THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number:	**2009-HICIL-44**
Proof of Claim Number:	**CLMN711647**
Claimant Name:	**Adebowale O. Osijo**
Claimant Number:	**CDV-2007-745**
Policy or Contract Number:	
Date of Loss:	

LIQUIDATOR'S CONSOLIDATED OBJECTION TO (1) CLAIMANT'S REQUEST FOR AN EVIDENTIARY HEARING AND (2) CLAIMANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND RESPONSES TO INTERROGATORIES

Roger A. Sevigny, Insurance Commissioner, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to (1) the request for an evidentiary hearing and (2) the motion to compel production of documents and responses to interrogatories filed by the claimant, Adebowale O. Osijo, MBA ("Claimant"). The Referee should deny the request and motion or, in the alternative, defer them until after the preclusion issue discussed below is resolved. Both the request and motion assume that the issue before the Referee is the enforceability of the 1991 settlement of Claimant's tort action against Home's insured. However, the enforceability of the settlement has already been exhaustively litigated by the Claimant in the California courts, and the courts have enforced the settlement and rejected Claimant's challenges. Therefore, the first and, in the Liquidator's view, dispositive question in this disputed claim proceeding is whether the final decisions of the California courts preclude the Claimant from challenging the settlement again. That issue can and should be resolved through briefing. Only if the California decisions did not preclude Claimant's renewed attack would

there be any potential need for discovery or evidentiary proceedings. As further reasons, the Liquidator respectfully states:

Background

1. This disputed claim proceeding arises from the Liquidator's determination of the Claimant's third-party claim in the Home liquidation. The Claimant seeks to recover for bodily injury he suffered allegedly because of the negligence of Home's insured Housing Resources Management, Inc. ("HRM"). The Claimant brought a personal injury action against HRM entitled Osijo v. Housing Resources Management, Inc., et al., No. C649881 (Superior Court of California, Alameda County) (the "HRM Action"). As is permitted by RSA 402-C:40, I, Claimant now seeks to assert a "direct action" claim against Home as insurer of the alleged tortfeasor. See Gonya v. Commissioner, New Hampshire Insurance Dept., 153 N.H. 521 (2006). The Claimant's proof of claim ("POC"), which is attached as Exhibit A, states that his claim is a third party claim (item 5) for personal injury (Item 10) and provides the conditional release of Home's insured HRM (Item 14) required of third-party claimants. The Proposed Second Amended Complaint in Equity attached to the POC makes clear that Claimant's third party claim concerns the injuries at issue in the HRM Action. POC, Exhibit, ¶ 1.

2. The HRM Action was settled in July, 1991, and Home paid $250,000 under the HRM policy to the trust account of Claimant's then attorney. See POC, Exhibit, ¶¶ 1-2, 7. A copy of the Settlement Agreement signed by Claimant is attached as Exhibit B. Since the settlement released Home's insured HRM in exchange for a payment (paid by Home), it eliminated any third party claim the Claimant might later assert against Home. A third-party claim depends upon the existence of a valid claim against Home's insured. See RSA 402-C:40. Where the insured has no further liability because the tort claim was settled, neither does Home.

3. Although the Claimant signed the settlement agreement at a mediation on July 25, 1991, he immediately became dissatisfied, and he has challenged the settlement repeatedly since 1991. As he states, he "has and had obdurately refused to accept the purported 'Voluntary Settlement Agreement,' as valid since July 25, 1991, and until eternity." POC, Exhibit, ¶ 4 (emphasis in original). However, the California courts have repeatedly rejected Claimant's challenges to the settlement, and those decisions have preclusive effect. The Liquidator accordingly determined in the Notice of Determination that since the California courts have upheld the settlement between Claimant and HRM, the Claimant has no third-party claim under the HRM policy in the Home liquidation. A copy of the Notice of Determination is attached to Claimant's letter objection initiating this disputed claim proceeding ("Objection") as Exhibit 2.

4. Claimant's request for evidentiary hearing and motion to compel both present issues concerning the July 1991 settlement of the HRM Action. Claimant requests an evidentiary hearing regarding an alleged conflict of interest involving his attorney (Georgia Ann Michell-Langsam of Ganong & Michell) in the HRM Action and the attorney's alleged unauthorized settlement of the HRM Action. Request for Evidentiary Hearing at 3-4. Claimant seeks to compel production of certain documents and orders concerning the settlement and its proceeds as well as information regarding malpractice actions against his attorney and the retention of defense counsel in Claimant's subsequent legal malpractice action against his attorney. Motion to Compel, Exhibits 2, 3.

5. As shown by the request for evidentiary hearing and motion to compel, Claimant is attempting to have the Referee conduct an inquiry into the enforceability of the 1991 settlement based on allegations of conflict of interest and lack of authority. Claimant's Objection also presents these issues.

ARGUMENT

6. The Referee should not conduct an evidentiary hearing or grant discovery concerning the enforceability of the 1991 settlement because the issue has been litigated and decided by the California courts. The first and potentially dispositive question is whether the several final decisions of the California courts preclude the Claimant from challenging the settlement again in the Home liquidation proceeding. The Liquidator determined that the enforceability of the settlement has been previously resolved against the Claimant in prior litigation, and that the settlement barred Claimant's third-party claim against Home. The preclusive effect of the prior litigation should be decided by the Referee as the first step in this disputed claim proceeding. That issue properly and most efficiently can be resolved by briefing based on a compendium of the relevant pleadings and decisions in the California actions (which the Liquidator will present in the Case File). Further proceedings would ensue only if it were determined that the California decisions did not preclude renewed challenges to the settlement. Accordingly, there should be no evidentiary hearing and no discovery, at least until the preclusion issue is addressed.

7. The Claimant has exhaustively litigated over the 1991 settlement in the California courts, which have finally resolved matters regarding the settlement in a series of decisions. The Alameda County Superior Court enforced the settlement – over Claimant's objections – on October 10, 1991, and that judgment was affirmed by the California Court of Appeal on July 16, 1992. Osijo v. Housing Resources Management, Inc., No. A055045 (Cal. Ct. App. First Dist. Jul. 16, 1992), review denied, No. S028364 (Cal. Sept. 30, 1992). A copy of the Court of Appeal's decision is attached as Exhibit C.

8. The Claimant's subsequent attacks concerning the settlement itself have also been rejected. See, e.g., Osijo v. Ganong and Mitchell, No. A068661 (Cal. Ct. App. First Dist. April 12, 1996) (at 8-9 rejecting claims of attorney conflict of interest), review denied, No. S053782 (Cal. June 26, 1996); Osijo v. Home Insurance Company, Nos. F042329, F043325 (Cal. Ct. App. Fifth Dist. Sept. 7, 2004) (at *19-24 rejecting claim of fraud in the settlement); Osijo v. Sevigny, No. F049063 (Cal. Ct. App. Fifth Dist. Dec. 12, 2006) (at *8-22 rejecting challenge to settlement for conflict of interest as well as additional attacks).[1] Copies of these decisions are attached as Exhibits D, E and F.

9. The California Court of Appeal itself anticipated the preclusive effect of its rulings in the Sevigny decision (Exhibit F). The court expressly noted that "[i]ssue preclusion bars relitigation of the conflict of interest claim here [against the Liquidator] just as it bars relitigation of that claim against Burnham Brown." Decision at *24. The Court also remarked that, "as plaintiff has not made any claim in this case that would entitled him to an order invalidating the judgment enforcing the settlement agreement, the fact that plaintiff would be unlikely to obtain relief in the liquidation proceedings does not show that they would be an inferior forum for him." Id. at *28-29.

10. Most recently, in 2007, Claimant filed a motion to set aside the enforcement order and nullify the settlement agreement, which the Alameda County Superior Court denied on June 21, 2007. The Court of Appeal affirmed on July 8, 2008, and both the California Supreme Court and the United States Supreme Court denied review. Osijo v. Housing Resources Management, Inc., No. A118833 (Cal. Ct. App. First Dist. Jul. 8, 2008), review denied, No.

[1] Claimant's claims against Home in the Home and Sevigny cases were dismissed based on the Order of Liquidation. Claimant filed his POC in the Home liquidation after the Court of Appeals decision in Sevigny ended his pursuit of Home in California. However, the Home and Sevigny decisions (and others) rejected Claimant's challenges to the enforcement order on the merits in addressing other defendants. Those rulings also preclude Claimant's claims against Home.

S165837 (Cal. Sept. 17, 2008), cert. denied, 129 S. Ct. 1341 (U.S. Feb. 23, 2009). A copy of the Court of Appeal's decision is attached as Exhibit G. The Court of Appeal noted that "[t]he parties have fully performed under the terms of the settlement agreement," and it concluded that "[i]t would be unjust and inequitable to allow appellant [the Claimant] to unwind more than a decade of decisions in the circumstances presented by this case." Decision at *24.[2]

11. In his POC and in this disputed claim proceeding, the Claimant again attacks the fully performed 1991 settlement agreement. The Proposed Second Amended Complaint in Equity attached to the POC expressly challenges the settlement. The asserted First Cause of Action seeks to "Nullify Settlement Agreement & Set Aside Enforcement Order Based on Wholly Unauthorized Acts of Attorney." POC, Exhibit at 1.[3] Claimant's Objection similarly attacks the settlement. Accordingly, the issue before the Referee in this disputed claim proceeding is whether the decisions of the California courts relied on by the Liquidator preclude the renewed attack on the settlement under preclusion principles.

12. The proper and most efficient way to address the preclusion issue is through briefing based upon the pertinent pleadings and decisions in the various California actions. Claimant's request for evidentiary hearing and motion to compel should be denied or, in the alternative, deferred because there is no need for discovery or evidentiary proceedings in the event that the Referee upholds the Liquidator's determination that the California decisions preclude Claimant from again challenging the enforceability of the 1991 settlement. If the Referee agrees with the Liquidator's view that the California decisions bar such challenges, and

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[2] The appellate decisions in these matters are unpublished. However, the Liquidator properly may rely on them for purposes of establishing preclusion. See Cal. Rules of Court, Rule 8.1115(b) (formerly Rule 977) ("An unpublished opinion may be cited or relied on: (1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; . . . .").

[3] The Proposed Second Amended Complaint in Equity attached to the POC is directed against the Liquidator, the law firm of Burnham Brown, and attorney Georgia Ann Michell-Langsam. Only the first cause of action is pertinent, as the second and third causes of action are not directed at the Liquidator.

thus any present claim against HRM or Home, then discovery and evidentiary hearings will be unnecessary. In these circumstances, it would be wasteful to allow discovery or evidentiary hearings without first addressing the potentially dispositive preclusion issue.

13. Accordingly, the Referee should deny Claimant's request for evidentiary hearing and motion to compel and instead issue a schedule for the briefing of the preclusion issue. The Liquidator will include all the pertinent California pleadings and decisions in the Case File due on May 8, 2009 under Section 14(b) of the Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation entered January 19, 2005 ("Claims Procedures Order"). At that point, this matter will be ready for briefing through written submissions under Section 15 of the Claims Procedures Order. In the briefing, the Liquidator will show how the California decisions fully support the Liquidator's claim determination.

CONCLUSION

For the foregoing reasons, the Referee should (a) deny Claimant's request for evidentiary hearing, (b) deny Claimant's motion to compel, and (c) set a schedule for the briefing of the preclusion issue based on the Case File which the Liquidator will file on or before May 8, 2009.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER OF INSURANCE OF THE STATE OF NEW HAMPSHIRE, SOLELY AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,
By his attorneys,
KELLY A. AYOTTE
ATTORNEY GENERAL

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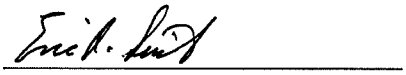
(617) 542-2300

April 15, 2009

Certificate of Service

I hereby certify that a copy of the foregoing consolidated objection was emailed to the Claimant on April 15, 2009.



Eric A. Smith

PROOF OF CLAIM
The Home Insurance Company,
Merrimack County Superior Court, State of New Hampshire 03-E-0106
Read Carefully Before Completing This Form
Please print or type

FOR LIQUIDATOR'S USE ONLY
DATE PROOF OF CLAIM RECEIVED
SCANNED
JAN 15 2007
JAN 12 2007
HICIL

Clmn 711647

The Deadline for Filing this Form is June 13, 2004.

You should file this Proof of Claim form if you have an *actual or potential claim* against The Home Insurance Company of any of its former subsidiaries* ("The Home") *even if the amount of the claim is presently uncertain.* To have your claim considered by the Liquidator, this Proof of Claim must be postmarked no later than June 13, 2004. Failure to timely return this completed form will likely result in the DENIAL OF YOUR CLAIM. You are advised to retain a copy of this completed form for your records.

1. Claimant's Name: Adebowale O. Osijo, MBA.
2. Claimant's Address: 2015 East Pontiac Way, Suite 203
Fresno, California 93726-3979

If your name, address, e-mail address, or telephone number set forth above are incorrect, or if they change, you must notify the Liquidator so she can advise you of new information.

3. Claimant's Telephone Number: (559) 273-5765
Fax Number: (559) 221-0585
Email address: adebowaleosij@hotmail.com

4. Claimant's Social Security Number, Tax ID Number or Employer ID Number: 405-19-5923

5. Claim is submitted by (check one):
a) ___ Policyholder or former policyholder
b) X Third Party Claimant making a claim against a person insured by The Home
c) ___ Employee or former employee
d) ___ Broker or Agent
e) ___ General Creditor, Reinsurer, or Reinsured
f) ___ State or Local Government Entity
g) ___ Other; describe: _____

Describe in detail the nature of your claim. You may attach a separate page if desired. **Attach relevant documentation** in support of your claim, *such as copies of outstanding invoices, contracts, or other supporting documentation.*

Please see the attached

6. Indicate the total dollar amount of your claim. If the amount of your claim is unknown, write the word "unknown", BUT be sure to attach sufficient documentation to allow for determination of the claim amount.

$ 3,000,000 (if amount is unknown, write the word "unknown").

7. If you have any security backing up your claim, describe the nature and amount of such security. Attach relevant documentation.

8. If The Home has made any payments towards the amount of the claim, describe the amount of such payments and the dates paid: Yes, $122500

9. Is there any setoff, counterclaim, or other defense which should be deducted by The Home from your claim?
Yes, $122,500

10. Do you claim a priority for your claim? If so, why: Yes, Personal injury

11. Print the name, address and telephone number of the person who has completed this form.
Name: Adebowale O. Osijo, MBA
Address: 2015 East Pontiac Way, Suite 203
Fresno, California 93726-3978
Phone Number (559) 273-5765
Email address adebowaleosij@hotmail.com

* The Home Indemnity Company, The Home Insurance Company of Indiana, City Insurance Company, Home Lloyds Insurance Company of Texas, The Home Insurance Company of Illinois, and The Home Insurance Company of Wisconsin.

12. If represented by legal counsel, please supply the following information:
    a. Name of attorney: _____
    b. Name of law firm: _____
    c. Address of law firm: _____
    d. Attorney's telephone: _____
    e. Attorney's fax number: _____
    f. Attorney's email address: _____

13. If using a judgment against The Home as the basis for this claim:
    a. Amount of judgment _____
    b. Date of judgment _____
    c. Name of case _____
    d. Name and location of court _____
    e. Court docket or index number (if any) _____

14. If you are completing this Proof of Claim as a Third Party Claimant against an insured of The Home, you must conditionally release your claim against the insured by signing the following, as required by N.H. Rev. Stat. Ann. § 402-C:40 I:

I, Adebowale O. Osijo (insert claimant's name), in consideration of the right to bring a claim against The Home, on behalf of myself, my officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives hereby release and discharge THOM (insert name of defendant(s) insured by The Home), and his/her/its officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives, from liability on the cause(es) of action that forms the basis for my claim against The Home in the amount of the limit of the applicable policy provided by The Home; provided, however, that this release shall be void if the insurance coverage provided by The Home is avoided by the Liquidator.

Claimant's Signature _____ 01-05-07 Date

15. All claimants must complete the following:

I, Adebowale O. Osijo (insert individual claimant's name or name of person completing this form for a legal entity) subscribe and affirm as true, under the penalty of perjury as follows: that I have read the foregoing proof of claim and know the contents thereof, that this claim in the amount of Three Million dollars ($ 3,000,000) against The Home is justly owed, except as stated in item 9 above, and that the matters set forth in this Proof of Claim are true to the best of my knowledge and belief. I also certify that no part of this claim has been sold or assigned to a third party.

Any person who knowingly files a statement of claim containing any false or misleading information is subject to criminal and civil penalties.

Claimant's Signature _____ 01-05-06 Date

16. Send this completed Proof of Claim Form, postmarked by June 13, 2004, to:

The Home Insurance Company in Liquidation
P.O. Box 1720
Manchester, New Hampshire 03105-1720

You should complete and send this form if you believe you have an actual or potential claim against The Home even if the amount of the claim is presently uncertain.

Adebowale O. Osijo, MBA.
2015 East Pontiac Way, Suite 203
Fresno, California 93726-3978
Telephone: 559-221-0585

Plaintiff In Propria Persona

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

CIVIL UNLIMITED DIVISION

ADEBOWALE O. OSIJO, MBA., Plaintiff, vs. ROGER A. SEVIGNEY, (Sued as the Commissioner of Insurance for the State of New Hampshire, and, in place of The Home Insurance Companies and Risk Enterprise Management, Ltd.); BURNHAM BROWN, (A Professional Law Corporation, sued in its corporate capacity, and in place of DAVID RAYMOND PINELLI, deceased); GEORGIA ANN MICHELL-LANGSAM, (An Attorney, sued in her individual capacity); and Does 1 through 10, Defendant.	Case No.: 04-CECG-02628-DSB **PROPOSED VERIFIED SECOND AMENDED COMPLAINT IN EQUITY TO:** **1) NULLIFY SETTLEMENT AGREEMENT & SET ASIDE ENFORCEMENT ORDER BASED ON WHOLLY UNAUTHORIZED ACTS OF ATTORNEY;** **2) NULLIFY ATTORNEY FEE RETAINER AGREEMENT BASED ON UNAUTHORIZED ACTS OF ATTORNEY & FOR AN ORDER OF DISGORGEMENT OF CLIENT'S MISAPPROPRIATED FUNDS; and** **3) SET ASIDE FRESNO COUNTY SUPERIOR COURT JUDGMENT IN CASE NO. 02-CECG-00002**

FIRST CAUSE OF ACTION
(Nullify Settlement Agreement & Set Aside Enforcement Order Based On Wholly Unauthorized Acts Of Attorney)

1. Plaintiff Adebowale O. Osijo, MBA., complains and thereafter alleges that at all times material herein, Georgia Ann Michell-Langsam, the personal injury attorney in a matter before the Alameda County Superior Court, titled: Osijo v Housing

Resources Management, Inc., Acorn I, Ltd., Acorn II, Ltd and Prostaff Security Services, Inc., Case No. 649881-6, without Plaintiff's informed knowledge and written authorization, initiated and stipulated with the Defendants' attorneys in the same personal injury case, (David Raymond Pinelli, deceased, and the then Law Offices of Larson & Burnham, now Burnham Brown), subject to the said Defendants' counsels' choice and payment of a private judge that the Alameda County Superior Court ordered the personal injury action to a private judge, (Judge Victor Mario Campilongo, retired) in a binding private mediation, at a place in San Francisco, California, called Judicial Arbitration and Mediation Services, (JAMS). Georgia Ann Michell-Langsam did not obtain Plaintiff's authorization before she stipulated his (Plaintiff's) substantive rights to a judicial trial, in accordance with the provisions of the *California Constitution, Article 1, Section 16*, be submitted to a private judge in a binding private mediation. If Plaintiff was informed and apprised by Georgia Ann Michell-Langsam of the stipulated order for the removal of his personal injury case to a private mediation in San Francisco, he will never ever have gone, and she will have been fired immediately.

2. Plaintiff complains and thereafter alleges that at all times material herein, the stipulated order of the Alameda County Superior Court for the removal of the aforementioned personal injury case to a private judge, for a binding private mediation is invalid for an indefinite period of time because Georgia Ann Michell-Langsam wholly lacked authority to initiate and stipulate that the personal injury action be removed to private mediation, without the Plaintiff's knowledge or consent. The resulting "Voluntary Settlement Agreement,", is invalid for an indefinite period of time because Georgia Ann Michell-Langsam wholly lacked authority to initiate and stipulate that the personal injury matter be removed to the authority a private judge, in a binding arbitration, without the Plaintiff's knowledge or consent. The order/judgment of the

Alameda County Superior Court, which enforced the purported "Settlement Agreement," as the final judgment of the said personal injury action is also invalid, and remains invalid, indefinitely, because it was based on the wholly unauthorized actions of Attorney Georgia Ann Michell-Langsam in the said personal injury case.

