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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| CHARLES KNIGHT,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CRISANN CONROY,<br><br>Defendant and Appellant. | E049034<br><br>(Super.Ct.No. CIVHS700049)<br><br>OPINION |

APPEAL from the Superior Court of San Bernardino County. Jules E. Fleuret, Judge. Affirmed.

Law Offices of Philipson & Erdmier and David Philipson for Plaintiff and Appellant.

Borton Petrini and Jeffrey A. Dains for Defendant and Appellant.

This case involves an appeal and a cross-appeal. At the trial court, Chuck Knight of Knight Plumbing (Knight) sued Crisann Conroy (Property Owner) for (1) malicious prosecution of an administrative proceeding; and (2) breach of contract. After a bench trial, the trial court (1) ordered that Knight take nothing on the malicious prosecution

cause of action; (2) awarded Knight damages for the breach of contract cause of action; (3) declared Knight the prevailing party; and (4) awarded Knight attorney's fees. On appeal, Property Owner's over-arching contention is that the trial court erred by awarding Knight attorney's fees. On cross-appeal, Knight asserts that the trial court relied on erroneous reasoning when it denied damages on the malicious prosecution cause of action.

## FACTUAL AND PROCEDURAL HISTORY

### A. SETTLEMENT AGREEMENT BACKGROUND

Property Owner held title to a property in Big Bear Lake (the property). In 2005, Property Owner entered into an agreement with Thomas Baird and Baird Construction and Development (Baird) to build a 3,200 square foot custom home on the property, for the purpose of selling the home. As part of the agreement, Property Owner conveyed 50 percent of her ownership interest in the property to Baird. In turn, Baird borrowed $710,000 from Indymac Bank, in the form of a construction loan. Baird was the sole borrower on the construction loan. In connection with the loan, Property Owner conveyed to Baird her remaining 50 percent ownership interest in the property, which resulted in Baird having a 100 percent interest in the property. The agreement between Property Owner and Baird became problematic, due to Property Owner and Baird disagreeing about their various obligations.

### B. SETTLEMENT AGREEMENT

On February 14, 2006, Property Owner and Baird entered into a settlement agreement. The settlement agreement provided that Property Owner would buy-out

Baird's interest in the project. In return, Baird would convey the property back to Property Owner and surrender all building permits to Property Owner.

The waiver and release portion of the settlement agreement reads as follows: "A. General Release by [Property Owner]: For and in consideration of the agreements stated above, [Property Owner] hereby releases and forever discharges [Baird] and each of their respective employees, contractors, subcontractors, officers, directors, shareholders, insurers, assigns, attorneys, agents, representatives, and each of their spouses, family members, principals, parent corporations, subsidiaries, predecessors, and successors-in-interest, from any and all claim, demands, obligations (fiduciary or otherwise), for causes of action she may not have or may ever have arising or in any way related to, either directly or indirectly, the acts, omissions, damages, and/or injuries arising from [the property], and the construction performed by [Baird] in connection therewith.

"[Property Owner] understands that this provision prevents her from asserting any claim against any of the subcontractors or third persons who performed work on [the property], and that these subcontractors and third persons are hereby deemed to be third party beneficiaries under this AGREEMENT as it pertains to enforcement of this provision."

"B. Limited Release by [Baird]: [Baird] agrees to indemnify [Property Owner] for unreported worker's compensation claims relating to the building of [the property] up through February 10, 2006.

"8. Waiver of Civil Code [section] 1542: It is the intention of the PARTIES that the foregoing shall bar all actions, fees, damages, losses, claims, liabilities and demands of whatsoever character, nature and kind, known or unknown, suspected or unsuspected, hereinabove specified to be so barred. In furtherance of this intention, [Property Owner] expressly waive[s] any and all rights and benefits conferred upon her by the provisions of [s]ection 1542 of the California Civil Code, which are as follows:

"'A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN [HER] FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY [HER] MUST HAVE MATERIALLY AFFECTED [HER] SETTLEMENT WITH THE DEBTOR.'"

