection with [the Petriks' case must] be reimbursed after the contingency fee is computed." The parties contemplated that costs would not be calculated or allocated among the plaintiffs until the representation was complete. To this end, the various paragraphs of the fee agreement discussed Mahaffey's representation in the present and future tense, but the cost provision is noticeably written in the past tense: "When the total homes . . . represented by [Mahaffey] exceed thirteen (13), all costs allocated to client will be waived." (Italics added.) The parties intended costs to be calculated or waived when they became due and apportioned among the plaintiffs remaining at the conclusion of the case.

D. Clarification and Correction of the Judgment

The Petriks assert the judgment required clarification with respect to whether their recovery can be offset by their settlement with Epstein. They also raised several corrections to parts of the judgment. We find no error with the trial court's denial of the motion.

With respect to the clarification request, the Petriks explain, the judgment provides the settlement proceeds totaling $146,323.18 "are to be remitted to the Petriks." However, the judgment also states the Petriks' "recovery is reduced by $142,000" due to their pre-trial settlement with Epstein. They filed a motion to clarify the trial court's judgment and correct clerical errors on the basis it is unclear whether Mahaffey should distribute the client trust money without being subject to any offset. They assert, "It would defy any sense of law, equity, or logic to deduct any settlement moneys obtained . . . from a co-defendant in this case from client trust moneys obtained through settlement in an entirely different case involving entirely different defendants." They provide no case authority to support this theory. They are wrong.

We conclude the judgment and the law is clear. The $142,000 was obtained through settlement with co-defendants the Petriks' alleged to be jointly and severally liable with Mahaffey, thereby making section 877 applicable. It should come as no surprise to the Petriks the settlement was included in the accounting. Law, equity, and logic are not defied by the court's decision the Petriks were left with only $146,323.18 of the original $400,000 because they owed attorney fees, costs, and other debt allocations. Equity and logic support the legal notion Mahaffey's obligation to satisfy the accounting need not be considered in a vacuum. Indeed, law, equity, and logic all support application of the statutes the Legislature has enacted giving a defendant the right to reduce the amount owed to the other party.

First, "'Pursuant to section 877, a good faith settlement bars nonsettling defendants from seeking contribution from a settling defendant, but in return the nonsettling defendants' ultimate liability to the plaintiff is reduced by the amount stipulated by the release or by the amount of consideration paid.' [Citations.] . . . [¶] Sections 877 and 877.6 are designed to promote the

equitable sharing of costs among the parties at fault, and to encourage settlement. [Citations.] In addition, the offset provided for in section 877 assures that a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one joint tortfeasor and all of his claim from another. [Citation.]" (Reed v. Wilson (1999),73 Cal.App.4th 439.) In short, Mahaffey's obligation on the accounting is subject to the section 877 good faith settlement offset.

Second, Mahaffey's recovery on the cross-complaint can be used to reduce his obligation pursuant to section 666. "If a claim asserted in a cross-complaint is established at trial and the amount so established exceeds the demand established by the party against whom the cross-complaint is asserted, then judgment for the cross-complainant must be given for the excess. If it appears that the cross-complainant is entitled to any other affirmative relief, judgment must be given accordingly." (Cal. Jur. 3d, Judgments § 136, p. 224, fn. omitted.) The Petriks lament application of these statutes will be "tragic" as it means they will never see any portion of the settlement proceeds. We would find it more tragic if the Petriks were enriched unjustly by a double recovery and Mahaffey was left without a mechanism to recover his fees, costs, and $10,000 judgment.

In denying the motion to clarify, the court stated there was "nothing in the statement regarding good faith settlements which creates confusion as to whether $146,323.18 is subject to offset." We agree. The judgment's statement, "Plaintiffs' recovery is reduced by" clearly signifies there must be an offset as permitted by section 877.