3. Plaintiff complains and thereafter alleges that at all times material herein, that as a client, his informed knowledge and written authorization, were required and mandatory as a matter of constitutional right in the State of California before Georgia Ann Michell-Langsam, as an attorney, can initiate a stipulated order for the removal of his action from the competent jurisdiction in the Alameda County Superior Court to the jurisdiction of a private judge, in a private mediation proceeding. Plaintiff was completely kept in the dark throughout the entire stipulation process by Georgia Ann Michell-Langsam.

4. Plaintiff complains, and, thereafter alleges that at all time material herein that he, either by implication or expression, did not, has not, and, will not ratify, the removal of his substantive rights in the aforementioned personal injury action from the jurisdiction of the Superior Court of Alameda County to that of a private judge in a private mediation. Plaintiff has and had **obdurately** refused to accept the purported "Voluntary Settlement Agreement," as valid, since July 25, 1991, and until eternity. He fired Georgia Ann Michell-Langsam as the Plaintiff's attorney in the personal injury action on September 13, 1991, when it became obvious that she had exceeded, and was exceeding her authority as the Plaintiff's attorney.

5. Plaintiff further complains, and, thereafter alleges that at all times material herein, that he, either by implication or expression, did not waive, has never waived, and will not waive his constitutional right to the judicial trial of his causes in the

personal injury action, in a competent jurisdiction in the State of California, and according to the California laws.

7. Plaintiff complains, and thereafter alleges that at all times material herein, Georgia Ann Michell-Langsam consummated the purported the "Voluntary Settlement Agreement," in a conscious disregard of the Plaintiff's challenge to the validity of the purported "Voluntary Settlement Agreement," and his request that the personal injury matter be taken to a jury trial. She, on Monday, July 30, 1991, collected a check issued by The Home Insurance Companies, in the value of $250,000, from David Raymond Pinelli and the Burnham Brown, without his knowledge or consent. She cashed the check, without the Plaintiff's knowledge and consent, and immediately misappropriated $127,500 to herself and for her own use and purposes, again, without the Plaintiff's knowledge or consent. She kept the balance of $122,500 for another two and a half years, again, without the Plaintiff's knowledge or consent, and in an apparent attempt to ruse Plaintiff into ratifying her unauthorized conduct. The exact words of David Pinelli to Georgia Ann Michell-Langsam in writing was " maybe we can pacify Wale with an immediate cash of $75,000."

8. Plaintiff complains and thereafter alleges that at all times material herein, that he terminated Georgia Ann Michell-Langsam on September 13, 1991, when it became obvious that she has usurped all his substantive rights in the said personal injury action in favor of enforcing the purported "Voluntary Settlement Agreement," to the express knowledge of David Raymond Pinelli and David Kizer, and in the open courtroom of the Alameda County Superior Court, Department 17. She simply ignored her termination as the Plaintiff's attorney. She, on September 23, 1991, executed a stipulated judgment with David Raymond Pinelli and David Kizer, which the Alameda County Superior Court executed and filed on October 10, 1991.

9. Plaintiff complains and thereafter alleges that at all times material herein, he is and was a tax accountant, in the City and County of Fresno, California, with a mailing address at 2015 East Pontiac Way, Suite 203, Fresno, California 93726-3978.

10. Plaintiff complains and alleges thereafter that at all times material herein, Defendant Roger A. Sevigney is the current Insurance Commissioner in and for the State of New Hampshire, with his mailing address at 56 Old Suncook Road, Concord, New Hampshire 03301. He is sued in place of The Home Insurance Companies, which is in a receivership process in the State of New Hampshire, and Risk Enterprise Management, Ltd. Plaintiff has no been statutorily notified of The Home Insurance been being placed into a receivership, nor was he served with the statutory claim form by the State of New Hampshire Insurance Commissioner, to use in filing claims with it and the California Insurance Guarantee Association.

11. Plaintiff complains, and thereafter alleges that at all times material herein, Defendant Burnham Brown is and was a successor-in-interest to Larson & Burnham, a professional corporation, duly licensed in the State of California. Its registered office and address is at 1901 Harrison Street, 11th Floor, Oakland, California 94604. Its mailing address is Post Office Box 119, Oakland, California 94604-0119. Burnham Brown was hired by The Home Insurance Companies, to represent Defendants Housing Resources Management, Inc., Acorn I, Ltd., and Acorn II, Ltd., in the aforementioned personal injury action. It is sued in place of David Raymond Pinelli.

12. Plaintiff complains, and therefore alleges that at all times material herein, Defendant Georgia Ann Michell-Langsam is and was an attorney, duly licensed to practice law in the State of California. She is now a sole legal practitioner, with her law office located at 1850 Mount Diablo Boulevard, Suite 605, Walnut Creek, California. She was hired on April 12, 1990, to represent the Plaintiff in the aforementioned personal

injury action, on a contingency fee basis. She is sued in her individual capacity and as an attorney.

13. Plaintiff complains and thereafter alleges that he does not know the true names and identities of Does 1 through 10, and therefore, reserves the right to amend this complaint to include them as Defendants, when their true names and identities are known.

WHEREFORE, Plaintiff prays for the followings:

A. That the purported "Voluntary Settlement Agreement" entered as the final judgment of the underlying, be declared a nullity and void, on the ground that Georgia Ann Michell-Langsam did not have authority to bind Plaintiff to the private mediation proceeding.

B. That the order which enforced the purported "Voluntary Settlement Agreement," be declared a nullity and void, on the ground that the Court lacked authority to bind Plaintiff with the unauthorized acts of an attorney;

C. That the Court accesses and awards the Plaintiff's damages from the personal injury case according to proof, against all the Defendants herein, jointly and or severally;

D. That the Court awards the Plaintiff punitive damages, subject to proof, against all the Defendants herein, jointly and or severally;

E. That the Court accesses and awards the Plaintiff damages and relief that it deems fit and just, against all the Defendants herein, jointly and or severally.

SECOND CAUSE OF ACTION
(Nullify Attorney Fee Retainer Based On Unauthorized Acts Of Attorney & For An Order Of Disgorgement Of Client's Misappropriated Funds)

14. Plaintiff incorporates the allegations of the First Cause of Action into this Second Cause of Action as if plead, separately and independently.

15. Plaintiff complains, and thereafter alleges that at all times material herein that Georgia Ann Michell-Langsam, without the Plaintiff's authority, consummated the purported "Voluntary Settlement Agreement," aforementioned personal injury case, by collecting a check issued by The Home Insurance Companies, in the amount of $250,000, from David Raymond Pineli, on Monday, July 30, 1991. She executed a Compromise and Release that was provided by David Raymond Pinelli, for and on behalf of the Plaintiff. She executed a dismissal with prejudice of the personal injury action and submitted these documents to David Raymond Pinelli. She thereafter cashed the check and over a period of two years misappropriated $127,500 to herself and for her own use and purposes, without the Plaintiff's knowledge or consent. The remaining $122,500 was ordered released to the Plaintiff by the Contra Costa County Superior Court, on her application, approximately two and a half years later.

16. Plaintiff complains and thereafter alleges that at all times material herein, his authority as a client is required and mandatory, as a matter of constitutional right before an attorney can consummate his personal injury action. Plaintiff did not ratify, has not ratified and will not ratify Georgia Ann Michell-Langsam's consummation of the aforementioned personal injury case. Plaintiff did not waive, has not waived and will not waive Georgia Ann Michell-Langsam's consummation of the aforementioned personal injury action.

17. Plaintiff complains and thereafter alleges that at all times material herein, Georgia Ann Michell-Langsam represented him with an actual conflict, in the personal injury action, which she stipulated with the State Bar of California, upon the his complaint against her, in *In the Matter of Georgia A. Michell-Langsam*, Case No. 92-0-11751-JG

WHEREFORE, Plaintiff prays for the followings:

A. That the Court declares the attorney fee retainer agreement between Plaintiff and Georgia Ann Michell-Langsam be declared a nullity and void, on the ground that violated the professional ethical requirements of the California State Bar, Rule 3-310 (A&B).

B. That the Court issues an order for the disgorgement of $127,500, together with interest, compounded at 10 percent annual interest rate, from June 30, 1991, that Georgia Ann Michell-Langsam misappropriated to herself and for her own use, without authority of the Plaintiff.

THIRD CAUSE OF ACTION
(To Set Aside Judgment)

18. Plaintiff incorporates the complaints and allegations of the First and Second Causes of Action into this Third Cause of Action as if separately and independently pled.

19. Plaintiff, has, since 1991, knocked every legal door in the State of California, including but not limited to the State Bar of California, Alameda County Superior Court, Contra Costa County Superior Court, the Fresno County Superior Court, the First District Court of Appeals, the Fifth District Court of Appeals, the Federal District Court in Los Angeles, the Federal District Court in Fresno, the Federal Court of Appeals for the Ninth Circuit, the California Supreme Court and the United

States Supreme Court, under any possible legal theory, all in an effort to show that Attorney Georgia Ann Michell-Langsam, without authority, usurped his substantive rights to a jury trial and consummated the personal injury action. Georgia Ann Michell-Langsam, in turn used the malicious prosecution lawsuits to try and dissuade the Plaintiff from challenging the Alameda County Superior Court's authority to order the personal injury action to a private judge in a binding private arbitration, under the aegis of the JAMS. The first judgment for malicious prosecution by the Contra Costa County Superior Court was vacated by the First District Court of Appeal on the ground that it will be unjust to find that Plaintiff prosecuted a malicious prosecution action, after the same Court found that Georgia Ann Michell-Langsam "wrongfully misappropriated" his funds in her trust. Undaunted by the appellate ruling, Georgia Ann Michell-Langsam, again, successfully prosecuted another malicious prosecution case in the Fresno County Superior Court, titled: Michell-Langsam v Adebowale O. Osijo, Case No. 02-CECG-00002, again, in a conscious attempt to "dissuade" the Plaintiff from challenging her authority to stipulate to the removal of the aforementioned personal injury action to a private judge in a binding private arbitration at JAMS.

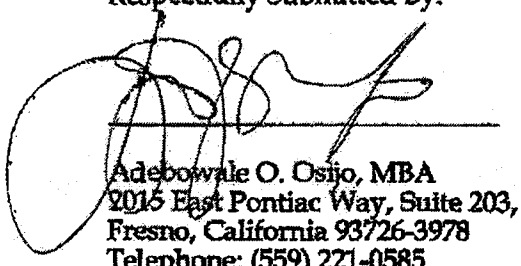
20. Plaintiff complains and thereafter alleges that at all times material herein, the Fresno County Superior Court does not have the authority to issue a judgment or order with the intention of dissuading the Plaintiff from challenging Georgia Ann Michell-Langsam's authority to usurp Plaintiff's substantive rights and consummate the aforementioned personal injury case.

WHEREFORE, Plaintiff prays that the judgment of the Fresno County Superior Court in the matter of Michell-Langsam v Adebowale O. Osijo, Case No. 02-CECG-00002, be declared void and a nullity, on the ground that the Fresno County Superior Court does not have the authority to issue a judgment, with the sole intention of trying

to dissuade Plaintiff from challenging Georgia Ann Michell-Langsam's authority to usurp Plaintiff's substantive rights and consummate the aforementioned personal injury case.

Dated this 26th day of December, in the year 2006.

Respectfully Submitted By:



Adebowale O. Osijo, MBA
2015 East Pontiac Way, Suite 203,
Fresno, California 93726-3978
Telephone: (559) 221-0585
Plaintiff In Propria Persona

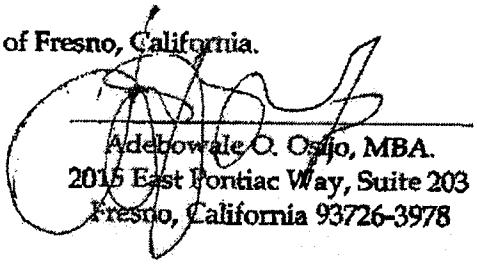
VERIFICATION

I, Adebowale O. Osijo, MBA., declare the followings:

1. I am the Plaintiff in this action.

2. I have read the foregoing Proposed Second Amended Complaint, and I understand the contents thereof.

3. The same is true and correct of my own personal knowledge and is executed this 26th day of December, in the year 2006, in the City and County of Fresno, California.



Adebowale O. Osijo, MBA.
2015 East Pontiac Way, Suite 203
Fresno, California 93726-3978

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

Wale O. Osijo, Plaintiff, -v- Housing Resources Management, Inc., et al., Defendants.	No. 649881-6 SETTLEMENT AGREEMENT

The above-referenced action came for a voluntary settlement conference on July 25, 1991 at the offices of Judicial Arbitration and Mediation Services in San Francisco, the Honorable Victor Campilongo, presiding. Plaintiff, Wale O. Osijo, was present, represented by his attorney, Georgia Ann Michell; defendants Housing Resources Management, Inc. and Filbert I & II, Ltd. were represented by attorney David R. Pinelli along with Don Fraga, his adjuster from Home Insurance; Intervenor, Department of Industrial Relations was represented by attorney, David Kizer; defendant Prostaff Security was represented by attorney David Van Dam.

The parties having discussed the matter and good cause appearing therefore, without admission of liability enter into the following global settlement of the above-entitled matter as follows:

1. In exchange for payment of the sum of $250,000.00 from

EXHIBIT B

defendants Filbert I & II, Ltd. and Housing Resources Management, Inc. to plaintiff, Wale O. Osijo, plaintiff shall release, dismiss with prejudice, defend and hold harmless and indemnify all defendants from all liability of whatever nature and kind including but not limited to any and all liens, known and unknown which arise or may arise and/or attorney fees, from the instant action except as hereinafter specifically provided for.

2. Intervenor, Department of Industrial Relations, hereby agrees to compromise their lien and dismiss their complaint in intervention with prejudice, in exchange for the sum of $10,000.00 from plaintiff, Wale O. Osijo, and assignment of $30,000.00 in the chose of action held by defendant, Prostaff Security and its owners and operators against Filbert I & II, Ltd., limited partnerships.

3. Cross-complainants Housing Resources Management, Inc. and Filbert I & II, Ltd. agree to dismiss their cross-complaint filed in this action with prejudice.

4. Intervenor Department of Industrial Relations further agrees to not oppose and to withdraw any opposition previously filed in the companion workers compensation action filed by plaintiff, Wale O. Osijo, for commutation of permanent disability benefits. It is understood that this is not a guarantee that the workers compensation appeals board will grant said motion, only that said motion shall be unopposed.

5. With respect to the potential lien of Highlands Hospital for medical services and care rendered in 1988 to plaintiff in the approximate amount of $33,000.00, which was a disputed subject of the award in the workers compensation case referenced above, intervenor, Department of Industrial Relations and plaintiff agree

that in addition to the compensation contained in paragraph 2-4, above, intervenor agrees to pay 60% of the negotiated (if any) sum due to Highlands and shall waive its right to a credit against plaintiff's damages recovered against defendants in the settlement amount of $250,000.00 as provided for in Labor Code § 3732 et seq. for the amount of the Highland lien, if any.

6. Defendants Housing Resources Management, Inc. and Filbert I & II, Ltd. hereby agree to pay Judicial Arbitration and Mediation Service for the cost of the settlement conference held on July 25, 1991. They further agree to waive collection of the award of $500.00 sanctions imposed in their favor as against attorney Georgia Ann Michell.

7. The parties hereto agree and further stipulate that the within settlement agreement shall satisfy the requirements of an settlement agreement on the record per CCP §664.

The undersigned sign this agreement with the full power and authority to bind their respective clients thereto.

Dated: July-25-1991

Wale O. Osijo

Dated: July 25, 1991

Georgia Ann Michell

Dated: 7/25/91

David R. Pinelli

Dated: 7/25/91

David A. Kizer

Dated: 7/26/91

David Van Dam

The above stated settlement is approved and accepted this date as set forth above.

Dated: 7-25-91

Hon. Victor Campilongo,
Judge Retired

Exhibit C

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

WALE O. OSIJO,

Plaintiff/Appellant,

v.

HOUSING RESOURCES MANAGEMENT, INC., et al.,

Defendant/Respondent.

DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS as Administrator, etc.

Intervener/Respondent.

A055045

Alameda Superior Court No. 649881-6

THE COURT:*

The trial court entered judgment in this action pursuant to a settlement agreement signed by appellant and the other parties to the litigation. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Appellant, who was working as a security guard, was seriously injured when he was shot repeatedly by an assailant armed with a semi-automatic weapon, while appellant was on duty

* Kline, P.J., Smith, J., and Peterson, J.

in the security office at the Acorn housing projects in Oakland. He brought this action to recover for his injuries.

The assailant responsible for appellant's injuries is in prison and judgment proof. Appellant's employer, the security guard company, is insolvent and had no insurance. The only solvent bystander appellant could sue were the owners of the Acorn projects, on a type of premises liability theory. (Actually, the owners are insolvent, too; but they did have insurance which would be applicable.)

Appellant had special damages in the form of medical bills of about $40,000. He had lost wages for a nine-month period of about $20,000. He has some residual physical limitations--for instance, he cannot stand for prolonged periods. The nature of any other cognizable damages or future loss of income remained quite speculative. In fact, appellant's income, in his new career as an accountant, is much greater now than it was at the time of the injury. Appellant wanted between $500,000 and $2.5 million to settle his case.

Pursuant to an agreement of counsel, a settlement conference was held under the auspices of the Judicial Arbitration and Mediation Service (JAMS). The settlement conference was presided over by a retired judge of the San Francisco Superior Court who has a long record of distinguished service in the management of litigation.

The negotiations were difficult, apparently, because appellant's demands were unreasonable. The retired judge and

appellant's counsel explained to appellant that the two most culpable defendants, the assailant and appellant's employer, had no money to pay any judgment appellant might receive. They also pointed out that, while appellant could expect to establish special damages of about $40,000 and lost wages of $20,000 at trial, the nature of any additional damages would be uncertain. Further, a jury was unlikely to think that the owner of the Acorn projects was liable in these circumstances, since there would be little an owner of property could have done which would have prevented the assailant's attack on appellant and his fellow security guards.

Ultimately, the case settled for $250,000, which appears to be a quite generous and fair settlement to appellant considering the problems with his claims. All parties, including appellant, executed the necessary settlement documents. Appellant and his counsel went out for a celebratory dinner at a lavish restaurant; appellant was in good spirits about the settlement and thanked his counsel for her help in achieving a favorable result. He repeatedly stated his satisfaction at the settlement.

The next day, appellant notified his counsel that he had decided he did not like the settlement after all, and wanted out of it. However, after hearing oral argument and considering the relevant evidence, the trial court entered judgment pursuant to the terms of the agreement.

II. DISCUSSION

We affirm. The trial court properly entered judgment pursuant to Code of Civil Procedure section 664.6.1/ Entry of such judgment was in accord with the terms of the written settlement agreement, which was knowingly entered into and signed by appellant; and entry of judgment was, therefore, proper despite the fact that appellant afterward had second thoughts about the deal: "In this case a binding enforceable settlement agreement was entered into by the parties." (Gallo v. Getz (1988) 205 Cal.App.3d 329, 334.)

Appellant makes a number of arguments on appeal which are totally lacking in merit. His principal claim is that he can get out of the settlement agreement he signed, because the settlement negotiations were presided over by a retired judge who is no longer an active member of the State Bar. The person who presides over settlement negotiations, however, need not be a member of the State Bar and need not have any legal training. This function may be performed by any person, including a minister, a businessperson, an arbitrator, or a friend of the parties. Moreover, we fail to see any fault in the retired judge's handling of these difficult negotiations. Specifically,

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1/ Code of Civil Procedure section 664.6 provides: "If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." All the prerequisites stated in the statute were met here.

his advice to appellant to accept the $250,000 offer appears to be entirely sound. Further, another well-respected and active trial judge, Judge Sutter, heard evidence and entered judgment pursuant to the settlement agreement.

Appellant makes a number of unsupported allegations regarding his counsel and opposing counsel, which we reject also. We agree that counsel for all parties were trying to achieve a settlement under trying circumstances, but that does not establish that the settlement was not fair or, more importantly, that appellant's will was so overborne that he can get out of the deal now.

Appellant makes other insinuations which lack support in the record and are frivolous. They do not merit discussion. We reject them.2/

III. DISPOSITION

The judgment is affirmed.