In regard to attorney's fees, the settlement agreement provided the following: "11. Attorney's Fees: In the event of litigation involving the provisions of this AGREEMENT, the prevailing party shall be entitled to reasonable attorney's fees and costs. The [Property Owner and Baird] shall bear their own attorney's fees and costs incurred up through the execution of this AGREEMENT."

C. CONTRACTORS STATE LICENSE BOARD

Knight installed a sewer line upgrade for the property. Knight only worked on the property during the time that Baird was the primary contractor. On October 3, 2006, Property Owner filed a complaint against Knight with the California Contractors State License Board (the Board). In the complaint, Property Owner alleged that Knight over-tightened a water line, which caused the line to crack and explode. Additionally,

Property Owner complained that Knight incorrectly installed the sewer line. Property Owner requested a refund of her money, in order to bring the plumbing work into compliance with the applicable codes.

On May 14, 2007, the Board held a mandatory arbitration hearing regarding Property Owner's complaint. The Board denied Property Owner's claim against Knight. The Board explained that Property Owner's claim was denied because Property Owner executed a settlement agreement, and waiver and release of all claims relating to the construction of improvements on the property, including claims against subcontractors.

D. LAWSUIT

On June 19, 2007, Knight filed a lawsuit against Property Owner for (1) malicious prosecution of an administrative proceeding, and (2) breach of contract. Knight complained that Property Owner acted maliciously by filing a complaint with the Board, because Property Owner knew that she was barred from bringing actions against Baird's subcontractors. Further, Knight alleged that pursuant to the settlement agreement, he had sent Property Owner a request for attorney's fees and costs, associated with the arbitration. Knight requested that the trial court award him the costs and fees associated with the arbitration, as well as the lawsuit.

During closing arguments of the bench trial, in regard to the breach of contract claim, Knight argued that Property Owner and Baird entered into a release of claims, and that Knight was a third party beneficiary of the release. Knight argued that as a third party beneficiary, he had the right to enforce the contract. Further, Knight asserted

that Property Owner breached the contract by filing a claim with the Board, because Property Owner had released all claims against subcontractors and third parties. Knight argued that he was harmed by Property Owner's actions because he had to pay for attorney's fees and costs, and he missed work.

In regard to the malicious prosecution cause of action, Knight asserted that Property Owner was responsible for filing the complaint against him with the Board. Knight argued that the complaint led to a mandatory arbitration, as opposed to voluntary arbitration. Further, Knight asserted that Property Owner's purpose in filing the complaint was not to succeed on the merits, rather her "primary purpose was to drive a stake through the [agreed upon] release so that she [could] pursue other people that she had released under that [agreed upon] release."

In Property Owner's closing argument, in regard to the malicious prosecution cause of action, she asserted that Knight chose to be bound by the Board's mandatory arbitration program when he became a licensed contractor, and therefore the arbitration was not truly mandated, because Knight chose to be a licensed contractor. In regard to the breach of contract claim, Property Owner set forth several arguments. First, Property Owner argued that Knight's work took place on the property, as well as on the neighboring property, which was also owned by Property Owner. Property Owner argued that the release only concerned work on the property, and therefore Knight's work that crossed onto the neighboring property was not covered by the release.

Second, Property Owner asserted that she was not responsible for the Board prosecuting her complaint, rather, it was the Board's decision to investigate her

complaint and proceed with an arbitration hearing. Third, Property Owner argued that the settlement release concerned litigation, and the Board arbitration did not constitute litigation. Property Owner argued that an administrative proceeding is distinguishable from litigation.

Fourth, Property Owner asserted that the "third-party beneficiary" language was limited to the release paragraph. Property Owner argued that the "third-party beneficiary" language did not pertain to the whole contract, and particularly did not pertain to the attorney's fees provision. Consequently, Property Owner argued that Knight was not a third party beneficiary to the attorney's fees provision.

Fifth, Property Owner argued that if Knight wanted attorney's fees for the arbitration, then Knight needed to request an award of fees during the arbitration. Sixth, Property Owner argued that Knight should not be awarded attorney's fees because the arbitrator did not designate a prevailing party, and Knight did not request such a designation. Seventh, Property Owner argued that Knight's damages for the alleged breach of contract were speculative, because Knight could not determine how much money he lost as a result of defending against Property Owner's claim.