The Petriks also sought correction of the judgment to include $50,000 damages plus $21,151 interest relating to the eighth cause of action for fee splitting. In addition, they believe the judgment should include the $5,032 awarded for appellate costs, plus $1,100 interest (fifth and sixth causes of action). They recognize these sums, totaling $27,282 are reflected in the special verdict section of the judgment, but it was clerical error for the court not to include any reference to this sum in the final disposition. Not so. In denying the motion, the trial court explained no correction was necessary because the "judgment does not omit damages awarded by the jury" as they "are contained in the [s]pecial [v]erdict portion of the [judgment]." The court did not need to gather all the damages into one section of the judgment. We find no authority, and the Petriks cite to none, holding the court is not permitted to arrange the judgment in sections relating to the claims tried by the jury and those decided in equity. In addition, the court stated in its minute order this issue concerning the special verdict damages had already been raised and rejected by the court. It was no longer a claim of clerical error. And we find no judicial error. The motion was correctly denied.

The Petriks also wish to correct the judgment as they claim it erroneously reflects nonsuit was granted as to the portion of the sixth cause of action for breach of fiduciary duty regarding the fee splitting arrangement. There were eight alleged breaches of fiduciary duty, and the fee splitting claim was contained in paragraph (b).

We note the identical allegations regarding the fee splitting agreement were contained in the second cause of action for legal malpractice and the eighth cause of action for breach of oral contract. The record shows nonsuit was granted as to the entire second cause of action eliminating it from the jury's consideration. The jury entered a special verdict on the eighth cause

of action in the Petriks' favor, returning the $50,000 they paid Mahaffey in exchange for a fee splitting agreement relating to his other clients.

The record is confusing as to how the allegation in paragraph (b) of the sixth cause of action was resolved. The Petriks and Mahaffey point to the same portion of the record to prove the nonsuit was denied, or granted, respectively. Initially, the court indicated it would not grant nonsuit, but then made the vague statement, "On (b), [the fee splitting issue], I think we've already covered that, and that really is—That's the second cause of action, which I granted a nonsuit on, but it's also the . . . eighth cause of action. Is that the oral contract?"

We conclude the record reflects the trial court made no specific finding on the record with respect to paragraph (b). We recognize the jury entered a special verdict on the issue, finding the fee splitting agreement was not a breach of Mahaffey's fiduciary duty. Nevertheless, in the final judgment the court ruled nonsuit was granted as to paragraph (b) [fee splitting] issue. In short, the Petriks lost on this claim.

Thereafter, the trial court denied the motion to correct the judgment relating to this claim, finding there was no error. In addition, it noted the correction issue had been raised before, and therefore it was now a claim of judicial error that cannot be remedied by a motion for correction. We agree the error, if any, was judicial and could not be remedied by a motion for correction.[3]

E. Prevailing Party & Section 998

The Petriks assert the trial court erred in awarding Mahaffey the costs of suit ($274,594.27) as the prevailing party and as a penalty for refusing to accept several section 998 settlement offers. The Petriks contend they were the prevailing parties in this case because they obtained "a net monetary recovery." (§ 1032, subd. (a)(4).) They also argue Mahaffey did not serve an enforceable section 998 offer high enough to entitle him to any cost recovery. They are wrong.

"Unless otherwise provided by statute, a 'prevailing party' is entitled to recover costs in any action or proceeding "as a matter of right." (§ 1032, subd. (b); § 1033.5, subd. (a)(10)(A)-(C) [allowable costs under § 1032 include attorney fees authorized by contract, statute, or law].) 'Prevailing party' for purposes of section 1032 [subdivision] (a)(4)[,] is defined as including: '[¶] the party with a net monetary recovery, [2] a defendant in whose favor a dismissal is entered, [3] a defendant where neither plaintiff nor defendant obtains any relief, and [4] a defendant as against those plaintiffs who do not recover any relief against that defendant.' If a party recovers anything other than monetary relief and in situations not specified above, a trial court shall determine the prevailing party and use its discretion to determine the amount and allocation of costs, if any. (Ibid.; Michell v. Olick (1996),49 Cal.App.4th 1194 [prevailing party is 'entitled to costs as a matter of right; the trial court has no discretion to order each party to bear his or her own costs'].)" (Goodman v. Lozano (2010),47 Cal.4th 1327.)

Therefore, ordinarily the prevailing party in an action is the party with "a net monetary recovery." (§ 1032, subd. (a)(4).) However, when, as here, a "party recovers other than monetary relief . . . the 'prevailing party' shall be as determined by the court . . . in its discretion." (§ 1032, subd. (a)(4); see Sears v. Baccaglio (1998),60 Cal.App.4th 1136 (Sears) ["Nothing in the statute limits the court's inquiry solely to net monetary recovery; to do so would be to ignore, among

others, the problems presented by . . . net recoveries which were actually Pyrrhic victories"].) We review the trial court's determination of the prevailing party for an abuse of discretion.