2/ In reaching these conclusions, we do not find it necessary to consider any matter contained in the amicus brief which appellant's counsel in the settlement negotiations sought to file. We, therefore, decline to accept the document for filing.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WALE O. OSIJO,

Plaintiff/Appellant,

v.

GANONG AND MICHELL et al.,

Defendant/Appellant.

A068661

Contra Costa Superior Court No. C92-05352

THE COURT:[1]

Wale O. Osijo (Osijo) brought this malpractice action concerning the representation he received from his former attorney, Georgia Ann Michell-Langsam (Michell), and other attorney defendants. Osijo's malpractice action against Michell resulted from his dissatisfaction with her representation of him in connection with a settlement agreement he signed in previous litigation while he was represented by Michell.

The trial court (Hon. James R. Trembath) granted summary judgment against the bulk of Osijo's malpractice claims, but found that Michell had wrongly misappropriated more than $12,000 in settlement proceeds which should have gone to Osijo. Michell also alleged in an amended cross-complaint that the termination of appellant's initial malpractice claims against her, other than the misappropriation claim, entitled her to damages for malicious prosecution. The matter of the cross-complaint and Osijo's remaining claims for breach of fiduciary duty proceeded to trial. The Honorable Barbara Zuniga granted a motion for a judgment against Osijo at the close of his evidence on the claim of breach of fiduciary duty. Also at the time of trial, it was brought to the

[1] Before Peterson, P.J.; King, J.; and Haning, J.

attention of Judge Zuniga that Osijo had not filed an answer to Michell's amended cross-complaint. The matter of the cross-complaint then proceeded as a default hearing, over appellant's objections. Judge Zuniga granted a judgment for prior litigation costs of more than $27,000 to Michell as damages for malicious prosecution. Osijo brought an appeal from this judgment; and Ganong and Michell, John F. Ganong (Ganong), and Michell brought a cross-appeal from the trial court's prior ruling that Michell had wrongly misappropriated more than $12,000 from Osijo's settlement proceeds.

We affirm Judge Trembath's ruling on summary adjudication, that Michell wrongly misappropriated more than $12,000 from Osijo's settlement proceeds. We also affirm his rulings granting summary adjudication against Osijo's other malpractice claims concerning his representation by Michell. We conclude we must reverse Judge Zuniga's ruling granting a motion for judgment against Osijo's claim of breach of fiduciary duty. We must also vacate the judgment for $27,000 against Osijo as damages for malicious prosecution. The record shows Osijo has already prevailed in part against Michell in this malpractice action, on the issue of misappropriation of settlement proceeds, although he did not prevail on other factual allegations of malpractice concerning the same settlement. More important, the action was and is still pending. This does not establish there was a previous action which was brought by Osijo without probable cause and which was finally terminated in Michell's favor, as is required for the separate tort of malicious prosecution. We, therefore, remand for further proceedings consistent with the views expressed in this opinion.

I. FACTS AND PROCEDURAL HISTORY

We summarize the relevant facts as briefly as possible. In 1989, Osijo filed a previous action entitled Osijo v. Housing Resources Management, Inc. (Super. Ct. Alameda County, No. 649881-6) (personal injury action). In this personal injury action, Osijo alleged he had been employed as a security guard at the Acorn Apartments, a housing project in Oakland, California when he was shot more than 15 times in his lower

body by assailants armed with high velocity rifles. This attack was carried out by the assailants in retaliation for physical and verbal abuse they suffered at the hands of other security guards earlier in the day. The lawsuit alleged that Osijo's injuries and damages resulted from the negligent failure of the defendants to warn him of the danger. These defendants included Osijo's employer, a security company, and the managers and owners of the housing complex he was guarding.

All the defendants were apparently insolvent or judgment proof. However, there was an applicable insurance policy issued by the Home Insurance Companies (Home), and Home retained the law firm of Larson and Burnham (the Larson firm) to defend Osijo's action.

Osijo had more than one attorney representing him at various times in the personal injury action; eventually in 1990, he retained Michell to represent him, executing a written retainer agreement. Under the terms of this written agreement, Michell was to be paid 40 percent of any settlement or damages award at trial, and 45 percent of any recovery if she was required to defend the damages award on appeal.

The action was eventually settled by Michell, the Larson firm, and Osijo. However, Osijo contended the settlement was improperly secured. This court (Division Two) affirmed an order of the trial court enforcing the settlement, over Osijo's objections. Under the terms of the settlement, the settling defendants paid $250,000 to Osijo and his counsel, Michell. Michell, however, took for herself 45 percent of the settlement proceeds or $112,500, not the 40 percent or $100,000 authorized by the written agreement for any settlement.

Osijo brought this action against Michell for malpractice, contending she had intentionally concealed from him facts relating to the settlement. According to Osijo's theory in the trial court, Michell concealed from him the fact that his damages could be much greater than the settlement amount, and also that she had an undisclosed conflict of interest as a result of her ties to Home and its retained law firm, the Larson firm, which was

by then defending Michell in another malpractice action. Osijo also contended Michell had committed malpractice and violated the terms of the written retainer agreement by taking too much of the settlement proceeds. Michell, in turn, filed a cross-complaint in the same action for malicious prosecution, contending Osijo wrongly sued her for malpractice.

Judge Trembath resolved certain matters on summary judgment or summary adjudication. He ruled Michell had violated the terms of the retainer agreement, because she "wrongfully appropriated" $12,500 too much from the recovery. He also granted summary judgment against Osijo's other claims of malpractice against Michell. Thereafter, Michell amended her cross-complaint to allege that the claims upon which summary adjudication were granted had been terminated in her favor, allowing her to pursue Osijo for malicious prosecution as a result of those claims.

We summarize the final state of Osijo's pleadings, as they stood at the time the matter went to trial, since the record before us is in a state of some confusion. Osijo, acting in propria persona, had brought a variety of malpractice claims and related claims of misconduct against his former attorney Michell, all relating to the same settlement. He had contended in this action that Michell's conduct in taking $12,500 from the settlement proceeds constituted a breach of contract and "misappropriation of . . . funds," a claim upon which he prevailed on summary adjudication before Judge Trembath. Osijo had also contended the same conduct constituted a breach of fiduciary duty; Judge Trembath did not make a dispositive ruling on this cause of action, which remained for trial.

In earlier pleadings, Osijo had also contended Michell's conduct constituted an undisclosed conflict of interest and "Antagonism and Refusal to Respect Discharge of Attorney," claims upon which Judge Trembath had granted summary adjudication against Osijo. Osijo had also previously complained to the State Bar about Michell's conduct; the State Bar initially declined to investigate, and instructed Osijo that he could only force the State Bar to begin an investigation by filing an original petition for such action with our Supreme Court, which Osijo did. Our Supreme Court denied Osijo's petition, but Osijo's

efforts did apparently result in further action by the State Bar, which allegedly did later investigate Michell, thereby causing her damage as a result of Osijo's claims, according to Michell's cross-complaint (filed in this same underlying action) for malicious prosecution.

Osijo's remaining claim for breach of fiduciary duty and the cross-complaint filed by Michell against Osijo proceeded to trial before Judge Zuniga. Judge Zuniga granted a motion for a judgment under Code of Civil Procedure[2] section 631.8 at the close of Osijo's evidence. Judge Zuniga also held Osijo was in default for not filing an amended answer to Michell's amended cross-complaint, and the trial proceeded as a default hearing. Judge Zuniga held Osijo's proceedings were "legally untenable" and awarded costs of defense to Michell for malicious prosecution of $27,729.05.

Osijo filed a timely appeal, and Michell filed a partial appeal from the previous ruling that she had wrongly misappropriated $12,500 from Osijo's settlement proceeds. We will discuss certain facts in greater depth later in this opinion, as they become relevant to specific legal issues.

II. DISCUSSION

We affirm the ruling that Michell wrongfully appropriated $12,500 in Osijo's settlement proceeds, contrary to the terms of the written retainer agreement. We affirm the summary judgment against Osijo's other claims for legal malpractice. However, we conclude we must reverse the trial court's granting of a motion for judgment under section 631.8 at the close of his evidence. We must also vacate the ruling in Michell's favor for malicious prosecution, because there was no showing she prevailed in this action or that this proceeding was brought without probable cause so as to justify a malicious prosecution award.

A. Wrongfully Appropriated Settlement Proceeds

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2 Unless otherwise indicated, all subsequent statutory references are to the Code of Civil Procedure.

The written retainer agreement between Michell and Osijo provided that if the matter were settled or resolved at trial, Michell would be entitled to recover 40 percent of the proceeds of the settlement or award. If the award were appealed by the defendants and successfully upheld, Michell would receive 45 percent of the proceeds. The precise wording of the relevant sentence in the fee clause of the written retainer agreement is as follows: "The fee shall consist of 40 % of the gross amount of recovery had by way of settlement or judgment and 45 % of the gross amount of recovery if the case is taken to appeal."

Osijo's case was resolved by settlement; and therefore, under the terms of the written retainer agreement, Michell's fee should have been 40 percent, or $100,000, of the $250,000 settlement, not the $112,500 which Michell subtracted from the settlement before turning the remainder over to Osijo. Michell does not contend otherwise, if the terms of the original written retainer agreement are applied.

However, Michell contends the terms of the original retainer agreement were later modified by the parties. At some point, Michell threatened to withdraw from the case unless Osijo rehired a worker's compensation attorney, Gary Snyder, whom she recommended he retain; and in a letter dated August 24, 1990, Osijo offered to pay Michell 45 percent of any recovery if she remained on the case without forcing him to rehire Snyder.

Significantly, Michell did not accept this offer that she would recover 45 percent of any proceeds if she did not force Osijo to rehire Snyder. By a letter dated September 13, 1990, she apparently rejected this offer: "This letter is to inform you that you must rehire Gary Snyder or I will get out of the case." There is also no other evidence in the record which shows the parties ever agreed on a 45 percent fee.

We apply de novo review to the trial court's orders granting summary judgment or summary adjudication, independently interpreting the language of the retainer agreement. (See *Perkins* v. *Howard* (1991) 232 Cal.App.4th 708, 712-713.) We find

nothing in the retainer agreement or the record which supports Michell's claims that she was entitled to 45 percent of the proceeds of the settlement.

Michell implicitly concedes she has no such entitlement under the terms of the written retainer agreement, but she contends she accepted Osijo's later offer of a 45 percent share by her performance, because she did, in fact, continue to represent Osijo. However, this was something she was already obligated to do by the written terms of the retainer agreement, and the written retainer agreement which she had previously presented to Osijo for his signature was never modified in writing to increase her fee. The retainer agreement states as follows: "This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out." Here there is obviously no "instrument in writing signed by both" Michell and Osijo, nor is there any evidence of "an oral agreement to the extent that the parties carry it out." Michell rejected Osijo's written offer by a letter in writing. There is also no evidence of an "oral agreement" on the new 45 percent fee which Michell and Osijo accepted by performance. The trial court properly granted summary adjudication on this point, finding that Michell's fee under the written retainer agreement was 40 percent, and that she "wrongfully appropriated" the additional $12,500 she subtracted from Osijo's settlement proceeds.

This case is governed by the provisions of Business and Professions Code section 6147, which provides in pertinent part: "(a) . . . The contract [for legal services] shall be in writing and shall include, but is not limited to, all of the following: [¶] (1) A statement of the contingency fee rate that the client and attorney have agreed upon." These provisions were enacted by the Legislature in order to protect clients and avoid fee disputes by having clear written agreements as to fees. (See *Alderman* v. *Hamilton* (1988) 205 Cal.App.3d 1033, 1036-1038 (*Alderman*).)

Here the original written fee agreement met the requirements of Business and Professions Code section 6147, but the subsequent exchange of letters between Osijo and

Michell did not. The original fee agreement also contained restrictions on subsequent modifications which were not satisfied by the subsequent exchange of letters in this case. We agree with the trial court that Michell's attempt to create an entitlement to a 45 percent fee from these sources violated Business and Professions Code section 6147 and the provisions of the original fee agreement. (See *Alderman, supra*, 205 Cal.App.3d at p. 1037.)

The trial court properly granted summary adjudication on this issue, finding that Michell wrongfully appropriated $12,500 of the settlement proceeds when she attempted to disregard the provisions of the parties' written fee agreement.

B. Osijo's Other Malpractice Claims Against Michell

Judge Trembath granted summary judgment against Osijo's other claims of malpractice. We affirm.

1. Nondisclosure

Osijo contends Michell had an undisclosed conflict of interest in representing him, because the defense of his personal injury action was under the control of Home, by and through its attorneys, the Larson firm; and Michell herself was insured against malpractice by Home and was defended in a later malpractice action by the Larson firm. We agree these circumstances would reasonably excite suspicion; and in other contexts, very serious questions might be raised about the need for disclosure to a client of these facts. (See *Jeffry* v. *Pounds* (1977) 67 Cal.App.3d 6, 10-12; *Stanley* v. *Richmond* (1995) 35 Cal.App.4th 1070, 1087-1088 (opn. of Phelan, J.) (*Stanley*).) However, in the context of the present case, we are limited by the record made below, which shows without contradiction that Osijo's representation by Michell had concluded before she was sued by another party for malpractice and was defended by the Larson firm in that matter. Consequently, the record before us shows Michell would have had nothing to disclose to Osijo during the time of her representation of him concerning the Larson firm or any claims made against her Home policy.

Osijo urges that Michell nevertheless had a duty to disclose the fact that her malpractice insurer, Home, was also controlling the defense in Osijo's personal injury litigation. However, the evidence before us shows Michell did not know that the insurer controlling the defense of Osijo's personal injury action was Home until this was disclosed in discovery in March 1991, long after she assumed representation of Osijo. Further, we decline on this record to impose a duty upon counsel to disclose to clients the identity of counsel's insurer, when there are presently no claims made or pending against the policy in question which would create a conflict of interest. No such claims were filed until long after Michell ceased representing Osijo. Further, the subject matter of the Osijo personal injury action had nothing to do with any unasserted claims for malpractice against Michell, and our Supreme Court has recently observed that the rules against attorney conflicts of interest are directed to situations in which a link between the subject matters of two representations or financial ties would give an attorney an incentive to compromise a client's claim at a discount; and we see no such incentive on the facts of record here, prior to the assertion of a claim against Michell which might be covered by her Home policy and have some substantial relationship to Osijo's case. (See *Santa Clara County Counsel Attys. Assn.* v. *Woodside* (1994) 7 Cal.4th 525, 546-547; *Flatt* v. *Superior Court* (1994) 9 Cal.4th 275, 283 (*Flatt*).) Consequently, we agree with the trial court that summary judgment on this claim was proper.[3]

2. Summary Judgment Against Other Claims of Malpractice

Osijo also asserted Michell was liable to him on a cause of action which he described as "Antagonism and Refusal to Respect Discharge of Attorney." The trial court properly granted summary judgment against this cause of action based upon the applicable one-year statute of limitations.

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[3] The case would be different if the evidence showed there was an actual conflict between Michell's duty to Osijo and her own later defense by Home and the Larson firm. We affirm the summary judgment on the narrow ground that the evidence of record does not demonstrate that such an actual conflict existed during the period Michell represented Osijo.

The relevant statute of limitations is the one-year statute, section 340.6, which requires that such an action against an attorney be brought within one year of the date when the plaintiff discovers the facts constituting the wrongful act or omission. The evidence before the trial court showed Osijo did not assert this particular claim within the applicable one-year time period.

Osijo first asserted this cause of action in March 1993. All of the acts complained of, however, occurred during the period of Osijo's representation by Michell, which ended in February 1992; and he was necessarily aware of those facts and the "Antagonism" they caused to him at the time they occurred. For instance, Osijo complains that Michell attempted to file an amicus curiae brief in this court (Division Two) in January 1992 which sought to enforce the terms of the settlement he was trying to avoid. We agree with Osijo that the filing of a brief contrary to the interests of a former client raises very serious ethical questions; for this reason, this court refused to accept the brief in question for filing. In any event, Osijo necessarily learned of the attempted filing of the brief at the time it occurred, since a copy of the brief was served on him. For purposes of section 340.6, he knew of the acts complained of at the latest in January 1992, but did not bring this cause of action within one year as he was required to do.[4]

Osijo also contends the trial court erred in granting summary judgment to Ganong, who he alleged was Michell's law partner. However, no independent acts by Ganong were alleged, and his liability on these claims could only have been derivative as a result of Michell's actions. Since we affirm the summary judgment against Osijo on these claims, the trial court properly entered summary judgment in favor of Ganong as well. Further, it appears Ganong had retired some years previously and played no role in these events.

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[4] We affirm summary judgment against this cause of action solely on the basis of the statute of limitations, and not on any other ground. It is apparent that if not for the bar of the statute of limitations, very serious questions might be raised which would have precluded summary judgment. (See *Flatt, supra*, 9 Cal.4th at pp. 282-285.)

C. The Motion for Judgment on the Fiduciary Duty Claim

After Osijo presented evidence at the court trial in favor of his claim of breach of fiduciary duty, Judge Zuniga granted a motion for judgment on this claim under section 631.8. Michell contends we are required to affirm this action granting a judgment under section 631.8 at the close of evidence in a court trial if the judgment is supported by substantial evidence, citing *Rodde* v. *Continental Ins. Companies* (1979) 89 Cal.App.3d 420, 423-424. However, more recent authority from our Supreme Court makes clear that where, as here, the underlying facts concerning such matters as the appropriation of client funds are no longer subject to dispute, and the only question is the legal one of whether such action constitutes a breach of fiduciary duty, we exercise de novo review. (*Locklin* v. *City of Lafayette* (1994) 7 Cal.4th 327, 369-371 (*Locklin*).)

We conclude we must reverse under either standard. Judge Trembath had previously found Michell had "wrongfully appropriated" to herself $12,500 in settlement proceeds which belonged to Osijo. The wrongful appropriation of client funds is a clear breach of the fiduciary duty owed by an attorney to a client. Judge Zuniga's ruling to the contrary is not supported by substantial evidence and was legally erroneous. (See *Locklin*, *supra*, 7 Cal.4th at pp. 369-371.)

The misappropriation of client funds held in trust by an attorney clearly constitutes a "breach of trust" in violation of the attorney's fiduciary duties. (*Copren* v. *State Bar* (1944) 25 Cal.2d 129, 134-135; *Baca* v. *State Bar* (1990) 52 Cal.3d 294, 304-305; see also *Mirabito* v. *Liccardo* (1992) 4 Cal.App.4th 41, 44-46 [Actions by an attorney which violate the rules of professional conduct may also constitute a breach of fiduciary duty.].) Here Michell cashed a settlement check without her client's knowledge or consent at a time when her right to any fee was still disputed, and used $100,000 for her own immediate purposes. She then later "wrongfully appropriated" an additional $12,500 held in trust for her client, again without her client's knowledge or consent, and apparently spent that money as well. We are, therefore, astounded by the trial court's ruling that

Michell did not violate any fiduciary duty owed to her client. This ruling is simply not supported by substantial evidence, and is legally erroneous. (See *Locklin, supra*, 7 Cal.4th at pp. 369-370.)

The trial court apparently reached this result because it observed that Osijo had not adduced any expert testimony that an attorney who has "wrongfully appropriated" client funds has breached a fiduciary duty. There is no need for expert testimony, however, as to obvious propositions. (See *People* v. *Johnson* (1993) 19 Cal.App.4th 778, 789-790.) This is especially true as to a question of law in a court trial, where the trial court is, or should be, already an expert in the law. Expert testimony is not required to show attorney malfeasance where the facts are so clear as to obviate the need for expert testimony. (*Stanley, supra*, 35 Cal.App.4th at p. 1093 [A judgment for nonsuit based upon the absence of expert testimony regarding attorney duties was reversed.]; accord, *Goebel* v. *Lauderdale* (1989) 214 Cal.App.3d 1502, 1508-1509.)

The judgment in favor of Michell on the cause of action for breach of fiduciary duties must be reversed.

D. Malicious Prosecution

Judge Zuniga also granted Michell damages for malicious prosecution, finding this action was not legally tenable. However, it is well established that a malicious prosecution action cannot be brought until a previous action has been terminated in favor of the defendant, and Michell obviously had not prevailed in this action, which was and is still pending. In fact, it appears Osijo has already prevailed in part in the action, and his other claims on which he did not prevail would not justify damages for malicious prosecution in any event. We, therefore, vacate the award of damages for malicious prosecution.