The trial court ordered that (1) Knight take nothing for his malicious prosecution cause of action, and (2) Knight recover damages for his breach of contract cause of action, including (a) $3,856.96 in attorney's fees related to the arbitration; (b) $256.96 in costs related to the arbitration; (c) $1,620 in lost income associated with the arbitration; and (d) interest on the judgment in the amount of $1,091,49. The trial court

further concluded that Knight was the prevailing party in the lawsuit, and therefore, awarded Knight $29,700 in attorney's fees and $1,679.47 in costs.

## DISCUSSION

We begin by addressing Property Owner's appeal. After addressing Property Owner's appeal, we will address Knight's cross-appeal.

### A. APPEAL

#### 1. *THIRD PARTY BENEFICIARY FOR ATTORNEY'S FEES*

Property Owner contends that Knight was not a third party beneficiary of the attorney's fees provision in the settlement agreement, and therefore, the trial court erred by awarding attorney's fees to Knight. Within this argument, under a single heading, Property Owner asserts (1) "[t]he trial court erred in its analysis" by misapplying the law; and (2) Knight did not meet his burden of proof. In regard to the standard of review, Property Owner contends that the independent standard of review is applicable because "[t]he facts are not in dispute." Property Owner then argues that the abuse of discretion standard may be applied, or, in the alternative, that the substantial evidence standard of review may be applied. Based upon Property Owner's mix of arguments and multiple standards of review, we cannot determine the exact alleged error that Property Owner is setting forth. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [each point must be raised under a separate heading].)

Despite Property Owner's jumble of legal arguments, we will address the contentions that we infer Property Owner is trying to raise. We have deciphered two arguments. First, we infer that Property Owner is contending that the trial court

incorrectly concluded that a third party beneficiary may benefit from an attorney fee clause, because only a signatory to an agreement may benefit from an attorney fee clause. Second, it appears that Property Owner is contending that Knight did not present substantial evidence that he was a third party beneficiary of the attorney's fees provision in the settlement agreement.

a. *Non-Signatory Party*

We begin our analysis with the contention that the trial court's ruling is incorrect because a third party beneficiary cannot benefit from an attorney fees clause, since only signatories to an agreement may benefit from an attorney fee provision. We disagree.

The foregoing contention presents a question of law, which we independently review. (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 445.)

Under California law, a third party beneficiary to a contract may benefit from a contract's attorney fee provision, even if the he or she is not a signatory to the agreement. (See *Renwick v. Bennett (In re Bennett)* (9th Cir. 2002) 298 F.3d 1059, 1071; see also *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 344; see also *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 383.) The foregoing rule of law is well settled. Property Owner has not explained why the settled law is incorrect. Consequently, we follow the settled rule of law, and find Property Owner's contention unpersuasive.

b. *Substantial Evidence*

Next, we address the contention that Knight did not present substantial evidence that he was a third party beneficiary to the attorney's fees provision in the settlement agreement. We disagree with the contention.

Whether a person is an intended third party beneficiary of a contract is a question of fact reviewed under the substantial evidence standard; however, where the issue of whether a third person is an intended beneficiary can be answered by interpreting the contract as a whole, while considering the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, then the issue becomes a question of law that we resolve independently. (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233.) In this case, we only need to consider the language of the contract. Consequently, we apply the independent standard of review.

"'The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person.'" (*Prouty v. Gores Technology Group*, *supra*, 121 Cal.App.4th at p. 1232.)

Within the release clause, the settlement agreement includes the following language: "[Property Owner] understands that this provision prevents her from asserting any claim against any of the subcontractors or third persons who performed work on [the property], and that these subcontractors and third persons are hereby

deemed to be third party beneficiaries under this AGREEMENT as it pertains to enforcement of this provision." The plain language of the agreement makes subcontractors and people who worked on the property third party beneficiaries.