As noted above, a cause of action for an accounting is a proceeding in equity. A monetary recovery in an equitable accounting does not necessarily reflect who should be deemed the prevailing party. Indeed, in this case there is no question Mahaffey prevailed in the accounting action as well as many of the legal causes of action. His designation as the prevailing party was an equitable outcome given what the Petriks sought to recover in this case: The Petriks' goal was to recover the entire $400,000 construction defect settlement in addition to over $1 million for breach of contract and legal malpractice. They did not succeed.

The jury found the Petriks suffered no significant damages (except for some appellate costs) by the unauthorized section 998 settlement and the jury clearly felt they should have accepted the $400,000. Specifically, after several claims were eliminated by nonsuit, the Petriks prevailed on only three of the eight causes of action presented to the jury, and they lost on the cross-complaint. Moreover, two of the eight causes of action were duplicative as they both related to Mahaffey's failure to pay the costs to appeal the unauthorized section 998 ruling (the fifth cause of action for legal malpractice and the sixth cause of action for breach of fiduciary duty both related to the failure to pay these appellate costs). The jury determined that in addition to the cost associated with that appeal ($5,032) there was some interest owed ($1,100 accrued on the $5,032 costs, and $21,151 interest accrued on the $50,000 returned to the Petriks in the accounting). The jury rejected the other five legal causes of action.

Thereafter, the court in its equitable accounting rejected the Petriks' cost waiver claim, as well as other equitable claims raised by the Petriks relating to the calculation of costs. It should not be overlooked the $400,000 settlement related to the prior lawsuit and should not be considered an award in this action. The court's accounting reducing the $400,000 to $146,323.18 could hardly be considered a win for the Petriks. Rather, the reduction was because Mahaffey prevailed in the hard-fought dispute over whether the Petriks owed Mahaffey over $228,000 in costs incurred during the prior lawsuit. Additionally, the court determined the Petriks were "on the hook" for the contingency attorney fees Mahaffey incurred in litigating their construction defect case. Mahaffey was also properly credited with an offset for the good-faith settlement proceeds the Petriks already recovered from Epstein. Finally, the court expressly noted the Petriks' other equitable claims were meritless, finding the Petriks "lacked credibility" and to award them any more money "would only reward their manifest incredulity."

Thus, the fact the Petriks may in the end be entitled to a small monetary recovery is not dispositive in light of the fact Mahaffey received all the equitable relief he sought in the accounting (and the Petriks received none). (See Sears, supra, 60 Cal.App.4th at pp. 1142-1143 [in action in equity, person receiving greater monetary value may not necessarily be said to have recovered greater relief]; § 1032, subd. (a)(4) [recognizing that person receiving net monetary recovery not necessarily prevailing party in action when one party recovers something other than monetary relief].) Given the record in this case, it cannot be said the court abused its discretion in awarding Mahaffey costs.

Because Mahaffey was the prevailing party, our discussion of the court's application of the section 998 penalties can thankfully be brief. Section 998 provides that the costs allowed under

section 1032 shall be withheld or augmented when offers to compromise are made and not accepted, if the party not accepting the offer to compromise ultimately fails to obtain a more favorable judgment or award. The purpose of these provisions is to "encourage settlement by providing a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer." (Bank of San Pedro v. Superior Court (1992),3 Cal.4th 797.)

The Petriks argue Mahaffey's highest enforceable section 998 offer was for $401,000. This offer included a waiver of statutory costs. They argue that since they should have been awarded the costs of suit as the prevailing party instead of Mahaffey, their recovery is higher than Mahaffey's section 998 offer. This argument fails because it is based on the incorrect premise the Petriks were the prevailing party. Because the Petriks were not entitled to any costs of suit, their total recovery did not come close to the $401,000 offer.[4]

Alternatively, the Petriks suggest that if this court reverses the directed verdict or the trial court's cost award then their monetary recovery would exceed the settlement offer. We disagree with their calculations, and in any event, these ruling were affirmed.[5] We note the Petriks do not dispute on appeal the court's calculation of $274,594.27 for cost of this suit, and we need not review this issue. We affirm the cost award because Mahaffey was the prevailing party and the Petriks failed to recover more than the section 998 settlement offer.