As our Supreme Court has repeatedly observed, it is "hornbook law" that damages may not be awarded for malicious prosecution of a prior action, unless the prior action is terminated in favor of the defendant. (See *Babb* v. *Superior Court* (1971) 3

Cal.3d 841, 845-847; *Lackner* v. *LaCroix* (1979) 25 Cal.3d 747, 749; *Sheldon Appel Co.* v. *Albert & Oliker* (1989) 47 Cal.3d 863, 871.) This court (Division Five) has also repeatedly observed that malicious prosecution actions may not be pursued unless the prior action has been favorably terminated. (*Walsh* v. *Bronson* (1988) 200 Cal.App.3d 259, 263-264 (opn. of Haning, J.); *Green* v. *Uccelli* (1989) 207 Cal.App.3d 1112, 1121 (*Green*) (opn. of King, J.) ["Clearly there has been no favorable termination of the underlying . . . action . . . , since [an] appeal from the court's judgment is pending before this court."].) Here, the malpractice action Osijo brought against Michell has not even terminated; it is still pending; further, Osijo has prevailed in part in this malpractice action.

Judge Zuniga did not find, and could not have found, that this action had terminated in favor of Michell. We are, therefore, mystified by the award of damages to Michell for malicious prosecution; there is no legal basis for such an award in any action which is still pending and in which Michell has not prevailed. (See *Jenkins* v. *Pope* (1990) 217 Cal.App.3d 1292, 1297-1301; *Eells* v. *Rosenblum* (1995) 36 Cal.App.4th 1848, 1854 (*Eells*).)[5]

Michell apparently now concedes the damages for malicious prosecution could not be based on the fact that Osijo filed certain pleadings in an action which is still pending, even though this was the trial court's articulated basis for its damages award on

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[5] In light of this legal conclusion, we find it unnecessary to more explicitly address the trial court's conclusion that Osijo was in default for failure to answer Michell's amended cross-complaint for malicious prosecution, although this ruling also appears erroneous. No such cross-complaint could properly be filed while the underlying action was still pending; and in fact, Osijo not only answered the first cross-complaint with an answer that he could have been allowed to orally amend at trial so as to apply to the amended cross-complaint, he also prevailed in part in the prior action, which was still pending. The prerequisite for a judgment in Michell's favor for malicious prosecution was, therefore, simply lacking, and the trial court erred in entering judgment against Osijo on this cause of action in any event. (See *Green, supra*, 207 Cal.App.3d at p. 1121 [No malicious prosecution action may be brought while the previous action is still pending.]; *Rose* v. *Lawton* (1963) 215 Cal.App.2d 18, 20-21 [Even after default in the trial court, legal defects in a cause of action as pleaded may be raised on appeal.]; cf. *Paramount General Hospital Co.* v. *Jay* (1989) 213 Cal.App.3d 360, 368-369 [A favorable termination of the *severable* causes of an action must occur prior to the bringing of a malicious prosecution action.].) Here there is no favorable termination and only a single cause of action for legal malpractice, enunciated on related legal theories, concerning the same settlement.

the malicious prosecution action. At oral argument, Michell contended, instead, that the malicious prosecution damages could be based on the fact Osijo filed a complaint with the California Supreme Court regarding Michell, which the Supreme Court declined to hear. Michell now implies that the final disposition of that complaint could be used to uphold the damages award for malicious prosecution. However, the trial court did not base its damage calculation on the Supreme Court complaint alone, as Michell implies. The trial court clearly awarded damages for the "initial filings" in this action, which was improper.

Further, Michell apparently had no cognizable damages from the filing of the Supreme Court complaint, as review of the record makes clear. Osijo filed a complaint with the State Bar regarding Michell. The State Bar initially declined to investigate the matter, and told Osijo he would have to file a complaint with our Supreme Court in order to appeal the State Bar's decision not to investigate. Osijo did so. The Supreme Court in its discretion dismissed that complaint, which did not raise issues of statewide application; but this dismissal, while final, does not reflect on the merits of the dispute so as to allow us to conclude the matter had been favorably terminated or was brought without probable cause. (See *Eells, supra*, 36 Cal.App.4th at pp. 1854-1855.)

Moreover, even if as Michell suggests the filing of that complaint damaged her because it led to a renewed State Bar investigation, it is also well established that the filing of a State Bar complaint by a client does not result in cognizable damages to an attorney, because those damages simply result from the actions of the State Bar acting as an arm of the Supreme Court. (See *Stanwyck v. Horne* (1983) 146 Cal.App.3d 450, 460-461.) Finally, this is a case in which Osijo prevailed on his claims that Michell did, in fact, wrongly misappropriate client funds. It would be unjust to award an attorney damages in an action for malicious prosecution brought in such circumstances.

The trial court's judgment in Michell's favor for malicious prosecution must be vacated.

III. DISPOSITION

The trial court's order of summary adjudication in favor of Osijo regarding wrongful appropriation of settlement proceeds is affirmed. The trial court's order granting summary judgment against Osijo's other claims for nondisclosure and "Antagonism" are also affirmed. The trial court's order granting judgment against Osijo on his cause of action for breach of fiduciary duty is reversed. The judgment against Osijo for malicious prosecution is vacated. The matter is remanded for further proceedings consistent with the views expressed in this opinion. Costs on appeal are awarded to Osijo.

LexisNexis

13 of 13 DOCUMENTS

ADEBOWALE O. OSIJO, Plaintiff and Appellant, v. THE HOME INSURANCE COMPANY et al., Defendants and Respondents. Fresno County ADEBOWALE O. OSIJO, Plaintiff and Appellant, v. RISK ENTERPRISE MANAGEMENT LTD. et al., Defendants and Respondents.

F042329, F043325

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

2004 Cal. App. Unpub. LEXIS 8173

September 7, 2004, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Fresno County, No. 02-CECG-00266 No. 02-CECG-00266 Fresno County. Stephen J. Kane, Judge.

DISPOSITION: The appeal against Home and REM is dismissed. The judgment is affirmed with respect to the remaining respondents. Plaintiff's request for sanctions is denied. Costs are awarded to respondents.

COUNSEL: Adebowale O. Osijo, in pro. per., for Plaintiff and Appellant.

Greenan, Peffer, Sallander & Lally, James S. Greenan, John P. Makin, and Erin D. Lopez for Defendants and Respondents The Home Insurance Company and Risk Enterprise Management Ltd.

Murphy, Pearson, Bradley & Feeney and Aaron K. McClellan for Defendants and Respondents Murphy, Pearson, Bradley & Feeney, James A. Murphy, and Antoinette W. Farrell.

Burnham Brown, Robert J. Lyman and Jennifer R. Thomas for Defendant and Respondent Burnham Brown.

[*2] Michell-Langsam and Georgia Ann Michell, in pro. per., for Defendant and Respondent Georgia Ann Michell.

JUDGES: Wiseman, J.; Vartabedian, Acting P.J., Cornell, J. Concurred.

OPINION BY: Wiseman

OPINION

Plaintiff and appellant Abedowale O. Osijo (plaintiff) settled a personal injury action in 1991. Since that time, plaintiff has filed numerous lawsuits against the insurers and attorneys involved in that case and subsequent litigation. In this action, plaintiff, in pro. per., filed suit against defendants and respondents The Home Insurance Company (Home); Risk Enterprise Management Ltd. (REM); Burnham Brown; Georgia Ann Michell-Langsam (Michell); and Murphy, Pearson, Bradley & Feeney (MPBF), James A. Murphy and Antoinette W. Farrell (collectively, the MPBF parties) for fraud and invasion of privacy.

In resolving the issues through several demurrers, motions for summary adjudication, and a bench trial, the

court found the claims barred by the statute of limitations and the litigation privilege. We affirm.

PROCEDURAL AND FACTUAL HISTORIES

This case is a procedural and factual maze with litigation in both the state and federal trial and appellate courts spanning over 15 years. We [*3] do our best to summarize it here.

In 1988, plaintiff was shot several times while he was working as a security guard at a housing project in Oakland, California. In 1989, plaintiff filed a personal injury action against Housing Resources Management, Inc., and his employer, the security guard company, among others. (See *Osijo v. Housing Resources Management, Inc., et al.*, Super. Ct. Alameda County, 1991, No. 649881-6.) Plaintiff retained Michell to represent him. All the defendants were apparently insolvent or judgment proof, but there was an applicable insurance policy-Housing Resources Management, Inc., was insured under a Home general commercial liability policy. Home retained the law firms of Larson & Burnham and MPBF to defend. In July 1991, the matter settled for $ 250,000. However, the following day, plaintiff notified his counsel that he wanted out of the agreement. The trial court nonetheless entered judgment pursuant to the terms of the settlement. Plaintiff appealed, and the First District Court of Appeal affirmed the judgment. The California Supreme Court denied plaintiff's petition for review. (See *Osijo v. Housing Resources Management, Inc., et al.* (July 16, 1992, A055045) [*4] [nonpub. opn.], review den. Sept. 30, 1992, S028364.)

Thereafter, plaintiff filed a legal malpractice action against Michell, her law firm and several other attorneys. Plaintiff alleged his attorneys failed to disclose a prior relationship with Home and Larson & Burnham-specifically that they were insured by Home for legal malpractice and that Larson & Burnham was representing them in another professional negligence action. Plaintiff alleged his attorneys set up a bogus settlement conference, "tricked" and "snookered" him into signing the settlement agreement, and took too much of the settlement proceeds. (See *Osijo v. Ganong and Michell, et al.*, Super. Ct. Contra Costa County, 1994, No. C92-05352.) The defendants filed a cross-complaint against plaintiff for malicious prosecution and abuse of process. Michell was originally defended by Burnham Brown (the successor to Larson & Burnham), but was later defended by the MPBF parties. The malpractice claim went to trial in 1994 and was decided against plaintiff. The defendants were awarded in excess of $ 27,000 on the cross-complaint.

Plaintiff appealed, and the First District Court of Appeal affirmed the judgment with respect [*5] to the malpractice claim, but reversed and remanded on the breach of fiduciary duty claim. The court vacated the judgment on the malicious prosecution claim. (See *Osijo v. Ganong and Michell, et al.* (Apr. 12, 1996, A068661) [nonpub. opn.].) The trial court subsequently awarded plaintiff $ 12,500 against Michell. The First District Court of Appeal affirmed that judgment. (*Osijo v. Ganong and Michell, et al.* (Feb. 2, 1998, A077882) [nonpub. opn.].)

In March 1998, plaintiff filed suit in district court, alleging various claims for civil rights violations against Home; Home's successor and manager of its claims and liabilities, REM; Michell; several of Michell's associates; an attorney with Larson & Burnham; several attorneys with MPBF; and employees of the Internal Revenue Service. Plaintiff alleged that certain of the attorney defendants maliciously instituted a tax collection proceeding against plaintiff and submitted plaintiff's entire file to employees of the Internal Revenue Service. Among the myriad allegations, plaintiff also asserted that Michell conspired with Home's attorney to settle the original personal injury action. Plaintiff sought damages in excess of $ [*6] 3 million. The district court granted numerous motions to dismiss filed by the private parties and entered judgment in favor of the United States on plaintiff's civil rights claims. [1] (See *Osijo v. United States of America, et al.* (C.D.Cal. Mar. 5, 1999, No. CV 98-1880-CAS (BQR)) 1999 WL 358686.)

1 The district court did find in favor of plaintiff on his claim that the Internal Revenue Service failed to issue a notice of deficiency to his "last known address."

The Ninth Circuit Court of Appeals affirmed. (See *Osijo v. Weiner, et al. (9th Cir. 2000) 232 F.3d 895, 2000 WL 1047109.*) The United States Supreme Court denied plaintiff's petition for a writ of certiorari. (See *Osijo v. Weiner, et al. (2001) 531 U.S. 1150, 148 L. Ed. 2d 966.*)

On April 12, 2001, plaintiff filed another action against Home; REM; Michell; Michell's law firm and several of its attorneys; Burnham Brown; the MPBF

parties; and the federal employees in the district court action, along with [*7] two government attorneys. Plaintiff asserted claims for deprivation of access to court, invasion of privacy and fraud based on allegations that the defendant attorneys conspired to release his legal and medical files to the Internal Revenue Service, and Home conspired to obtain a fraudulent judgment in the personal injury action. This time, plaintiff sought damages in excess of $ 10 million. (See *Osijo v. Robbins, et al.*, Super. Ct. Fresno County, 2001, No. 01CECG01279.) The case was removed to district court. Pursuant to plaintiff's request, the federal claims were dismissed with prejudice. The remaining claims were dismissed without prejudice to their being litigated in state court. (See *Osijo v. Robbins, et al.* (E.D.Cal. Sept. 4, 2001, No. CV F 01-5496 AWI LJO).)

On January 25, 2002, plaintiff filed the instant action against Home; REM; Burnham Brown; Michell; Michell's law firm and former attorneys; and the MPBF parties. Plaintiff alleged two claims: 1) extrinsic fraud in his underlying personal injury action, and 2) deprivation of privacy rights and interests in legal and medical files.

On April 16, 2002, the trial court sustained without leave to amend the demurrer [*8] of the MPBF parties to the first cause of action, but overruled it as to the second cause of action. The court also sustained without leave to amend the demurrer of Michell, her firm and attorneys to the first cause of action, but overruled it as to the second cause of action. The court found that the first cause of action for fraud was barred by the litigation privilege. The court overruled the demurrers of REM and Burnham Brown in their entirety.

On October 7, 2002, the trial court granted Home's motion for summary judgment. The court found Home met its burden of establishing that the first cause of action was barred by the litigation privilege and both the first and second causes of action were barred by the applicable statute of limitations. The court denied REM's motion for summary judgment, finding it failed to show it did not exist during the time of the alleged disclosure of legal and medical records. REM did not move in the alternative for summary adjudication.

On November 15, 2002, the trial court granted the MPBF parties' summary adjudication as to the second cause of action, concluding it was barred by the applicable statute of limitations. The court also granted Burnham [*9] Brown's motion for summary adjudication as to the first cause of action, finding it was barred by the litigation privilege and the applicable statute of limitations. The court treated Burnham Brown's motion for summary adjudication of the second cause of action as a motion for judgment on the pleadings. The court reasoned that plaintiff's allegations against Burnham Brown failed to state a valid claim for invasion of privacy because, as defense counsel in the personal injury action, Burnham Brown had a right to obtain plaintiff's medical information. The motion for judgment on the pleadings was granted with 10 days' leave to amend. The court later sustained Burnham Brown's demurrer to the second cause of action without leave to amend, finding plaintiff failed to allege any new facts to cure the defect.

Following a court trial on the affirmative defenses, judgment was entered in favor of the remaining defendants, including REM and Michell. The court found that the evidence established that 1) plaintiff had actual knowledge in 1993 of facts upon which his suspicions of fraud were based and 2) plaintiff was aware that the defendants turned over his legal and medical files to the Internal [*10] Revenue Service in 1997. Thus, the court concluded that both the fraud and invasion of privacy claims were barred by the applicable statutes of limitation. The court denied plaintiff's motion for a new trial.

Plaintiff appealed. We granted Home and REM's motion to consolidate the two separate appeals filed by plaintiff.

DISCUSSION

Plaintiff claims error by the trial court in finding his fraud claim barred by the litigation privilege and both the fraud and invasion-of-privacy claims barred by the applicable statute of limitations. Before reaching the merits, we first address Home and REM's motions to dismiss the appeal.

I. Motions to dismiss

Home and REM filed motions to dismiss the appeal on the ground Home has been declared insolvent, pursuant to a New Hampshire liquidation order, and all actions and proceedings against Home and REM, arising from its actions on behalf of Home, must be abated. Home and REM maintain that California's recognition of the legal doctrines of full faith and credit and judicial comity support dismissal of the appeal.

Home and REM cite to an Order of Liquidation, issued on June 13, 2003, by the New Hampshire [*11] Superior Court in an action in which Home was declared insolvent. [2] The Commissioner of Insurance for the State of New Hampshire was appointed liquidator and was vested with the full powers and authority under New Hampshire's Insurers Rehabilitation and Liquidation Act (37 N.H. Rev. Stat. § 402-C). (See *In the Matter of the Rehabilitation of The Home Insurance Company*, Super. Ct. New Hampshire, 2003, No. 03-E-0106.) Pursuant to New Hampshire's Insurers Rehabilitation and Liquidation Act, the court's liquidation order further provided as follows:

> 2 Pursuant to *Evidence Code sections 452* and *459*, we grant Home and REM's requests for judicial notice filed in support of their motions to dismiss. Plaintiff filed a June 20, 2003, request for judicial notice in opposition to Home's motion to stay the proceedings. Because we denied Home's motion, it is not necessary to grant plaintiff's request. It is therefore denied.

"(m) All actions and all [*12] proceedings against ... Home whether in this state or elsewhere shall be abated in accordance with *RSA 402-C:28* and *RSA 402-C:5*, except to the extent the Liquidator sees fit and obtains leave to intervene;

"(n) To the full extent of the jurisdiction of the Court and the comity to which the orders of the Court are entitled, all persons are hereby permanently enjoined and restrained from any of the following actions:

"(1) commencing or continuing any judicial, administrative, or other action or proceeding against ... Home or the Liquidator;

"(2) commencing or continuing any judicial, administrative, or other action or proceeding against ... Home's ... or the Liquidator's present or former directors, officers, employees, agents, representatives, or consultants, including, without limitation, [REM] and each of its officers, directors and employees, arising from their actions on behalf of ... Home ... or the Liquidator;

"(3) enforcing any judgment against ... Home or its property ...."

The allegations in plaintiff's complaint against REM indisputably arise from REM's actions on behalf of Home. Plaintiff alleges that REM is Home's successor and manager of its claims and liabilities. [*13] According to plaintiff's complaint, "[REM] has and had managed the existing risks and liabilities of ... Home ... since January 1995.... Home ... funded, provided and controlled the defense of, and offered to settle the ... subsequent legal malpractice action through [REM] ...." All of the allegations against REM relate to its actions on behalf of or in connection with Home.

The federal constitutional mandate of full faith and credit does not apply here. (U.S. *Const., art. IV, § 1* [full faith and credit must be given "in each State to the public Acts, Records, and Judicial Proceedings of every other State"]; *28 U.S.C. § 1738*; *Underwriters Assur. Co. v. N. C. Guaranty Assn. (1982) 455 U.S. 691, 704, 71 L. Ed. 2d 558* [judgment of state court should hold same credit, validity and effect in every other court of United States]; *Capital Trust, Inc. v. Tri-National Development Corp. (2002) 103 Cal.App.4th 824, 826* [judgments of sister states given full faith and credit if rendering state had fundamental jurisdiction of matter and all parties were provided reasonable notice and opportunity to be heard].) First, plaintiff [*14] was not a party to the New Hampshire insolvency proceeding and thus had no notice of the action and no opportunity to be heard. (See *Underwriters Assur. Co. v. N. C. Guaranty Assn., supra, 455 U.S. at p. 705* [if another state court had no jurisdiction over subject matter or relevant parties, full faith and credit need not be given]; accord *Bank of America v. Jennett (1999) 77 Cal.App.4th 104, 113*; see also 2 Witkin Cal. Procedure (4th ed. 1996) Jurisdiction, § 232 p. 793 [court with personal jurisdiction over defendant may enjoin him from instituting lawsuit elsewhere]; cf. *Advanced Bionics Corp. v. Medtronic, Inc. (2002) 29 Cal.4th 697, 704-705* [forum court's power to restrain proceedings in sister state should be used sparingly].)

Second, the liquidation order was not a final adjudication of plaintiff's claim or a determination of his rights with regard to Home or REM. (See *Underwriters Assur. Co. v. N. C. Guaranty Assn., supra, 455 U.S. at pp. 703-704* [concept of full faith and credit created in recognition of risk of relitigation of same issue]; *Morris v. Jones (1947) 329 U.S. 545, 554, 91 L. Ed. 488* [*15] [holding petitioner's claim may not be relitigated in state proceeding where nature and amount of claim conclusively determined by judgment in another state].) The order simply declared Home insolvent and set up a

plan for distributing the company's remaining assets. Plaintiff makes no challenge here to the validity of the insolvency finding or the appropriateness of the plan.

Thus, we are not required to give full faith and credit to the abatement provision of the liquidation order. We therefore examine the permissive doctrine of comity.