We note that "[a] party need not show that [the agreement] was intended to benefit [him] as an individual and [that the party] may prevail by showing that [he] is a member of a class the parties intended to benefit." (*Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 891.) Knight performed plumbing work on the property before the settlement agreement was signed. Specifically, Knight worked on the property when Baird was the primary contractor. Therefore, Knight is among the class of "subcontractors [or] third parties who performed work on [the property]." The plain language of the contract reflects that subcontractors are to be deemed third party beneficiaries. Consequently, Knight, as a subcontractor, is a member of a class that the parties intended to benefit.

In regard to attorney's fees, the settlement agreement provided, "11. Attorney's Fees: In the event of litigation involving the provisions of this AGREEMENT, the prevailing party shall be entitled to reasonable attorney's fees and costs. The PARTIES shall bear their own attorney's fees and costs incurred up through the execution of this AGREEMENT." The attorney's fees clause relates to litigation "involving the provisions of [the] AGREEMENT." The attorney's fees clause is not a stand-alone provision, rather, it relates to all of the other provisions in the agreement. Consequently, when Knight, as a third party beneficiary of the release provision, sued

due to an alleged violation of the release provision, Knight was entitled to seek attorney's fees.

We find support for our conclusion in *Sessions Payroll Management, Inc. v. Noble Const. Co., Inc.* (2000) 84 Cal.App.4th 671 (*Sessions*). In regard to attorney's fees, the *Sessions* contract provided, "'[I]n the event it becomes necessary for *either party* to enforce the provisions of this Agreement . . . .'" (*Id.* at p. 681.) The appellate court reasoned that "either" referred only to the two parties to the contract, and if the parties wanted to include third persons, then they would have used the term "any" party. Additionally, the appellate court noted the term "party" referred to a "party" to the contract, i.e., the contract signatories. (*Ibid.*) Accordingly, the appellate court concluded that the attorney's fees clause excluded third parties. (*Id.* at pp. 680-681.)

The attorney's fees clause in the instant case uses the term "prevailing party," as in "*the prevailing party* shall be entitled to reasonable attorney's fees and costs." The language of the attorney's fees clause does not limit the entitlement of fees to signatory parties, as the contract did in *Sessions*. Rather, the contract reads that any "prevailing party," such as a prevailing third party beneficiary, is entitled to fees. Consequently, we find *Sessions* supportive of our reasoning in the instant case, because the language in the *Sessions* contract, which excluded third party beneficiaries from receiving attorney fees, is not present in the instant settlement agreement.

Property Owner provides several arguments as to why the instant case is similar to *Sessions*, rather than distinguishable from *Sessions*. First, Property Owner asserts that the instant case is similar to *Sessions* because the attorney's fees clause in the

instant case did not include any language specifically including Knight. We do not find this argument persuasive because the attorney's fees clause also did not expressly reference Property Owner and Baird. Rather, the clause simply reflects, "In the event of litigation involving the provisions of this agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs." In other words, the failure to mention a specific party by name does not mean that the party is automatically disclaimed from the provision.

Second, Property Owner argues that the instant case is similar to *Sessions* because the release provision disclaimed subcontractors from any other portion of the settlement agreement. Specifically, Property Owner cites to the following language in the release clause, "these subcontractors and third persons are hereby deemed to be third party beneficiaries under this AGREEMENT *as it pertains to enforcement of this provision*." (Italics added.) We do not find Property Owner's argument persuasive, because the only way to "enforce" the provision would be to sue Property Owner for not complying with the litigation release. The attorney's fees clause provides, "In the event of litigation involving the provisions of this AGREEMENT, the prevailing party shall be entitled to reasonable attorney's fees and costs." It is not logical to conclude that the subcontractors are permitted to "enforce" the release provision, but excluded from the clause that provides for what will happen in the event of "enforcement," i.e., attorney's fees, especially when the attorney's fees clause allows for any "prevailing party" to collect fees.

In sum, the dividing line that Property Owner is attempting to draw between (1) the litigation release, and (2) the attorney's fees clause, does not appear to be present in the contract, because (a) there is no language disclaiming third parties from the attorney's fees clause, and (b) it is not logical to allow third parties to enforce the release provision, but then exclude those third parties from the definition of "prevailing party."