III

The judgment is affirmed. The respondents shall recover their costs on appeal.

O'LEARY, J.

I CONCUR:

IKOLA, J.

BEDSWORTH, ACTING P.J., Dissenting:

I agree with almost everything my colleagues say about this case. But the "almost" is a big one for me, so I must respectfully dissent from their analysis of the cost waiver clause of the contract.

There really isn't much to say about this. It's not a complex point of law requiring close analysis of statute or precedent. There aren't cases to be dissected and distinguished. It's a difference of opinion about contractual interpretation. To my mind the plain language of this contract is so clear it bars the taking of extrinsic evidence and compels a result in the Petriks' favor. My colleagues see it differently.

The clause of the contract in question says, "When the total homes in the Tract represented by [a]ttorney exceed thirteen (13), all costs allocated to [c]lient will be waived." This is not a legal nicety, it's a business practice. It's very common; we see it every day: "If you recommend me to your friends and they hire me, I'll give you a discount." It's perfectly acceptable whether done by an attorney or a cruise line or a window washer.

Here the attorney made a deal that if he got more than 13 clients in the tract, the Petriks' share of the costs would be waived. He did; he got over 20. The Petriks figured they were off the hook for the costs. But respondent said, "Wait, there are three more words in that clause - invisible words - that defeat your claim. The houses have to be joined in this lawsuit."

This is obviously a critical emendation. The lawsuit ended up - mirabile dictu - with exactly 13 homes. The Petriks, under respondent's interpretation of the contract, missed by one.

My colleagues agree with this interpretation. I do not. To my mind, it's like saying, "I will buy your horse for $10,000. But if I can race him, I will pay you $50,000." Then, when the horse wins a race or two and the seller tries to collect the extra money, the happy horse-owner says, "Oh, gee, did you think I meant any race? No, I meant 'if I can race him in the derby' and - unfortunately - I've decided not to enter him in the derby."

The rule to be applied to such disputes is pretty simple and my colleagues and I agree on it. "The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity." (Civ. Code, § 1638.) In deciding whether the language is clear and explicit, we are adjured by Civil Code section 1641 to consider the entire contract, "so as to give effect to every part . . . ."

I see no ambiguity in the cost waiver language. It requires that the homeowners in question be in the tract. This is important to the attorney because there will be similar issues and significant economies of scale involved in cases involving the same builder, building the same houses, at roughly the same time. This will make representation of homeowners in the tract economically viable enough to sacrifice the costs bill as an incentive for the recruitment of more plaintiffs.

Beyond that one qualifier, that the homeowners be in the tract, respondent imposed no requirements. And neither should we.

My colleagues position is, "Mahaffey correctly included the word 'Tract' when referring to homes subject to the Petriks' lawsuit. Who else could be included in their construction defect lawsuit?" (Maj. Opn., p. 21.) But this is fallacious -specifically, it falls into the logical fallacy of "begging the question." It assumes to be true the fact it is trying to prove. Another way of stating their position is, "Nothing is in the contract that doesn't pertain to this lawsuit, so that phrase must pertain to the lawsuit." But the point of contention is whether anything in the contract pertains to something outside the lawsuit; we can't decide that fact by assuming it.

I think the phrase, "in the tract" does pertain to something outside the lawsuit. It pertains to other homes in the tract, presumably with the same flaws and issues, and therefore worth the sacrifice of the cost bill to sign up. Homes outside the tract might have different builders, different problems, different issues; the marginal utility of signing them up would not justify eating the cost bill because there would not be a concomitant saving in terms of investigative and legal economies of scale. If that is the reason for including the clause - and I cannot imagine another - then the question of which lawsuit the home goes into is nugatory . . . as long as it is in the same tract.

Otherwise, there is no reason to put the phrase "in the tract" into the clause. If the clause just said, "When the total homes represented by [a]ttorney exceed thirteen, all costs allocated to [c]lient will be waived," this would be a unanimous opinion.

This would also be a unanimous opinion if respondent had drawn up a contract that said, "When the total homes represented by [a]ttorney in this lawsuit exceed thirteen, all costs allocated to [c]lient will be waived." Then there would be nothing to interpret and presumably we would all agree appellant had no case.