Comity is founded upon the principle of governmental reciprocity-recognizing that the laws of one state have no force beyond its territorial limits, but the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice. (*Advanced Bionics Corp. v. Medtronic, Inc., supra, 29 Cal.4th at p. 707.*) """This courtesy, or comity, is established, not only from motives of respect for the laws and institutions of the foreign [jurisdictions], but from considerations of mutual utility and advantage.'" ....' [Citations.]" (*Ibid.*; see also *State of Oregon v. Superior Court (1994) 24 Cal.App.4th 1550, 1562*, [*16] disapproved on other grounds in *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal.4th 434, 465, fn. 8.*)

The discretionary doctrine of comity may be appropriately applied here. Although California is not compelled by its own laws, or by the federal Constitution, to give full faith and credit to the abatement provision of the New Hampshire liquidation order, public policy considerations and the similarities between Hew Hampshire's Insurers Rehabilitation and Liquidation Act and California's own laws regarding insolvent insurers supports our decision to give the New Hampshire order effect in California. California's Insurance Code grants this state's insurance commissioner, acting as the liquidator of an insolvent insurer, the very same authority to "prevent" by an appropriate order "the institution or prosecution of any actions or proceedings" against the insurer. (*Ins. Code, § 1020.*) Insurance Code "*section 1020* reflects a legislative intent to preserve an insolvent insurer's assets for orderly disposition by the commissioner." (*Webster v. Superior Court (1988) 46 Cal.3d 338, 344, 250 Cal. Rptr. 268*, fn. omitted.) Implicit [*17] in *Insurance Code section 1020* is an understanding that all claims against the insurer will be processed in a single forum, which will further the orderly disposition of the insurer's net assets. This state has a strong public interest in the orderly administration of insolvencies in the insurance business, regardless of the administering state, in order to protect policyholders, creditors and the public. (*Garamendi v. Executive Life Ins. Co. (1993) 17 Cal.App.4th 504, 515*; *Ins. Code, § 1064.3, subd. (b).*)

In sum, given California's adoption of statutes which acknowledge and promote the principle that claims against an insolvent insurer should be adjudicated and resolved in a single forum, and given the existence of equivalent New Hampshire legislation, we find it appropriate to apply the principle of comity to the New Hampshire liquidation order. The appeal is dismissed with respect to Home and REM. (See *In re Stephanie M. (1994) 7 Cal.4th 295, 314* [extension or denial of comity is discretionary].) [3]

3 In one-paragraph arguments with no citation to legal authority, plaintiff contends that the motions to dismiss should be denied because 1) it is the responsibility of the court- appointed liquidator to file a motion, and 2) REM is not in liquidation through receivership. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784-785*; see also *People v. Stanley (1995) 10 Cal.4th 764, 793*; *Akins v. State of California (1998) 61 Cal.App.4th 1, 50* [waiver of contention by failure to cite any legal authority].)

[*18] We turn then to the claims pertaining to the remaining parties, Burnham Brown, Michell, and the MPBF parties.

II. Applicable standards of review

We briefly set forth the applicable standards for reviewing the various claims at issue. "In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, we must assume the truth of all facts properly pleaded by the plaintiff ..., as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal.4th 809, 814.*)

"'A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.' [Citation.]" (*Simon v. Walt*

Disney World Co. (2004) 114 Cal.App.4th 1162, 1168.)

Finally, a challenge to the sufficiency of the evidence at trial is reviewed under the substantial evidence rule. [*19] (*Lenk v. Total-Western, Inc. (2001) 89 Cal.App.4th 959, 968.*)

III. Fraud claim

The trial court sustained the demurrers of Michell and the MPBF parties without leave to amend on the fraud cause of action, finding the claim barred by the litigation privilege. The court also granted Burnham Brown summary adjudication on this claim based on the same ground.

Plaintiff's fraud cause of action is premised on the alleged fraudulent communications made by Michell, Burnham Brown, and the MPBF parties in connection with the initial personal injury action and subsequent malpractice action. Plaintiff alleged as follows:

"[Home] hired [MPBF] to represent [Michell], prosecute the defense of, and offered to settle the ... subsequent legal malpractice action. [Home] hired [MPBF] to file and prosecute a sham and frivolous cross-complaint for malicious prosecution and abuse of process against the plaintiff, and offered to dismiss the sham and frivolous cross-complaint in exchange for the plaintiff's settlement of the ... subsequent legal malpractice action. [P] ... [P]

" ... Plaintiff categorically and affirmatively alleges that [Home] and [REM] [*20] hired [the MPBF parties] to expressly and/or impliedly perpetrate fraud on the Courts in the [State] of California. [Home] and [REM] expressly and/or impliedly instructed [the MPBF parties] to withhold and/or conceal the involvement of [Home] in the funding and control of the defense of the ... subsequent legal malpractice action, from the California Court of Appeals, First District, Division V, in order to obtain a judgment in favor of [Home] and [REM]. [Home] and [REM] expressly and/or impliedly instructed [the MPBF parties] to put [Michell] on the witness stand to falsely and fraudulently testify under Oath that she had 'mistakenly misappropriated' 5 percent of the $ 250,000 that [Home] paid her to settle the ... underlying personal injury action, in order to withhold and/or conceal the fact that [Michell] represented the plaintiff with an actual conflict of interest in the ... underlying personal injury action....

" ... Plaintiff categorically and affirmatively alleges that [Home] hired ... Burnham & Brown ... to expressly and/or impliedly perpetrate fraud on the Courts in the State of California. [Home] expressly and/or impliedly instructed them [*21] to falsely and fraudulently plead to the Superior Court of Alameda County ... that it fairly obtained a legally binding agreement to settle the ... underlying personal injury action from the plaintiff and his attorneys....

" ... Plaintiff categorically and affirmatively alleges that [Home], ... Burnham & Brown, ... and [Michell], conspired to sabotage plaintiff's future appeal of the enforcement order, and/or any subsequent legal malpractice action against [Michell]. [Michell], as the plaintiff's attorney was to motion the Superior Court of Alameda County for the removal of the case to a 'Voluntary Settlement Conference,' in a place in San Francisco called the 'Judicial Arbitration and Mediation Service,' without the plaintiff's knowledge or consent."

Civil Code section 47, subdivision (b), provides that a privileged publication or broadcast is one made "in any ... judicial proceeding ...." The litigation privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of litigation; and (4) that have some connection or logical relation to [*22] the action." (*Silberg v. Anderson (1990) 50 Cal.3d 205, 212, 266 Cal. Rptr. 638*; see also *Drum v. Bleau, Fox & Associates (2003) 107 Cal.App.4th 1009, 1024-1027* [privilege protects communication, not conduct].) The privilege is given broad application. (*Silberg v. Anderson, supra, 50 Cal.3d at pp. 211-212.*) It is absolute and extends to all torts other than malicious prosecution. (*Wise v. Thrifty Payless, Inc. (2000) 83 Cal.App.4th 1296, 1302.*) The privilege applies to an insurer and its attorneys in judicial proceedings. (*Home Ins. Co. v. Zurich Ins. Co. (2002) 96 Cal.App.4th 17, 24*; *Doctors' Co. Ins. Services v. Superior Court (1990) 225 Cal. App. 3d 1284, 1295-1296, 275 Cal. Rptr. 674.*)

Here, as recognized by the trial court, the statements at issue alleged by plaintiff in his fraud claim were indisputably communications in a judicial proceeding, by litigants or their attorneys, to achieve the objects of litigation, and the communications had some connection to the action. The communications were made by and between the MPBF parties, Burnham Brown, and Michell in their respective [*23] capacities as counsel or party in

the personal injury and malpractice actions. Thus, the litigation privilege bars any claim based on the alleged misrepresentations of those parties related to the previous litigation.

Plaintiff attempts to circumvent the litigation privilege by labeling his claim "extrinsic" fraud. (*Home Ins. Co. v. Zurich Ins. Co., supra, 96 Cal.App.4th at p. 26* [litigation privilege does not apply to equitable action to set aside settlement agreement based on extrinsic fraud]; see also *Silberg v. Anderson, supra, 50 Cal.3d at p. 214.*)

"'Fraud is extrinsic where the defrauded party was deprived of the opportunity to present his or her claim or defense to the court, that is, where he or she was kept in ignorance or in some other manner, other than from his or her own conduct, fraudulently prevented from fully participating in the proceeding.' [Citation.]

"'Any fraud is intrinsic if a party has been given notice of the action and has not been prevented from participating therein, that is, if he or she had the opportunity to present his or her case and to protect himself or herself from any mistake or fraud of his or [*24] her adversary, but unreasonably neglected to do so. [P] ... Generally, the introduction of perjured testimony or false documents, or the concealment or suppression of material evidence is deemed intrinsic fraud." (*Home Ins. Co. v. Zurich Ins. Co., supra, 96 Cal.App.4th at pp. 26-27.*)

Despite plaintiff's label, the fraud alleged in the complaint-prosecution of a sham cross-complaint, concealment of Home's involvement in the defense of the malpractice action, instruction to witnesses to fraudulently testify, and removal of a case to a settlement conference-is not extrinsic fraud. It did not prevent plaintiff from presenting his case in court. And plaintiff has presented no evidence to suggest he could amend his complaint to support a claim for extrinsic fraud.

Thus, the trial court properly sustained the demurrers of Michell and the MPBF parties without leave to amend. The court also properly granted Burnham Brown summary adjudication. [4]

> 4 As a result of our conclusion, it is not necessary to address the additional contention that the fraud claim is barred by the statute of limitations. However, we find incontrovertible evidence in the record that plaintiff was aware of his fraud complaint back in August 1993. His claim would therefore be barred by the statute of limitations as well.

[*25] ***IV. Invasion of privacy claim***

The trial court sustained Burnham Brown's demurrer on the invasion of privacy claim on the ground plaintiff failed to state a valid cause of action. The court granted the MPBF parties summary adjudication, finding the claim barred by the applicable statute of limitations. With respect to Michell, the court also found, following a bench trial, that the claim was barred by the statute of limitations.

Plaintiff alleged as follows with respect to his invasion of privacy claim:

"In the course and causes of the ... legal malpractice action, [Home] and [REM] expressly and/or impliedly instructed James A. Murphy, Antoinette W. Farrell, [and] [Michell] ... to turn over copies of plaintiff's legal and medical files to Edward M. Robbins, Jr., an Assistant United States Attorney ...; Mark A. Weiner, an attorney in the employ of the Internal Revenue Service ...; Penny Childers, a Supervisor in the Internal Revenue Service ...; Barbara Salisbury, an Income Tax Examiner in the employ of the Internal Revenue Service ...; and other unknown employees of the Internal Revenue Service. The employees of the Internal Revenue Services rummaged through [*26] and disseminated every page in the files for evidence or evidences of taxable income, without the plaintiff's knowledge or consent .... The employees of the Internal Revenue Service in turn used the information they obtained from the plaintiff's psychiatry and psychological examinations, evaluations and reports to physically and verbally abuse ... him as a mad man, with a potential for violence.... Penny Childers felt threatened by the plaintiff. She believed he is a sorcerer and a magician because he is an African and based on what [Home] and [REM] expressly and/or impliedly instructed all the defendants ... to tell them in the Internal Revenue Service that plaintiff is associated and/or affiliated with a group called the 'Nigerian hit squad....'

" ... Plaintiff alleges that all the defendants fraudulently obtained plaintiff's legal and medical files. [Michell] represented the plaintiff with an actual conflict of interest in the underlying personal injury action. She turned over plaintiff's legal and medical files to [Home] and [REM], through [MPBF], in the ... legal malpractice

case.... Burnham & Brown ... obtained plaintiff's legal and medical files in the ... personal [*27] injury case from [Michell], without plaintiff's knowledge or consent. [Home] [and] ... Burnham & Brown ... used the information they obtained from the plaintiff's legal and medical files to plan their defense of the ... subsequent legal malpractice action."

We dispense initially with the issue related to Burnham Brown. In granting Burnham Brown judgment on the pleadings with respect to the invasion-of-privacy claim, the trial court noted:

"Plaintiff has apparently alleged that Burnham [Brown] obtained plaintiff's legal and medical records in the personal injury action and used them against him in the malpractice action. [Citation.] However, these allegations fail to state a claim for invasion of privacy since Burnham [Brown] was defense counsel in the personal injury action, and, therefore, had a right to obtain plaintiff's medical information as part of their defense. Thus, plaintiff's allegations against Burnham [Brown] do not state a valid claim for invasion of privacy."

The court gave plaintiff 10 days' leave to amend his complaint, but he failed to allege any new facts. We agree with the trial court. Burnham Brown was entitled to plaintiff's medical files in [*28] defense of the personal injury case and to plaintiff's legal files in defense of the malpractice case. Plaintiff has set forth no facts to otherwise state a valid claim against Burnham Brown for invasion of privacy. (See *Saliter v. Pierce Brothers Mortuaries (1978) 81 Cal. App. 3d 292, 299-300, 146 Cal. Rptr. 271.*) We therefore proceed on the claim as it relates to Michell and the MPBF parties.

At the time plaintiff filed his complaint, the applicable statute of limitations for a claim of invasion of privacy was one year, as set forth in former *Code of Civil Procedure section 340, subdivision (3).* (*Cain v. State Farm Mut. Auto. Ins. Co. (1976) 62 Cal. App. 3d 310, 313, 132 Cal. Rptr. 860.*) The 2002 Legislature amended *Code of Civil Procedure section 340, subdivision (3)*, and redesignated it as *Code of Civil Procedure section 340, subdivision (c).* As amended, the one-year statute of limitations no longer applies to personal injury actions. Those actions are now governed by a two-year statute of limitations set forth in *Code of Civil Procedure section 335.1.* However, [*29] the statute was made retroactive only to personal injury or wrongful death actions brought by victims of the September 11, 2001, terrorist attacks. (Sen. Bill No. 688 (2001-2002 Reg. Sess.) § 1; 3 Witkin, Cal. Procedure (2004 supp.) Actions, § 545A, pp. 142-143.) In this case, the distinction is immaterial, since plaintiff failed to file his action within even the two-year statute of limitations.

Under the "rule of discovery," the cause of action does not accrue until the plaintiff knows or should know all material facts essential to show the elements of the cause of action. (*Cain v. State Farm Mut. Auto. Ins. Co., supra, 62 Cal. App. 3d at pp. 314-315.*) Here, the statute commenced upon plaintiff's discovery of the alleged invasion of privacy-disclosure of his legal and medical files to the Internal Revenue Service. (*Ibid.*)

Plaintiff's March 1998 complaint in district court alleged that the defendants, including Michell and MPBF attorneys James A. Murphy and Antoinette W. Farrell, submitted plaintiff's "entire file" to the Internal Revenue Service. In addition, plaintiff's first amended complaint in that action, filed July 7, 1998, alleged that plaintiff [*30] first discovered that the defendants, including Michell and MPBF attorneys James A. Murphy and Antoinette W. Farrell, submitted his entire file to the Internal Revenue Service during his September 26, 1997, trial for unreported income tax. In his opening brief in this appeal, plaintiff admits he knew of the disclosure of his legal and medical files in October 1997.

Plaintiff's pleadings in the federal action constitute admissions that he was aware of the alleged invasion of privacy no later than March 1998. (See *Barr v. ACandS, Inc. (1997) 57 Cal.App.4th 1038, 1055-1056*, overruled on other grounds by *Hamilton v. Asbestos Corp. (2000) 22 Cal.4th 1127, 1147*; *Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1061, 271 Cal. Rptr. 1.*) Unequivocal admissions in pleadings are treated as "judicial admissions"-they are conclusive and cannot be contradicted by the pleader. (*Valerio v. Andrew Youngquist Construction (2002) 103 Cal.App.4th 1264, 1271* [admission of fact in pleading treated as judicial admission]; *Heater v. Southwood Psychiatric Center (1996) 42 Cal.App.4th 1068, 1079-1080, fn. 10*; [*31] Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) PP 10:20.1, 10:147, pp. 10-6, 10-53.)

As recognized by the trial court, since plaintiff has already admitted in his original and first amended complaints in the district court action that he knew of the

alleged invasion of privacy no later than March 1998, his claim is now barred. Plaintiff did not file the instant complaint until January 2002, well beyond the statute of limitations. Notably, during the trial on this issue, plaintiff admitted on numerous occasions that he knew about the disclosure of his legal and medical files back in 1997, 1998 and 1999.

Citing to *28 United States Code section 1367(d)*, plaintiff argues that the statute of limitations was tolled while his district court case was pending. Where at least one federal claim is involved, district courts have supplemental jurisdiction over other state claims that are so related to the federal claim that they form part of the same case or controversy. (*28 U.S.C. § 1367(a).*) However, a district court may decline to exercise supplemental jurisdiction if, among other things, it has dismissed [*32] all claims over which it had original jurisdiction. (*28 U.S.C. § 1367(c)*; see also *Kendrick v. City of Eureka (2000) 82 Cal.App.4th 364, 368.*) When a state law claim is dismissed under such circumstances, the limitations period is tolled for a period of 30 days after the dismissal unless state law provides for a longer tolling period. (*28 U.S.C. § 1367(d).*) "The tolling provision of *28 United States Code section 1367(d)* includes the time during which a federal appeal with the Court of Appeals is pursued, and the 30-day grace period commences once the judgment of dismissal is affirmed by that court. This tolling is not extended by the later filing of a petition for writ of certiorari with the United States Supreme Court." (*Kendrick v. City of Eureka, supra, 82 Cal.App.4th at p. 369.*)

Plaintiff acknowledges that there is no California case law providing for a longer tolling period. (See *Kendrick v. City of Eureka, supra, 82 Cal.App.4th at p. 369, fn. 2* [California has no statute providing for longer tolling period, although decisional law arguably provides [*33] for equitable tolling in extraordinary circumstances]; but see *Bonifield v. County of Nevada (2001) 94 Cal.App.4th 298, 303-304* [days left in statute of limitations period at time federal claim filed begin to run after tolling ceases, i.e., on 31st day after federal claim dismissed].) Plaintiff clearly filed this action well beyond the tolling period. The Ninth Circuit Court of Appeals decision was filed in July 2000. Plaintiff did not file this action until January 2002. But more fundamentally, we note that plaintiff's original case, filed in state court on April 12, 2001, and subsequently removed to district court, also would have been untimely as beyond the original one-year statute of limitations.

Thus, the trial court properly found in favor of Burnham Brown, Michell, and the MPBF parties on plaintiff's claim for invasion of privacy. As a result of our conclusion, we reject plaintiff's contention that the judgment is void.

DISPOSITION

The appeal against Home and REM is dismissed. The judgment is affirmed with respect to the remaining respondents. Plaintiff's request for sanctions is denied. Costs are awarded to respondents.

Wiseman, J.

[*34] WE CONCUR:

Vartabedian, Acting P.J.

Cornell, J.

Exhibit F

*2006 Cal. App. Unpub. LEXIS 11193, **

ADEBOWALE O. **OSIJO,** Plaintiff and Appellant, v. ROGER A. SEVIGNY, as Insurance Commissioner etc., et al., Defendants and Respondents.

F049063

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

2006 Cal. App. Unpub. LEXIS 11193

December 12, 2006, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977. $

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Fresno County, No. 04-CECG-02628. Donald S. Black, Judge.

CORE TERMS: settlement agreement, default, void, judgment enforcing, insurer, res judicata, prior actions, cause of action, liquidation proceedings, service of summons, lawsuit, demurrer, comity, notice, personal jurisdiction, primary right, settlement, insolvent, summons, claim preclusion, previous cases, properly served, declaration, preclusion, liquidation, vacate, Law Offices, new action, void judgment, conflict of interest

Available Briefs and Other Documents Related to this Case:

CA Court of Appeal Brief(s)

COUNSEL: Adebowale O. Osijo, in pro. per., for Plaintiff and Appellant.

Greenan, Peffer, Sallander & Lally, James S. Greenan and Enoch Wang for Defendant and Respondent Roger A. Sevigny.

Burnham Brown, Robert M. Bodzin and Jennifer R. Thomas for Defendant and Respondent Burnham Brown.

Georgia Ann Michell-Langsam, for Defendants and Respondents Michell-Langsam and Georgia Ann Michell-Langsam.

JUDGES: Wiseman, J.; Harris, Acting P.J., Cornell, J. concurred.

OPINION BY: Wiseman

OPINION

This is the latest in a series of lawsuits brought by plaintiff Adebowale O. Osijo in connection with a personal injury claim settled in 1991. Plaintiff became dissatisfied with the settlement agreement the day after it was executed and has sought its invalidation ever since. **[*2]** In this case, he sued Georgia Ann Michell-Langsam (Michell-Langsam), the attorney who represented him in the settlement, Burnham Brown, the law firm that represented the insurer funding the settlement, and the Insurance Commissioner of the State of New Hampshire (currently Roger A. Sevigny), who is the liquidator of that now-insolvent insurer. The trial court dismissed Burnham Brown on res judicata grounds; plaintiff had sued the firm unsuccessfully in previous actions. The court also dismissed the Insurance Commissioner. It relied on the doctrine of comity and took account of the liquidation proceedings in New Hampshire, in which an order abating other litigation had issued. Finally, as to Michell-Langsam, the court quashed service of summons and vacated a default entered against her, ruling that she had never been properly served. We perceive no error and affirm these dispositions.