Third, Property Owner asserts that the instant case is akin to *Sessions* because Knight was not specifically named in the settlement agreement. As set forth *ante*, a party need not show that an agreement was intended to benefit him as an individual, if the party can show that he is a member of a class the parties intended to benefit. (*Souza v. Westlands Water Dist.*, *supra*, 135 Cal.App.4th at p. 891.) In the instant case, the settlement agreement specifically identified "subcontractors or third persons who performed work on [the property]" as people to be benefited by the release provision. The evidence reflects that Knight performed work on the property while Baird was working on the property. Consequently, Knight was a subcontractor or a third party who performed work on the property. Therefore, Knight did not need to be named as an individual in order to be benefited by the agreement, because Knight is a member of a class that the parties intended to benefit.

Fourth, Property Owner contends that the term "prevailing party" in the attorney's fees clause was a specific reference to Property Owner and Baird, similar to the *Sessions* contract which used the term "either party." Contrary to Property Owner's position, a "prevailing party" is defined as "the party with a net monetary recovery, a

defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." (Code Civ. Proc., § 1032; see also *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1333.) Based upon the foregoing definition, we are not persuaded by the argument that "prevailing party" refers to the signatory parties to a contract.

Property Owner goes on to analogize her case to *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858 (*Blickman*). In *Blickman*, the attorney's fees clause provided "for recovery of attorney fees by the prevailing party in 'any litigation between the parties hereto to enforce any provision of this Agreement.'" (*Id.* at p. 893.) First, Property Owner cites to the portion of the opinion in which the appellate court was presented with the issue of "whether the cross-complaint was an action 'on a contract.'" (*Id.* at p. 894.)[1] In other words, the court focused on the idea of "action 'on a contract,'" not the term "prevailing party." We do not see how this portion of the *Blickman* opinion is relevant to determining if Knight is a beneficiary of the attorney's fees clause. Consequently, we do not address this portion of Property Owner's analogy.

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[1] The page cited by Property Owner is *Blickman*, *supra*, 162 Cal.App.4th 864, which is the first page of the opinion. Based upon the quote Property Owner provides, we infer that, rather than page 864, Property Owner intended to pinpoint cite page 894, which is the page associated with the quote provided in Property Owner's opening brief.

2. *RECIPROCITY*

Next, Property Owner contends that Knight should not have been awarded attorney's fees because Property Owner could not have been awarded attorney's fees from Knight. In other words, Property Owner contends that the attorney's fees clause should not be enforced because it was not reciprocal. We disagree.

When interpreting a contract, we apply the de novo standard of review. (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 713.)

The following rule has been set forth concerning attorney's fees and non-signatory parties, "A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed." (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382.)

As set forth *ante*, the settlement agreement provided the following, "11. Attorney's Fees: In the event of litigation involving the provisions of this AGREEMENT, the prevailing party shall be entitled to reasonable attorney's fees and costs. The PARTIES shall bear their own attorney's fees and costs incurred up through the execution of this AGREEMENT." The attorney's fees clause provides that whoever prevails in litigation is entitled to attorney's fees. There is no language limiting the entitlement of attorney's fees to signatories or non-signatories. Rather, any prevailing party can be awarded fees. Consequently, Property Owner could have been awarded attorney's fees if she prevailed in the litigation.

Property Owner argues that the attorney's fees clause is not reciprocal because there are "no facts in the record or on the face of the SETTLEMENT AGREEMENT that in any way **clearly manifests** the intent of [Property Owner] and Baird to make the attorney's fees provision of paragraph 11 inure to the benefit of the incidental beneficiary Knight." Property Owner's argument is not persuasive because it does not address the reciprocal nature of the attorney's fees clause.