But respondent did include the words "in the tract." And my understanding of contract interpretation does not allow us to ignore such plain language or to replace it with something else. To my mind, the words "in this tract" should have the same clear and conclusive effect that the words "in this lawsuit" would have had. By describing the homeowners covered by the costs clause with particularity, respondent eliminated any ambiguity in the contract. The cost waiver was to cover any other homeowners "in the tract" who signed up with him. This would be good business on his part - indeed, it proved to be excellent business - so it is not like we are ascribing to him some bizarre departure from ordinary practice, and I do not find the plain language of the cost clause susceptible of any other interpretation. I agree with appellants that had respondent meant to limit the cost waiver to a situation in which he had 13 plaintiffs in this lawsuit, the words "in this lawsuit" were the obvious way to do that. That is an easy and conspicuous way to handle it, and I see no reason why the attorney who drew up the contract should not be held to the significantly different language he chose.

To read it as my colleagues have read it, renders the promise in the clause completely illusory. The attorney has complete control over how many cases go into any one lawsuit. He could - as he did here - simply put other construction defect cases from the tract into another lawsuit. His obligation to provide the consideration he promised did not bind him in any way. It was entirely within his discretion whether to file a case with 13 homeowners or more.

In this case, the Miller/Pfleuger lawsuit was filed separately while this case was pending (February 2000). It was another construction defect case from the same housing tract. Had it been joined with the Petrik complaint, the cost waiver clause would have been activated under any construction of the contract. But it was not. It was filed separately.

I do not mean to suggest respondent acted improperly in filing the Miller/Pfleuger case separately. I have nothing to indicate that was the case. There may have been very good reasons for bundling those two actions separately. My point is simply to demonstrate the illusory nature of the contract when interpreted as the majority opinion interprets it. Under that interpretation, application vel non of the cost waiver clause is entirely in the hands of respondent.

What's more, I think respondent interpreted the clause the same way I do . . . at the outset. In May of 1999, he sent appellants an invoice for 1/10 of the costs thus far incurred. At that time, he had 10 plaintiffs, so the invoice reflected that appellants' share was 1/10. But those plaintiffs were spread out over four different lawsuits. The Petrik, Yamashiro, Gray, and Stetson cases, which eventually became the Petrik lawsuit, were not consolidated until a year later. Clearly, respondent was apportioning costs among all the lawsuits in the tract at that time, not among the plaintiffs in the Petrik case, which only had four plaintiffs then. Clearly, at that time he thought

the costs aspect of his contract with appellants covered lawsuits other than just their own. I still do.

The cost assessment should be reversed.

BEDSWORTH, ACTING P. J.

Notes:

[1.] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

[2.] The Petriks also sued David Epstein and Mahaffey's employee Sean McGee. These parties settled with the Petriks before trial.

[3.] In their reply brief, the Petriks argue for the first time nonsuit should not have been granted as to the claim for breach of fiduciary duty for fee splitting because there was "substantial evidence adduced during trial" on the issue. The issue is waived because it was noted only in appellants' reply brief, and not in their opening brief. (See, e.g., Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2010) ¶ 9:78.2, pp. 9-14 to 9-26, and cases cited therein.) Moreover, we fail to see any prejudice with respect to this issue because the Petriks recovered on the fee splitting issue in their eighth cause of action.

[4.] We calculated the Petriks' recovery as follows: The court's accounting awarded the Petriks $146,323.18 from the settlement proceeds. From the jury's special verdict the Petriks were awarded $27,283 ($5,032 costs + $1,100 interest + $21,151 interest). This gave the Petriks a subtotal of $173,606.18. This recovery must be offset by the $142,000 good faith settlement and $10,000 verdict on Mahaffey's cross-complaint. This calculates to a recovery of $21,606.18 (more than $300,000 below the settlement offer).

We note that in light of the trial court's award of $274,594.27 to Mahaffey for the cost of this suit, the Petriks will owe Mahaffey money in the end.

[5.] The Petriks assert that if they were the prevailing party their pre-offer costs would be close to $100,000. This sum plus their $21,606.18 recovery in the action does not exceed the settlement offer. Similarly, if we had reversed the $228,360 cost award, the Petriks' recovery would still not have exceeded the $401,000 settlement offer.