FACTUAL AND PROCEDURAL HISTORIES

A longer account of the underlying facts may be found in our unpublished opinion affirming the judgment in one of plaintiff's previous cases, *Osijo v. Home Insurance Company* (Sept. 7, 2004, F042329, F043325), and the First District Court of Appeal's **[*3]** unpublished opinions in *Osijo v. Housing Resources Management, Inc.* (Jul. 16, 1992, A055045) and *Osijo v. Ganong and Michell* (Apr. 12, 1996, A068661). A shorter version will suffice for purposes of this appeal.

In 1988, plaintiff was working as a security guard at an apartment complex in Oakland. While on duty, he was shot multiple times by an assailant or assailants with semi-automatic rifles. Plaintiff sued the owners of the apartment complex and his employer, a security guard company. Among other things, his complaint alleged that the assailants had a confrontation with other security guards at the complex earlier in the day and that no one had warned plaintiff about them. The company was insolvent and uninsured, but the apartment complex owners, though also insolvent, had insurance. After a mediation held under the auspices of the Judicial Arbitration and Mediation Service (JAMS), the parties executed a settlement agreement on July 25, 1991, under which plaintiff and his counsel received $ 250,000. In these proceedings, plaintiff was represented by Michell-Langsam. The insurer, Home Insurance of America (Home), was represented by a law firm called Larson and Burnham, now **[*4]** known as Burnham Brown.

On July 26, 1991, the day after he signed the settlement agreement, plaintiff became dissatisfied and informed Michell-Langsam that he wanted to withdraw from it. The owners of the apartment complex filed a motion to enforce the agreement. The superior court heard plaintiff's objections and granted the motion to enforce in spite of them. The Court of Appeal affirmed, rejecting plaintiff's principal claim that the agreement was unenforceable because the JAMS mediator was not a current member of the State Bar.

In the succeeding years, plaintiff filed a series of lawsuits against Michell-Langsam, Burnham Brown, Home, and a variety of other parties. In the first of these, plaintiff recovered $ 12,500 against Michell-Langsam for withholding as fees more of the settlement proceeds than her retainer agreement permitted. There is no indication in the record that plaintiff recovered anything in any of the other cases. In a malicious prosecution action in Fresno County Superior Court (*Michell v. Osijo* (Super. Ct. Fresno County, 2004, No. 02 CE CG 00003)), Michell-Langsam obtained a judgment against plaintiff of more than $ 165,000 based on his actions in two previous **[*5]** cases.

Acting in propria persona, plaintiff filed the operative first amended complaint in this case on September 16, 2004. The first cause of action is titled "Void Judgment." It alleges that the order enforcing the settlement agreement is void because of an attorney conflict of interest. Home was both the insurer of the apartment complex and Michell-Langsam'smalpractice insurer. Burnham Brown represented Home in plaintiff's original personal injury case and defended Michell-Langsam in plaintiff's malpractice suit against her. Plaintiff claims that Michell-Langsam connived with Burnham Brown to settle the personal injury case, receiving her contingent fee, and in return providing Burnham Brown with confidential information about plaintiff, presumably for use against him in the malpractice case (which, however, was not filed until later). According to the complaint, these allegations show that the superior court lacked jurisdiction to enforce the settlement agreement and that plaintiff was deprived of his due process rights under the Fourteenth Amendment.

The second cause of action is titled "Void Settlement Agreement." It asserts that the settlement agreement is unenforceable because **[*6]** of the conflict of interest alleged in the first cause of action. The third cause of action, "Void Subsequent Judgments," asserts that various judgments and orders of various courts are void because they gave effect to or declined to invalidate the allegedly void settlement agreement and the judgment enforcing it. The fourth cause of action, "Disgorgement of Misappropriated Funds," claims that Michell-Langsam should be compelled to return the contingent fee she collected when the personal injury case settled.

Burnham Brown demurred, arguing that plaintiff's effort to invalidate the settlement was barred by the doctrine of res judicata because it was an attempt to relitigate claims that had been decided against plaintiff in prior actions. The trial court agreed, sustained the demurrer without leave to amend, and entered a judgment of dismissal in favor of Burnham Brown.

The Insurance Commissioner moved to dismiss the action on several grounds, including an argument that, under the doctrine of comity, the court should dismiss plaintiff's claims because proceedings to liquidate the insolvent insurer had been instituted in a New Hampshire state court. These are the same liquidation proceedings **[*7]** we discussed in our opinion in *Osijo v. Home Insurance Company, supra,* F042329, F043325. The insurer was declared insolvent in an action in New Hampshire Superior Court. That court issued an order of liquidation on June 13, 2003, appointing the Insurance Commissioner as liquidator, abating all other actions and proceedings against the insurer and requiring all claims against it to be processed via the liquidation. (*Osijo v. Home Insurance Company, supra*, at p. 8.) The trial court granted the motion. It stated that it was relying on grounds of inconvenient forum, but in substance its order dismisses the action for reasons of comity. Subsequently, the court entered a judgment of dismissal in favor of the Insurance Commissioner.

Michell-Langsam moved to quash service of summons and to vacate a default that had been entered by the clerk. The trial court ruled that Michell-Langsam was never properly served and granted the motion.

Plaintiff appeals from these rulings. Additional factual and procedural details will be set forth in our discussion below.

DISCUSSION

I. Burnham Brown and res judicata

Plaintiff contends that the trial court erred in sustaining **[*8]** Burnham Brown's demurrer. We recently restated the

pertinent standard of review:

"In an appeal from a judgment dismissing an action after a general demurrer is sustained without leave to amend, our Supreme Court has imposed the following standard of review. 'The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 603.)

We hold that the trial **[*9]** court was correct in sustaining the demurrer without leave to amend on res judicata grounds.

The doctrine of res judicata is divided into two parts. The first part, called claim preclusion (or res judicata), bars a party to an action in which final judgment has been obtained from bringing a new action against the same opposing party and seeking a recovery based on the same cause of action as that relied on in the first action. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897 (*Mycogen*).) "Cause of action" in this context does not mean "legal theory." It means "primary right," a concept we discuss further below. (*Id.* at p. 904; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795, 126 Cal. Rptr. 225.) Claim preclusion only applies if the parties to the new action are identical with or in privity with the parties to the prior action. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828-829; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 951, 126 Cal. Rptr. 805.) Privity exists if the party to the new action is "'" ... so identified in interest with [a party to the prior action] that he **[*10]** represents the same legal right."'" (*Armstrong v. Armstrong, supra,* at p. 951.)

The second part, called issue preclusion or collateral estoppel, bars a party from relitigating in a new action an issue that was actually litigated and decided in a prior action. (*Mycogen, supra,* 28 Cal.4th at p. 896; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, 272 Cal. Rptr. 767.) A party in the new action may advance collateral estoppel as a defense against a party who previously litigated the same issue in a prior action even if the party advancing collateral estoppel was a stranger to the prior action. (*Vandenberg v. Superior Court, supra,* 21 Cal.4th at pp. 828-829; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 812-813; *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.* (1972) 24 Cal. App. 3d 410, 417, 100 Cal. Rptr. 826.)

The difference between a primary right, which may not be reasserted under claim preclusion, and an issue, which may not be relitigated under issue preclusion, is important. A primary right may include several issues, none of which may be raised again if claim **[*11]** preclusion applies, even those that were not raised in the prior action. (*Mycogen, supra,* 28 Cal.4th at p. 904; *Slater v. Blackwood, supra,* 15 Cal.3d at p. 795.) An attempt to raise in the new action an issue that is within the primary right advanced in the prior action but not actually litigated in that action is called "'claim splitting,'" and is not permitted under claim preclusion. (*Mycogen, supra,* at pp. 900, 903; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) Under issue preclusion, by contrast, a party is barred from raising an issue only if it was actually litigated and decided in the prior action. (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 346.)

In this case, so far as the claims against Burnham Brown are concerned, there is identity of parties. Osijo unsuccessfully sued Burnham Brown in a previous case, a decision we affirmed in *Osijo v. Home Insurance Company, supra,* F042329, F043325. Therefore we proceed to analyze the case under claim preclusion.

Claim preclusion bars a lawsuit if (1) it advances the same cause of action that was advanced in a prior action; (2) the **[*12]** prior action resulted in a final judgment on the merits; and (3) the parties to the present action are the same as, or in privity with, the parties to the prior action. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974, 104 Cal. Rptr. 42; *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556.) Here, the parties are the same, as we have just said, and there is no doubt that the previous case resulted in a final judgment on the merits. The only question is whether Osijo advances the same cause of action here as he advanced previously.

Under California law, for res judicata purposes, a single cause of action arises from the invasion of a single primary right. (*Slater v. Blackwood, supra,* 15 Cal.3d at p. 795.) "[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered." (*Crowley v. Katleman, supra,* 8 Cal.4th at pp. 681-682.) Multiple legal theories and multiple remedies can be based on a single injury, and a failure to assert any of the available theories or claim any of the available remedies in an action based on the injury means those theories **[*13]** and remedies are barred by claim preclusion in subsequent litigation. (*Mycogen, supra,* 28 Cal.4th at pp. 904-906, 907 [judgment granting specific performance of breached license agreement barred later action for damages for breach of same agreement]; *Slater v. Blackwood, supra,* 15 Cal.3d at p. 795.) On the other hand, the fact that the two lawsuits are premised on the same set of facts does not necessarily mean they assert the same primary right. (See *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954-955, 160 Cal. Rptr. 141 [prior judgment for employer in racial discrimination suit brought under federal civil rights law was not res judicata with respect to employee's subsequent suit, based on same termination of employment, for defamation and intentional infliction of emotional distress], overruled on other grounds by *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563.)

The complaint in this case is based on an injury that was asserted in the prior action. In that case, plaintiff sued Burnham Brown, Michell-Langsam, Home, and several other parties. He alleged that Burnham Brown committed fraud in obtaining the settlement **[*14]** in the original personal injury action and violated his privacy rights with respect to his legal and medical files. (*Osijo v. Home Insurance Company, supra,* F042329, F043325, at p. 5.) The trial court granted Burnham Brown's motion for summary adjudication on the fraud claim, finding it was barred by the litigation privilege and the

statute of limitations. It also granted judgment on the pleadings on the privacy-rights claim, ruling that, because Burnham Brown was entitled to the information in the files as defense counsel in the original lawsuit, the claim failed to state a cause of action. After plaintiff amended his complaint in an attempt to allege the privacy claim adequately, the trial court sustained Burnham Brown's demurrer without leave to amend. (*Id.* at p. 6.)

Defendant relies on the same primary right in the present case. The legal theories are different-previously he asserted fraud and now he asserts an attorney conflict of interest-but the injury he claims is the same: that his agreement to settle the personal injury case was obtained improperly through the misconduct of his counsel and opposing counsel. His attempt to litigate the same primary right a second **[*15]** time in a second lawsuit under a different legal theory constitutes claim splitting and is barred by the doctrine of claim preclusion.

In arguing against the trial court's conclusions in this case, plaintiff relies on the principle that a void judgment has no res judicata effect in subsequent litigation (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1100; *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239-1240) and may be attacked at anytime by way of an independent action in equity (*Rochin, supra,* 67 Cal.App.4th at p. 1239). His argument may be summarized as follows: (1) In this case, the trial court relied on the judgments in his previous cases, including the one reviewed by this court, *Osijo v. Home Insurance Company, supra,* F042329, F043325, when it ruled that the present action was barred by res judicata. (2) The previous judgments in turn relied on the original order enforcing the settlement agreement. (3) The order enforcing the settlement agreement is void. (4) A void judgment cannot be the basis of a ruling barring a lawsuit under res judicata principles. Therefore **[*16]** (5), the present suit cannot be barred on res judicata grounds.

This argument is incorrect for at least two reasons. First, although the case we previously reviewed rejected plaintiff's request to invalidate the judgment enforcing the settlement agreement, it did not *rely on* that judgment. Burnham Brown did not win there because that prior judgment existed. Instead, the trial court granted summary adjudication on plaintiff's fraud claim based on the litigation privilege and the statute of limitations and granted judgment on the pleadings on plaintiff's invasion-of-privacy claim because Burnham Brown was entitled to the records in question. We agreed. In other words, plaintiff lost in the previous case not merely because the judgment enforcing the settlement agreement was already on the books, but because the legal theories plaintiff advanced in attacking that judgment lacked merit. When the trial court barred the present action based on res judicata, consequently, its decision was based only on the judgment we previously reviewed in *Osijo v. Home Insurance Company, supra,* F042329, F043325, and not on the judgment enforcing the settlement agreement.

To put the same point another **[*17]** way, plaintiff had and took an opportunity to litigate his claim against Burnham Brown that the judgment enforcing the settlement agreement should be invalidated in *Osijo v. Home Insurance Company, supra,* F042329, F043325. His claims did not prevail and, under res judicata, he is not entitled to another try.

Plaintiff appears to believe that the judgment in *Osijo v. Home Insurance Company, supra,* F042329, F043325, can act as a bar to the present suit only if our opinion in that case "upheld the validity of the underlying personal injury judgment ...." He criticizes the trial court for not telling him, when he asked, on what page our opinion did this. There is no such requirement, however. As we have said, the point is that plaintiff's claims against Burnham Brown were decided on their merits in the previous case and he is not entitled to relitigate them under a new legal theory.

Second, the claims plaintiff advances in the present case cannot show that the judgment enforcing the settlement agreement is void in any event. According to Witkin, the exception to res judicata for void judgments applies where the judgment is "wholly void for lack of jurisdiction of the subject **[*18]** matter or person, and perhaps for excess of jurisdiction, or where it is obtained by extrinsic fraud." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 286, p. 828.) Plaintiff says the judgment enforcing the settlement is void because of the alleged conflict of interest and because the judgment was executed by means of a rubber-stamp replica of the judge's signature rather than an actual signature. Neither claim can establish that the judgment is void.

First, even if plaintiff's suit against Burnham Brown were not barred in its entirety by claim preclusion, his conflict-of-interest claim would be barred by issue preclusion and for that reason could not be used to show that the judgment enforcing the settlement agreement is void. Plaintiff litigated the same claim to a final judgment in his malpractice suit against Michell-Langsam, *Osijo v. Ganong and Michell, supra,* A068661. There, plaintiff contended that a conflict existed because Michell-Langsam's malpractice insurer was Home, to which plaintiff was adverse in the personal injury suit, and whose counsel, Larson and Burnham (now Burnham Brown), later also defended Michell-Langsam against **[*19]** plaintiff. The trial court granted summary adjudication on this issue. The Court of Appeal affirmed, observing that, during Michell-Langsam's representation of plaintiff, plaintiff had not yet asserted a malpractice claim against Michell-Langsam or her insurer, so a conflict of interest could not yet have been created. The court also stated that there was no evidence in the record of an actual conflict between Michell-Langsam's "duty to Osijo and her own later defense by Home and the Larson firm." (*Osijo v. Ganong and Michell, supra,* at p. 9 & fn. 3.) Plaintiff further contended that Michell-Langsam had a conflict of interest with him arising from her desire to proceed with the settlement after he told her he wanted out. (Michell-Langsam went so far as to attempt to file an amicus brief against plaintiff in the Court of Appeal when plaintiff appealed from the judgment enforcing the settlement agreement.) The Court of Appeal upheld summary adjudication for Michell-Langsam on this claim based on the statute of limitations. (*Id.* at pp. 9-10.) In asserting that the judgment enforcing the settlement agreement is void because of the same alleged conflicts, plaintiff attempts to relitigate **[*20]** against Burnham Brown an issue he has already unsuccessfully litigated to a final judgment in the malpractice case against Michell-Langsam. Under issue preclusion, he is not entitled to do this.

Second, there is nothing wrong with a judge instructing his staff to use a rubber stamp to indicate his approval of judgments and other documents instead of signing them himself by hand. The practice is commonplace. It does not

constitute "forgery" and does not need to be approved by local rule, as plaintiff contends. Plaintiff does not claim the rubber stamp was used without the judge's permission.

Plaintiff also argues that the judge in question, Judge Sutter, was the wrong judge to execute the settlement agreement. He cites *Williams v. Superior Court* (1939) 14 Cal.2d 656, 662 for the proposition that when a case has been assigned to one department and not reassigned, other departments lack jurisdiction to "'interfere with the exercise of the power of the department to which the proceeding has been so assigned.'" Plaintiff says the "personal injury case was not assigned to Judge Sutter and Department 18, nor, was it the Law & Motions Department of the Alameda County Superior **[*21]** Court. The Law & Motion Department was Department 19, with Judge Dawn Girard, presiding, which was not unavailable to entertain the motion to enforce. The case was assigned to Department 12, with Judge Demetrios Agretelis, presiding, which was not unavailable to entertain the motion to enforce." These claims are not accompanied by any citations to the record. Our own examination of the record on appeal has revealed nothing indicating that the matter was not properly before Judge Sutter or that the judgment interfered with any act of any other department.

Finally, at oral argument, plaintiff called our attention to *In re Marriage of Deffner* (2006) 143 Cal.App.4th 662, a copy of which he had provided to us before. *Deffner* does not alter our analysis. In it, the Court of Appeal affirmed a trial court's decision to set aside its own judgment approving a marital settlement agreement because the judgment was obtained, in part, by the husband's attorney's filing of papers in which he claimed to be the wife's attorney. The Court of Appeal held that this constituted a fraud upon the trial court and justified setting the judgment aside even though that action otherwise **[*22]** would have been time-barred. We do not disagree that a judgment can be set aside under circumstances of that kind. *Deffner* does not support plaintiff's position here for the two reasons we have just stated: (1) the trial court's res judicata ruling did not depend on the judgment enforcing the settlement agreement; and (2) even if it did, plaintiff's arguments do not establish that that judgment is void.

For all these reasons, we conclude that Burnham Brown's demurrer was properly sustained as to all causes of action without leave to amend. The judgment we reviewed and affirmed in *Osijo v. Home Insurance Company, supra,* F042329, F043325, bars the present action against Burnham Brown.

II. The Insurance Commissioner and comity

The Insurance Commissioner's motion to dismiss made several arguments: the trial court lacked personal jurisdiction over the Commissioner; the doctrine of comity required the court to give effect to a liquidation order entered in a New Hampshire state court, abating all other litigation advancing claims against Home and its successors; reciprocity provisions of the California Insurance Code required the court to defer to the New Hampshire liquidation **[*23]** proceedings; and the full faith and credit clause of the federal Constitution required the court to enforce the New Hampshire liquidation order. The Insurance Commissioner added an alternative claim that the action should be stayed or dismissed on forum non conveniens grounds.

In granting the motion, the trial court stated that it was relying on the ground of inconvenient forum. It explained, however, that the doctrine of comity and the reciprocity provisions of the Insurance Code were what made the alternate forum in New Hampshire appropriate.

Plaintiff responded to the ruling by filing a document he called a motion to vacate judgment. This motion argued that the court's order granting the motion to dismiss was "a nullity and prima facie void" because it "either wittingly or unwittingly ... gave effect to the underlying prima facie void judgment" that enforced the settlement agreement. The judgment enforcing the settlement agreement was void, plaintiff argued, because of the alleged conflict of interest and the rubber stamp. The trial court denied the motion.

Plaintiff states that his appeal is from the denial of his motion to vacate and contends that the motion should have been **[*24]** granted because the liquidation proceedings in New Hampshire do not constitute an appropriate alternative forum. We will treat the appeal as if it is from both the order denying the motion to vacate the dismissal and the dismissal itself.

The motion to vacate was properly denied. Plaintiff's claims cannot show that the judgment enforcing the settlement agreement is void. His contention that a rubber stamp of the judge's signature should not have been used on the judgment is without merit for the reasons we have already stated. Issue preclusion bars relitigation of the conflict-of-interest claim here just as it bars relitigation of that claim against Burnham Brown. Further, even if the judgment enforcing the settlement agreement were void, we agree with the trial court's conclusion that its dismissal of plaintiff's claim against the Insurance Commissioner did not give effect to the judgment enforcing the settlement agreement. The judgment enforcing the settlement agreement is not rendered effective, or affected in any other way, by an order directing that a claim against the Insurance Commissioner should be brought in the New Hampshire liquidation proceedings. Plaintiff's view seems **[*25]** to be that any ruling denying him relief against any party gives effect to the judgment enforcing the settlement agreement, but this is not so.

The motion to dismiss was granted, according to the trial court's order, on grounds of inconvenient forum, but the real substance of the court's ruling was that dismissal was justified by the doctrine of comity. The court reasoned:

"Deferring to the New Hampshire court's jurisdiction and giving effect to its liquidation order (which abates all actions against Home and its liquidator) under principles of comity would promote California's interests in preserving the insolvent insurer's assets for orderly disposition, and eliminating the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants."

We applied the same reasoning in *Osijo v. Home Insurance Company, supra,* F042329, F043325, in which plaintiff asserted a claim against Home and a successor company. We explained that comity is a doctrine under which the laws of one state are permitted by the courtesy of another to operate in the latter for the promotion of justice and for mutual utility and advantage. (*Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 707.) **[*26]** The doctrine was applicable in that case, even though California law and the full faith and credit clause did not compel deference to the New Hampshire liquidation order, because the principles underlying California's own insolvent-insurer liquidation scheme supported discretionary deference to the operation of a similar scheme in another state. We observed that under section 1020 of the Insurance Code, our state's Insurance Commissioner may institute proceedings to dispose of the assets of an insolvent insurer and may cause the abatement of all other claims and proceedings against the insurer. The purpose of this, we further stated, is to ensure the orderly disposition of the insurer's assets and protect policyholders, creditors, and the public. Since the New Hampshire scheme serves the same purposes, we granted Home's motion to dismiss plaintiff's appeal. (*Osijo v. Home Insurance Company, supra,* F042329, F043325, at pp. 9-10.)

Precisely the same rationale justifies affirming the trial court's disposition in this case. Plaintiff cannot avoid the application of the comity doctrine by merely substituting the Insurance Commissioner for Home and its successor. **[*27]** The only conceivable reason for naming the Insurance Commissioner as a defendant is to attempt to obtain an order against the Commissioner dealing with a claim against the insolvent insurer's assets. Deference to the New Hampshire order therefore is as appropriate here as it was in the previous case.

Seizing upon the trial court's inconvenient-forum language, plaintiff asserts that a dismissal on those grounds was not proper because the New Hampshire liquidation proceedings did not constitute a suitable alternative forum. A court deciding a motion to dismiss on forum non conveniens grounds must first determine whether the alternative forum proposed by the moving party is a "'suitable'" place for trial. (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.) This threshold requirement is satisfied if the defendant is subject to or agrees to submit to the jurisdiction of the alternative forum, the statute of limitations has not expired in the alternative forum or the defendant agrees not to rely on it, and some remedy is available in the alternative forum. (*Id.* at pp. 752, 753; *Roulier v. Cannondale* (2002) 101 Cal.App.4th 1180, 1186.) **[*28]** The court's determination on this issue is reviewed de novo. (*Roulier v. Cannondale, supra,* at p. 1186.) Plaintiff says the liquidation proceedings do not provide a suitable forum because they cannot decide whether the judgment enforcing the settlement agreement is void or not and do not have jurisdiction to enter a judgment against the Insurance Commissioner.

Plaintiff is in error. The purpose of the liquidation proceedings is to adjudicate claims against the insolvent insurer and distribute its assets. As we have said, plaintiff's only possible purpose in naming the Insurance Commissioner as a party is to assert a claim against the insolvent insurer. The liquidation proceedings were instituted for the purpose of deciding these claims. The assertion that making a claim in the liquidation proceedings will not result in a judgment against the Insurance Commissioner is thus irrelevant. Further, as plaintiff has not made any claim in this case that would entitle him to an order invalidating the judgment enforcing the settlement agreement, the fact that plaintiff would be unlikely to obtain that relief in the liquidation proceedings does not show that they would be an **[*29]** inferior forum for him.

For all these reasons, we affirm the trial court's judgment of dismissal of plaintiff's claims against the Insurance Commissioner and its denial of plaintiff's motion to vacate that judgment. The court applied the law correctly.

III. Michell-Langsam, service of summons, and default [1]

FOOTNOTES

1 Plaintiff has pending a request for judicial notice of a Stipulation in Lieu of Discipline entered into between Georgia Ann Michell-Langsam and the State Bar in connection with a complaint plaintiff made against her. Georgia Ann Michell-Langsam opposed the request, arguing that the stipulation is confidential. Judicial notice of this document is not required under Evidence Code section 451 and we need not decide whether it is subject to permissive judicial notice under Evidence Code section 452. We have reviewed the document and conclude that it would have no effect on the outcome of this appeal if noticed, and we deny the request on that ground.

Plaintiff also requests that we take judicial notice of the Appellate Court's opinion in *Osijo v. Ganong and Michell, supra,* A068661. The request is granted.

[*30] Finding that Michell-Langsam was never properly served with the summons and complaint, the trial court granted her motion to (1) vacate a default the clerk had entered against her and (2) quash service of summons. In reviewing the order quashing service of summons, we decide whether the trial court's factual findings were supported by substantial evidence and determine independently the ultimate question of whether service was sufficient to secure personal jurisdiction over defendant. (See *F. Hoffman-La Roche, Ltd. v. Superior Court* (2005) 130 Cal.App.4th 782, 795; *In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 111.) We review the order granting relief from default for abuse of discretion. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478, 243 Cal. Rptr. 902.) Because plaintiff did not submit a statutorily adequate proof of service, we affirm the order quashing service of summons. We affirm the order vacating Michell-Langsam's default because of plaintiff's failure to prove service in the manner required by statute.

A summons may be served on an individual defendant by delivering it to the defendant personally **[*31]** or to a person authorized by the defendant to receive it. A copy of the complaint must be included. (Code Civ. Proc., §§ 415.10, 416.90.) If the summons and complaint cannot with reasonable diligence be delivered to an individual defendant personally, they may be served by leaving them at the defendant's usual place of business in the presence of a person 18

years of age or older and apparently in charge, telling that person what they are, and then mailing them to the same place. (Code Civ. Proc., § 415.20, subd. (b).) This procedure is known as substitute service. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) P 4:193, p. 4-29 (rev. # 1, 2006).) Two or three unsuccessful attempts at personal service at the defendant's usual place of business typically constitute sufficient diligence to justify resorting to substitute service. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182; *Espindola v. Nunez* (1988) 199 Cal. App. 3d 1389, 1392, 245 Cal. Rptr. 596; Weil & Brown, *supra*, P 4:198, p. 4-30.) Although a defendant is **[*32]** under no duty to respond to a defectively served summons-even a defendant with actual knowledge of the lawsuit (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808; *Kappel v. Bartlett* (1988) 200 Cal. App. 3d 1457, 1466, 246 Cal. Rptr. 815)-substantial compliance with the service-of-summons statutes is sufficient to defeat a motion attacking a judgment based on improper service. (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313.)

In this case, plaintiff described his efforts to serve Michell-Langsam in a declaration he filed in support of his motion for a default judgment against her. He traveled with a companion, Jhoe Ajayi, from Fresno to Michell-Langsam's Walnut Creek office on September 13, 2004. Carmelita Torres, the receptionist, told Ajayi that Michell-Langsam was not in the office and that she, Torres, was not authorized to receive service of process. Ajayi gave Torres two copies of the summons and original complaint and then mailed additional copies to the office.

On October 18, 2004, plaintiff sent a registered process server, Roman Edwards, to Michell-Langsam's office. Edwards delivered the summons and **[*33]** a second amended complaint to a person at the office and subsequently mailed the documents to the office. The second amended complaint was subsequently stricken because it was filed without leave.

On June 29, 2005, plaintiff again traveled to Michell-Langsam's office, this time with a companion named Eugene Maduakor. Again Torres said she was not authorized to accept service of process and that Michell-Langsam was out of the office. Soon, Jean Michell, Michell-Langsam's mother and office manager, appeared. Maduakor gave two copies of the summons, original complaint, and first amended complaint to Jean Michell and then mailed additional copies to the office. Plaintiff filed a proof of substitute service based on these facts in the superior court.

Plaintiff does not claim that Michell-Langsam was ever served personally, so if service was effected, it either was via substitute service after reasonably diligent efforts at personal service or was upon a person actually authorized by Michell-Langsam to receive it. We address these two possibilities in turn.

Plaintiff did not submit an adequate proof of service to show substitute service after reasonably diligent attempts at personal service. **[*34]** Code of Civil Procedure section 417.10, subdivision (a), provides that proof of service of a summons shall be made "by the affidavit of the person making such service showing the time, place, and manner of service and facts showing that such service was made in accordance with this chapter." The only proof of service of summons included in the appellate record is one executed by Eugene Maduakor for the service of June 29, 2005. To show that substitute service was made in accordance with statute, it is necessary to show that reasonably diligent attempts were made at effecting personal service. In Maduakor's proof of service, a box is checked saying, "I attach a declaration of diligence station actions taken first to attempt personal service." No such declaration by Maduakor is attached to the copy in the appellate record. Plaintiff's own declaration describes the prior attempts we have summarized, but that declaration is not a permitted form of proof under the statute. The affidavit must be that "of the person making [the] service" (Code Civ. Proc., § 417.10, subd. (a)), and service must be made by a person who is "not a **[*35]** party to the action" (Code Civ. Proc., § 414.10).

The record contains conflicting evidence on the subject of whether service was ever made on a person actually authorized to receive it. Plaintiff's declaration states that Carmelita Torres said that Jean Michell was authorized to receive service of process. Jean Michell's declaration states that Michell-Langsam never authorized her to receive service of process on Michell-Langsam's behalf. Michell-Langsam's declaration states that no one in her office is authorized to accept service of process on her behalf. The trial court implicitly resolved this factual issue in favor of Michell-Langsam and its finding is supported by substantial evidence. We would, therefore, be bound to uphold that finding even absent the problem regarding the form of proof.

Plaintiff argues that the court had personal jurisdiction over Michell-Langsam even if she was never properly served because she made a general appearance in the case by filing a case management statement. He contends that filing this document constituted "participat[ing] in an action in some manner which recognizes the authority of the court to proceed," **[*36]** and therefore is a general appearance. (*Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1756.) We disagree. In *Mansour*, the Court of Appeal held that two parties made a general appearance when their attorneys attended and actively participated in a case management evaluation conference and prepared a case management statement that stated the discovery they planned to take. At the time of the conference, one party's attorney had already conducted nonjurisdictional discovery. The other party's attorney suggested the date for which the mandatory settlement conference was set. (*Id.* at p. 1757.) Here, by contrast, there is no allegation that a case management conference took place, and Michell-Langsam's case management statement indicated that no discovery was anticipated. Significantly, her case management statement also stated that she was never personally served. Michell-Langsam listed dates on which she would not be available for trial; stated an estimated length of trial; asserted that alternative dispute resolution would be a waste of time and that a settlement conference would not be fruitful; and expressed her intention to move to set **[*37]** aside any default that might have been entered against her. We conclude that, on the whole, Michell-Langsam's case management statement did not raise "'any [nonjurisdictional] question, or [ask] for any relief which can only be granted upon the hypothesis that the court has jurisdiction of [her] person,'" and therefore did not constitute a general appearance. (*California Overseas Bank v. French American Banking Corp.* (1984) 154 Cal. App. 3d 179, 184, 201 Cal. Rptr. 400.)

Plaintiff also argues that the court had personal jurisdiction over Michell-Langsam because she had actual notice of the lawsuit. Actual notice does not confer personal jurisdiction, however. A defendant is under no duty to respond to a defectively served summons, even a defendant with actual knowledge of the lawsuit, as we have said. (*Ruttenberg v. Ruttenberg, supra*, 53 Cal.App.4th at p. 808; *Kappel v. Bartlett, supra*, 200 Cal. App. 3d at p. 1466.)

Apart from the question of whether Michell-Langsam was properly served as an individual, the parties dispute whether the Law Offices of Michell-Langsam has been properly served. We agree with the trial court's ruling **[*38]** that because the Law Offices of Michell-Langsam is a fictitious business name, not a corporate entity, it cannot be a party to the lawsuit. (See *Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348.) Plaintiff argues that Michell-Langsam is estopped from asserting that the Law Offices of Michell-Langsam cannot be sued because she once filed a document in another case in which she purported to appear on behalf of herself and the Law Offices of Michell-Langsam. We agree with the trial court's conclusion that the document saying Michell-Langsam was appearing on behalf of herself and the Law Offices of Michell-Langsam did not constitute the assertion of any position about the status of the Law Offices of Michell-Langsam and therefore does not estop the assertion of any position.

Because the summons was not properly served, the trial court was also correct to set aside the default. A court may set aside a void judgment or order at any time. (Code Civ. Proc., § 473, subd. (d); see also Weil & Brown, *supra*, P 5:485, p. 5-113.) Proper service is necessary to establish personal jurisdiction, so a default judgment entered in the **[*39]** absence of proper service is void. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.) It follows that a default entered by the clerk is also void due to lack of personal jurisdiction if entered in the absence of proper service.

Plaintiff argues that the trial court should not have entertained Michell-Langsam's motion to set aside the default because she made it as part of her motion to quash service of summons but did not mention it in the caption of the notice of that motion. He says this means the motion to quash was the only noticed motion and that Michell-Langsam was not entitled to make it, or any other motion, except a motion to set aside the default, so long as the default was in effect. (See *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal. App. 3d 381, 385-386, 202 Cal. Rptr. 204.) He also argues that the motion to set aside the default was defective because Michell-Langsam did not attach a copy of the "answer, motion or other pleading proposed to be filed in the action" should the default be set aside and the defendant granted leave to defend the action. (Code Civ. Proc., § 473.5, subd. (b).)

Plaintiff **[*40]** is mistaken. Michell-Langsam's motion included both a request to set aside the default and a request to quash service of summons. It was an appropriate vehicle to accomplish both ends. The trial court had discretion to entertain both parts of the motion even though only the request to quash service of summons was mentioned in the caption of the notice of motion; the notice of motion and the brief in support of it were served together and the latter discussed both requests. The requirement to attach an answer, motion, or other pleading proposed to be filed did not apply because Michell-Langsam was not seeking leave to defend the action. She was only seeking to show that personal jurisdiction over her was not established.

Finally, plaintiff argues that the court should not have denied the request for entry of judgment that he made after the clerk entered Michell-Langsam's default. In light of our conclusion that Michell-Langsam was not properly served, this argument is moot. Any default judgment the court entered would have been void due to lack of personal jurisdiction.

DISPOSITION

The judgments dismissing Burnham Brown and the Insurance Commissioner and the orders **[*41]** quashing service of summons on Michell-Langsam, vacating the default taken against her, and denying plaintiff's request for entry of default judgment are affirmed. Plaintiff's request for judicial notice filed July 25, 2006, is denied with respect to the stipulation in lieu of judgment. The request is granted with respect to the Appellate Court's opinion in *Osijo v. Ganong and Michell, supra,* A068661.

Burnham Brown and the Insurance Commissioner shall recover their costs on appeal. Plaintiff and Michell-Langsam shall bear their own costs.

Wiseman, J.

WE CONCUR:

Harris, Acting P.J.

Cornell, J.

- Citing Refs. With Analysis Available
- Citation information available

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*2008 Cal. App. Unpub. LEXIS 5515, **

ADEBOWALE O. **OSIJO,** Plaintiff and Appellant, v. HOUSING RESOURCES MANAGEMENT, INC., et al., Defendants and Respondents.

A118833

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

2008 Cal. App. Unpub. LEXIS 5515

July 8, 2008, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: [*1]
Alameda County Super. Ct. No. C-649881.

CORE TERMS: settlement agreement, void, settlement, contempt, judgment enforcing, excess of jurisdiction, subject to collateral attack, vexatious litigant, contempt proceedings, collateral attack, subject matter, stipulated order, insolvent, fundamental sense, enforcing, vacate, apartment complex, contempt order, subject matter, res judicata, direct attack, purportedly, premised, personal jurisdiction, reconsideration, unauthorized, enforceable, liquidation, personally, signature

JUDGES: Kline, P.J.; Haerle, J., Richman, J. concurred.

OPINION BY: Kline

OPINION

INTRODUCTION

Plaintiff Adebowale O. Osijo appeals in propria persona from an order of the Alameda County Superior Court, denying his motion to set aside a judgment entered in 1991, enforcing a settlement agreement that was fully performed long ago. Appellant contends that the trial court erred in refusing to set aside the judgment enforcing the settlement and in refusing to nullify the settlement agreement. He argues that the judgment enforcing the settlement was a void order because the settlement agreement was not signed by the party defendants, but rather by their attorneys and, therefore, pursuant to *Levy v. Superior Court* (1995) 10 Cal.4th 578, 583 (*Levy*), the court was without jurisdiction to order enforcement via the summary enforcement procedure of Code of Civil Procedure section 664.6. [1] We shall affirm the order denying the motion.

FOOTNOTES

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

FACTUAL AND PROCEDURAL BACKGROUND

Numerous unpublished appellate opinions have discussed the facts underlying this case and subsequent actions filed by appellant. [2] In **[*2]** 2006, the Fifth Appellate District summarized the various actions to that point as follows: "In 1988, plaintiff was working as a security guard at an apartment complex in Oakland. While on duty, he was shot multiple times by an assailant or assailants with semi-automatic rifles. Plaintiff sued the owners of the apartment complex and his employer, a security guard company. . . . The company was insolvent and uninsured, but the apartment complex owners, though also insolvent, had insurance. After a mediation held under the auspices of the Judicial Arbitration and Mediation Service (JAMS), the parties [*sic* [3]] executed a settlement agreement on July 25, 1991, under which plaintiff and his counsel received $ 250,000. In these proceedings, plaintiff was represented by [attorney Georgia Ann] Michell-Langsam. The insurer, Home Insurance of America (Home), was represented by a law firm called Larson and Burnham, now known as Burnham Brown.

FOOTNOTES

2 Some of those cases include: *Osijo v. Housing Resources Management, Inc.* (Jul. 16, 1992, A055045) (First App. Dist); *Osijo v. Ganong and Michell* (Apr. 12, 1996, A068661) (First App. Dist); *Osijo v. Ganong and Michell* (Feb 2, 1998, A077882) (First App. Dist); **[*3]** *Osijo v. United States of America, et al.* (C.D.Cal. Mar. 5, 1999, No. CV 98-1880-CAS (BQR) 1999 WL 358686), affirmed by *Osijo v. Weiner et al.* (9th Cir. 2000) 232 F.3d 895; *Osijo v. Home Insurance Company* (Sept. 7, 2004, F042329, F043325) (Fifth App. Dist.); and *Osijo v. Sevigny* (Dec. 12, 2006, F049063) (Fifth App. Dist.).

3 The signatories to the settlement agreement were appellant and his attorney, the attorney for the insolvent and uninsured defendant security company Prostaff Security Services, the attorney for the insolvent defendant apartment owners and their insurance company, and the attorney for intervenor Department of Industrial Relations.

"On July 26, 1991, the day after he signed the settlement agreement, plaintiff became dissatisfied and informed Michell-Langsam that he wanted to withdraw from it. The owners of the apartment complex filed a motion to enforce the agreement. The [Alameda County Superior Court] heard plaintiff's objections and granted the motion to enforce in spite of them. The Court of Appeal [this court in 1992, in *Osijo v. Housing Resources Management, Inc., supra* (A055045) [nonpub opn.]] affirmed, rejecting plaintiff's principal claim that the agreement **[*4]** was unenforceable because the JAMS mediator was not a current member of the State Bar." (*Osijo v. Sevigny, supra,* 2006 WL 361643 at p. *1.)

In affirming the order enforcing the judgment, we related that plaintiff "had special damages in the form of medical bills of about $ 40,000. He had lost wages for a nine-month period of about $ 20,000. He has some residual physical limitations-for instance, he cannot stand for prolonged periods. The nature of any other cognizable damages or future loss of income remained quite speculative. In fact, appellant's income, in his new career as an accountant, is much greater now than it was at the time of his injury. Appellant wanted between $ 500,000 and $ 2.5 million to settle his case." (*Osijo v. Housing Resources Management, Inc., supra,* (A055045), at p. 2.) We also observed that "[u]ltimately, the case settled for $ 250,000, which appears to be a quite generous and fair settlement to appellant considering the problems with his claims." (*Id.* at p. 3.)

A $ 250,000 settlement check from Home was deposited into the client trust account of plaintiff's counsel. Under the terms of the settlement, the settling defendants paid $ 250,000 to Osijo and his counsel. **[*5]** Michell-Langsam, however, took for herself 45 percent of the settlement proceeds, or $ 112,500, not the 40 percent or $ 100,000 authorized by the written agreement for any settlement. (*Osijo v. Gagnon & Michell, supra* (A077882) [nonpub.opn.], at p. 3.)

"In the succeeding years, plaintiff filed a series of lawsuits against Michell-Langsam, Burnham Brown, Home, and a variety of other parties. In the first of these, plaintiff recovered $ 12,500 against Michell-Langsam for withholding as fees more of the settlement proceeds than her retainer agreement permitted. There is no indication in the record that plaintiff recovered anything in any of the other cases. In a malicious prosecution action in Fresno County Superior Court (*Michell v. Osijo* (Super. Ct. Fresno County, 2004, No. 02 CE CG 00003)), Michell-Langsam obtained a judgment against plaintiff of more than $ 165,000 based on his actions in two previous cases." (*Osijo v. Sevigny, supra,* 2006 WL 3616431, at p. *2.)

In the appeal *Osijo v. Sevigny, supra,* 2006 WL 3616431, the Fifth Appellate District rejected appellant's claim that the order enforcing the settlement agreement was void because of an attorney conflict of interest and because **[*6]** the judgment was executed by means of a rubber-stamp replica of the judge's signature rather than the actual signature. Appellant also argued that various judgments and orders of various courts were also void because they gave effect to or declined to invalidate the allegedly void settlement agreement and the judgment enforcing it. (*Id.* at pp.*2, *6.)

Thereafter, Michell-Langsam moved in the Fresno County Superior Court to declare plaintiff to be a vexatious litigant. (§ 391, subd. (b)(2).) In an order filed May 10, 2007, the superior court denied the motion, opining that a trio of cases, *Levy, supra,* 10 Cal.4th 578, *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299 (*Harris*), and *Davidson v. Superior Court* (1999) 70 Cal.App.4th 514 (*Davidson*), "suggest that the judgment enforcing the settlement agreement could be void." The Fresno court determined that it was without jurisdiction to determine whether the judgment was void, but stated it would "not provide a roadblock to plaintiff's efforts to set the judgment aside in a court of competent jurisdiction."

In the order denying Michell-Langsam's vexatious litigant motion, the Fresno court recognized that "[p]laintiff may be

repeatedly **[*7]** relitigating an action he has lost." However, the court opined that "it is possible that he should not have lost the original action." The superior court referenced *Levy, supra,* 10 Cal.4th 578, holding that the term "parties" in section 664.6 meant that the litigants themselves, not merely their attorneys, must assent to the settlement agreement before it can be enforced under that section; *Harris, supra,* 74 Cal.App.4th 299, holding that the reference to "parties" meant, that pursuant to *Levy,* both the party trying to enforce the settlement agreement and the party against whom the settlement agreement was being enforced must have signed the agreement for it to be enforceable under the expedited procedure of section 664.6; and *Davidson, supra,* 70 Cal.App.4th 514, holding that a 1987 judgment confirming a settlement was in excess of the court's jurisdiction and could not support a contempt order since the settlement was signed by the parties' attorney, but not by the parties themselves.

On June 27, 2007, the Fresno County Superior Court denied Michell-Langsam's motion to reconsider her vexatious litigant motion. We note the same court did declare plaintiff a vexatious litigant as to defendant **[*8]** Burnham Brown in an order filed June 12, 2007, at the same time it sustained Burnham Brown's demurrer to a complaint filed by plaintiff against Burnham Brown, Michell-Langsam and others.

On May 18, 2007, plaintiff moved the Alameda County Superior Court to set aside the enforcement order and to nullify the settlement agreement, arguing that the 1991 judgment enforcing the settlement agreement was "void" pursuant to *Levy, supra,* 10 Cal.4th 578 and its progeny. The Alameda County Superior Court heard the motion on June 21, 2007 and denied it. As a preliminary matter, the Alameda court recognized that plaintiff had been declared a vexatious litigant, and that his name appears on the vexatious litigant list prepared and maintained by the Administrative Office of the Courts. However, because the case preceded the order declaring him a vexatious litigant, the matter was not new litigation requiring a prefiling order. Ruling on the motion to vacate the judgment, the court concluded that the "instant motion seems to be an untimely motion for reconsideration." It denied the motion on the grounds that plaintiff had failed to explain why his request for relief was not a veiled motion for reconsideration **[*9]** and that he had failed to comply with the requirements of section 1008 for such motions. This timely appeal followed.

No respondent's brief has been filed in this appeal. We have received letters from various persons served by appellant including: David J. Van Dam, purportedly served as counsel for Prostaff Security Services; Larson & Burnham, purportedly served as attorneys for defendants owners of the property; and California Insurance Guarantee Association (CIGA), purportedly for Home Insurance Company in Liquidation and for defendant Housing Resources Management, Inc. These persons and entities advised us that they do not now (and in some cases never have) represented parties to this action and would not be filing briefs. [4]

FOOTNOTES

[4] Van Dam relates that neither he nor his current law firm represents Prostaff, that his firm never represented Prostaff, and that he last represented Prostaff in 1991 when the case was resolved through mediation. At the time Prostaff was uninsured, insolvent, had ceased to do business and has not been active since.

Burnham Brown states they have received correspondence in connection with this matter and advises they do not represent any of the defendants in this **[*10]** lawsuit and that attorney David Pinelli (who took part in the settlement negotiations as counsel for the owners and insurer) has been deceased for many years.

Counsel for CIGA states they are not and have never been a party to the lawsuit, that they do not represent or stand in the shoes of Home Ins. Co in Liquidation or defendant Housing Resources Management, Inc., but that plaintiff continues to improperly serve them.

DISCUSSION

Appellant does not address the superior court's determination that he had made an untimely motion for reconsideration (§ 1008.) Rather, he argues that the judgment enforcing the settlement agreement was void because the Alameda County Superior Court lacked subject matter jurisdiction to enforce it under the summary procedures of section 664.6, because defendants had not personally signed the agreement. He further contends that because the judgment enforcing the settlement agreement was void, he may attack it at any time, citing *Davidson, supra,* 70 Cal.App.4th 514. We disagree with his premise that the judgment was void for lack of subject matter jurisdiction and we find *Davidson* distinguishable.

A. Levy* and *Davidson

In *Levy, supra,* 10 Cal.4th 578, the court resolved **[*11]** a conflict among the districts when it held that a written settlement agreement is not enforceable under the section 664.6 summary procedures for enforcement of a settlement agreement, unless it is signed personally by the litigant. (*Id.* at p. 580.) The court did not find the settlement agreement itself was void or unenforceable, and expressly noted that alternative nonsummary means of enforcement, such as a motion for summary judgment, a separate suit in equity, or an amendment to the pleadings, may exist. (*Id.* at p. 586, fn. 5.) *Levy* upheld the trial court's denial of the section 664.6 motion to enforce the settlement agreement, as plaintiff had refused to sign it. (*Id.* at pp. 580-581.) *Levy* has been held to apply retroactively. (*Johnson v. Department of Corrections* (1995) 38 Cal.App.4th 1700, 1709; *Burckhard v. Del Monte Corp.* (1996) 48 Cal.App.4th 1912, 1916-1917, fn. 4.)

In *Davidson, supra,* 70 Cal.App.4th 514, the City of Mendota filed a civil action seeking to prohibit the petitioners from

operating a junkyard on their property. The parties purportedly reached a settlement requiring petitioners to stop their junkyard activities. A "Stipulation for Settlement and Entry of Order" **[*12]** was signed by the petitioners' attorney and the city attorney, but not by the petitioners. It was presented ex parte to a judge, who signed a judgment confirming the settlement in 1987. (*Id.* at pp. 516, 518.) The petitioners later contended their attorney never had authority to bind them. (*Id.* at p. 516.) The city initiated contempt proceedings against petitioners in late 1991 for failing to comply with the stipulated settlement and petitioners moved to vacate the stipulated order, arguing, among other things that since it was not signed by them nor approved in open court, it was not binding. (*Id.* at pp. 516, 518-519.) The contempt proceeding and the motion to rescind were separated for hearing; the rescission motion was denied and the appellate court affirmed, noting that the authorized signature of an attorney could bind the client to a written settlement agreement. Thereafter, the petitioners sought to set the matter for jury trial to decide the issue whether their attorney had authority to bind them. This motion was denied and another appeal was dismissed as an attempt to appeal a nonappealable order. (*Id.* at p. 517.) The City of Mendota again initiated contempt proceedings. Petitioners **[*13]** were found in contempt and sentenced to five days in jail. Petitioners filed a petition for writ of habeas corpus, requesting a stay. The appellate court issued the order to show cause and stayed the contempt order.

Relying upon *Levy, supra,* 10 Cal.4th 578, the appellate court held "the *judgment* obtained by the City of Mendota behind the purported settlement agreement is void for purposes of enforcement in contempt proceedings premised on its violation." (*Davidson, supra,* 70 Cal.App.4th at p. 517.) "The bottom line: the contempt order issued against the petitioners is invalid since it is not premised on a valid judgment." (*Id.* at p. 518.) The court annulled the judgment of contempt and issued a permanent writ of mandate to vacate the void 1987 stipulated order. (*Ibid.*) The court identified "the underlying principle that '[a]n order of contempt cannot stand if the underlying order is invalid.' (*In re Misener* [(1985)] 38 Cal.3d [543,] 558.)" (*Davidson*, at p. 529.) The court recognized well-settled California authority " 'that "the violation of an order in excess of jurisdiction of the issuing court cannot produce a valid judgment of contempt [citations], and that the 'jurisdiction' in **[*14]** question extends beyond mere subject matter or personal jurisdiction . . . ." Rather, " 'any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis,* are in excess of jurisdiction.' " [Citation.]' " (*Id.* at p. 529.) The *Davidson* court took no position on whether the stipulated settlement agreement was valid or legally enforceable. (*Ibid.*) "We only hold the present judgment, i.e., the 1987 stipulated order, which was obtained in an unauthorized manner, is void for purposes of enforcement in contempt proceedings premised on its violation." (*Ibid.,* fn. omitted.) The court expressly noted that in California, courts " 'apply the rule that in the contempt proceeding, the contemner may, for the first time, collaterally challenge the validity of the order he or she is charged with violating. [Citations.]' " (*Id.* at pp. 529-530, fn. 2.)

In reaching its determination, the *Davidson* court rejected the claim that law of the case applied to the claim that the petitioners' then attorney was not authorized to enter into the **[*15]** stipulated settlement, recognizing that the intervening change in the law wrought by *Levy* was "reason to ignore the doctrine because it is simply a procedural rule. [Citation.]" (*Davidson, supra,* 70 Cal.App.4th at p. 530.) [5] *Davidson* also relied on authority that " 'the doctrine of the law of the case should not be adhered to when its application results in a manifestly unjust decision. [Citations.]' " (*Id.* at p. 530.) Observing that because the 1987 stipulated order was invalid under *Levy,* and the viability of the contempt finding depended on the viability of that stipulated order, the court stated that "the procedural doctrine of law of the case must bow to the substantive rights of petitioners, especially given the quasi-criminal nature of the matter. [Citations.]" (*Id.* at p. 531.)

FOOTNOTES

5 "The doctrine of law of the case applies to later proceedings in the same case. [Citation.] The doctrines of res judicata and collateral estoppel apply to later litigation to give conclusive effect to a former judgment or an issue determined in a former proceeding. [Citation.]" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701-702.)

B. Finality

As related above, in 1992, we affirmed **[*16]** the order enforcing the settlement agreement in *Osijo v. Housing Resources Management, Inc., supra,* (A055045). The California Supreme Court denied plaintiff's petition for review on September 30, 1992, and the remittitur issued on October 26, 1992. The case is final. Once the remittitur issues, the lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, even in the event of an intervening change in the law. (See *Griset v. Fair Political Practices Com., supra,* 25 Cal.4th at pp. 701-702.)

"A motion to vacate or set aside the judgment, if made after the statutory time has elapsed for direct attack by motion, or if made on grounds or procedure not authorized by statutes governing direct attack, is a collateral attack. [Citations.]" (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court § 8, p. 516.)

A collateral attack on a judgment for an error committed in the exercise of the court's jurisdiction is not permitted. (*Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 Cal.App.4th 387, 398; 8 Witkin, Cal. Procedure (2007 supp.) Attack on Judgment in Trial Court, § 6, p. 189.) "Except in the case **[*17]** of extrinsic fraud, '[a] judgment on the merits that is not void on its face and [thus] subject to collateral attack is protected by the doctrine of res judicata after the time for ordinary direct attack has passed.' (at p. 718.)" (*Aerojet-General Corp,* at p. 398, fn. 3.)

Moreover, plaintiff is simply wrong when he asserts that the court acted without subject matter jurisdiction. Subject

matter jurisdiction and personal jurisdiction are jurisdiction in the fundamental sense. (See 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 323, pp. 899-900; *id.*, § 328, pp. 908-909.) The court had the authority to hear the section 664.6 motion and to decide it. "In ruling upon [a section 664.6] motion, trial courts are empowered to resolve all underlying factual disputes and 'ultimately determine whether the parties reached a binding mutual accord as to material terms.' [Citations.]" (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2007) P 4:534.)

A judgment by a court lacking in jurisdiction of the *subject matter* is subject to collateral attack, as is a judgment by a court lacking jurisdiction of the *person.* (2 Witkin, Cal. Procedure, *supra,* Jurisdiction, § 323, p. **[*18]** 899.) However, the question whether an act *in excess of jurisdiction* by a court that had both subject matter and personal jurisdiction is subject to collateral attack cannot be answered authoritatively, "for the cases are in conflict in their holdings, and the opinions have produced no clear statement of principles. This is partly due, perhaps, to the difficulty encountered in distinguishing total absence of jurisdiction from excess of jurisdiction, and also to the practical fact that some acts in excess of jurisdiction are more serious and objectionable than others." (*Ibid.*)

As our Supreme Court explained in *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653: "The term 'jurisdiction,' 'used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition.' (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287 (*Abelleira*).) Essentially, jurisdictional errors are of two types. 'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' (*Id.* at p. 288.) **[*19]** When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.' (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 119 (*Barquis*).)" (*People v. American Contractors Indemnity Co.,* at p. 660.)

"However, 'in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations.' (*Abelleira, supra,* 17 Cal.2d at p. 288.) It may also 'be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' (*Ibid.*) ' "[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction." ' (*Id.* at p. 290.) When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by 'principles **[*20]** of estoppel, disfavor of collateral attack or res judicata.' [Citation.] Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final unless 'unusual circumstances were present which prevented an earlier and more appropriate attack.' (*Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 727 [general rule is that a 'final judgment or order is res judicata' and not subject to collateral attack 'even though contrary to statute where the court has jurisdiction in the fundamental sense, i.e., of the subject matter and the parties']; 2 Witkin, Cal. Procedure[, *supra,*] Jurisdiction, § 323, p. 899.)" (*People v. American Contractors Indemnity Co., supra,* 33 Cal.4th at p. 661.)

Witkin identifies one reason for the rule: "If there is jurisdiction of the subject matter and the parties, one who complains of the act is usually before the court. He has an opportunity to object, or to have the judgment or order reviewed by the usual methods of direct attack, such as new trial or appeal. He may also in many situations use the extraordinary **[*21]** writs . . . to directly attack and prevent or annul the unauthorized act. . . . [P] . . . [A]cts merely in excess of jurisdiction, by a court having jurisdiction of the subject matter and parties, should not be subject to collateral attack unless exceptional circumstances precluded an earlier and more appropriate attack. [Citations.] [P] The contrary view, that a judgment or order in excess of jurisdiction is as completely void as one made by a court lacking subject matter jurisdiction, is artificial and dangerous. If uniformly followed it would mean that any judgment or order which might be prevented by prohibition or annulled on certiorari would be subject to collateral attack. . . . To open up this vast field of departures from authorized procedure to collateral attack is neither necessary nor desirable." (2 Witkin, Cal. Procedure, *supra,* Jurisdiction, § 323, pp. 899-900.) Expanding on this discussion, Witkin observes that "[t]he theory that acts beyond a court's authority are void and always subject to collateral attack . . . was abandoned in a series of cases beginning with *Pacific Mut. Life Ins. Co. v. McConnell*[*, supra,* 44 Cal.2d 715] . . . ." (2 Witkin, Cal. Procedure, *supra,* **[*22]** Jurisdiction, § 328, p. 907.) Consequently, "[a] judgment enforcing a contract is res judicata even though the defense of illegality is raised in the subsequent litigation." (*Ibid.*)

However, "[i]n exceptional situations collateral attack is allowed, despite subject matter jurisdiction, where the judgment is contrary to statute: (1) '[W]here unusual circumstances were present which prevented an earlier and more appropriate attack' [citation]. (2) Where a *contempt adjudication* is based on violation of an injunction or other equitable order made contrary to statute. [Citation.] 'The decisions do not use the term, but the attack in such cases might be considered to be collateral, and the proceedings apparently fall in a special category because they are penal in nature.' [Citation.]" (2 Witkin, Cal. Procedure, *supra,* Jurisdiction, § 328, pp. 907-908, italics added.)

This latter contempt adjudication exception is precisely the situation faced by the court in *Davidson, supra,* 70 Cal.App.4th 514. Indeed, the appellate court did not hold that the trial court lacked subject matter jurisdiction or jurisdiction in the fundamental sense. It specifically stated that "the 1987 stipulated order was **[*23]** *in excess of the court's jurisdiction* because it was not entered in compliance with section 664.6 or some other settlement enforcement mechanism. Thus, it is void and cannot be the basis of a valid contempt order. . . . We only hold the present judgment, i.e., the 1987 stipulated order, which was obtained in an unauthorized manner, is void for purposes of enforcement in contempt proceedings premised on its violation." (*Davidson,* at p. 529, fn. omitted, italics added.) Clearly, the court applied the well-recognized exception to res judicata, allowing collateral attack on the contempt citation.

Levy, supra, 10 Cal.4th 578, which itself arose in the context of a petition for writ of mandate from the trial court's denial

of expedited enforcement of a settlement agreement pursuant to section 664.6, has been applied primarily in cases on direct appeal from a court order enforcing or refusing to enforce a settlement agreement pursuant to section 664.6. (See e.g., *Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, 1115-1123; *Harris, supra,* 74 Cal.App.4th 299, 302-306; *Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1160, 1162-1164; *Burckhard v. Del Monte Corp., supra,* 48 Cal.App.4th 1912, 1914-1915; **[*24]** *Robertson v. Chen* (1996) 44 Cal.App.4th 1290, 1292-1293; *Cortez v. Kenneally* (1996) 44 Cal.App.4th 523, 524-525, 528-530; *Johnson v. Department. of Corrections, supra,* 38 Cal.App.4th 1700, 1704-1710.)

Unlike petitioners in *Davidson, supra,* 70 Cal.App.4th 514, plaintiff is not raising the alleged invalidity of the enforcement order as a defense to a contempt order. Although he has challenged the enforcement order and settlement agreement in numerous ways, until recently he never raised *Levy* or the failure of defendants to personally sign the settlement agreement as a basis for any challenge. The parties have fully performed under the terms of the settlement agreement. Plaintiff has not offered to return any settlement funds he has received. At this point, every former party defendant in the original action is insolvent, and even the insurer is in liquidation. Unlike *Davidson,* we cannot say here that " ' " 'adherence to the previous decision would result in defeating a just cause . . . .' " ' " (See *Davidson, supra,* at p. 530, italics omitted.) It would be unjust and inequitable to allow appellant to unwind more than a decade of decisions in the circumstances presented by this case. [6] **[*25]**

FOOTNOTES

6 Such equitable considerations are highly relevant here. We note that in the direct appeal in *Johnson v. Department of Corrections,* the Court of Appeal rejected the defendants' argument that equity weighed against retrospective application of section 664.6 because defendants had already tendered $ 83,000 to the plaintiff. However, plaintiff refused to accept the money and the trial court had not permitted the plaintiff's attorney to withdraw the money from the client trust account until the dispute between plaintiff and the attorney was resolved. The appellate court observed that since the funds could be returned to defendants, defendants would not be harmed in any way by retroactive application of *Levy.* (*Johnson v. Department of Corrections, supra,* 38 Cal.App.4th at p. 1710.) In the instant case, it does not appear that the funds could be effectively returned and plaintiff has not sought to do so in any event.

DISPOSITION

The order denying appellant's motion to set aside the judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.