Property Owner cites to *Blickman* to support her argument. As set forth *ante*, in *Blickman*, the attorney's fees clause provided "for recovery of attorney fees by the prevailing party in 'any litigation between the parties hereto to enforce any provision of this Agreement.'" (*Blickman*, *supra*, 162 Cal.App.4th at p. 893.) The appellate court concluded that the plain language—"'litigation between the parties hereto'"—limited an award of fees to litigation between the signatories. (*Id.* at p. 896.) In *Blickman*, the signatories were "Mozart and its broker CPS." (*Ibid.*) CPS was not a party to the litigation in *Blickman*, rather, the litigation was between Blickman and Mozart. As a result, the appellate court reasoned that "no part of [the] proceeding constituted 'litigation between the parties hereto,' and no part of it fell within the fee clause," due to the fact that the litigation was not between Mozart and CPS. (*Ibid.*) The appellate court held that neither party to the litigation, i.e., Blickman or Mozart, could assert a right to fees. (*Ibid.*)

Property Owner analogizes the instant case to *Blickman*. Property Owner asserts that the attorney's fees clause in the instant case "has the same limitation as the fee provision" in *Blickman*. The agreement in the instant case provides, "In the event of

litigation involving the provisions of this AGREEMENT, the prevailing party shall be entitled to reasonable attorney's fees and costs." Contrary to Property Owner's position, there is no limiting language that is similar to the language in *Blickman*. The fee provision in the instant case provides for attorney's fees to be awarded to the prevailing party "in the event of litigation." There is nothing limiting the fee clause to "litigation between the parties hereto." In sum, we are not persuaded that the instant case is similar to *Blickman*.

3. *AUTHORITY TO BIND A THIRD PARTY*

In an argument tangentially related to reciprocity, Property Owner asserts that the attorney's fees provision was not reciprocal, because Property Owner and Baird did not have the authority to bind Knight to an attorney's fees clause. For example, if Knight were not a "prevailing party" in litigation then he could not be expected to pay attorney's fees because he never signed the settlement agreement.[2]

In support of Property Owner's argument, she cites Civil Code section 1717, which concerns an award of attorney's fees in a contract action. Property Owner also cites Civil Code section 1636, which provides instructions for interpreting a contract. Property Owner does not cite any other legal authority. Property Owner does not provide a citation to any case or statute supporting her position that she and Baird could not bind Knight to the attorney's fees provision. Since Property Owner's argument does

[2] Under the same heading as the foregoing argument, Property Owner asserts that the attorney's fees clause could not have been reciprocal because Knight only became aware of the attorney's fees clause on the eve of arbitration. It is unclear what legal argument Property Owner is trying to raise in relation to this alleged fact.

not contain citations to relevant legal authorities, we treat her contention as forfeited or abandoned. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948 [Fourth Dist., Div. Two]; see also Cal. Rules of Court, rule 8.204(a)(1)(B).)

4. *ESTOPPEL*

Property Owner argues that her request for attorney's fees, in her answer to Knight's complaint, does not estop her from arguing that Knight should not receive attorney's fees. The general rule is that an appellant cannot complain on appeal about an interpretation of a contract, which the appellant used in her answer in the trial court, because the admission in the answer is binding on the appellant. (*McPherson v. Great Western Milling Co.* (1919) 44 Cal.App. 491, 494.) Within this contention, Property Owner appears to be concerned that her request for Knight to pay her attorney's fees will bind Property Owner to the interpretation that the attorney's fees provision included Knight. Property Owner's contention seems to be anticipating an argument by Knight. We have not relied on the principle of estoppel in resolving Property Owner's contentions. Consequently, we do not address this issue.

5. *INCIDENTAL BENEFICIARY*

Property Owner contends that Knight should not receive attorney's fees because Knight was an incidental third party beneficiary to the settlement agreement. Stated differently, Property Owner asserts that since the settlement agreement was not made expressly for Knight's benefit, Knight cannot recover fees. We disagree.

Civil Code section 1559 provides that "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto

rescind it." A third party beneficiary may be classified as either an "intended" beneficiary or an "incidental" beneficiary. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1022 (*Spinks*).) "As used in Civil Code section 1559, the 'word "expressly . . ." . . . has now come to mean merely the negative of "incidentally."' [Citations.]" (*Ibid.*)

"'The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.' [Citations.]" (*Spinks, supra,* 171 Cal.App.4th at p. 1022.) "Thus, a third party will qualify as an intended beneficiary where 'the circumstances indicate that the promisee' . . . 'intends to give the beneficiary the benefit of the promised performance.' [Citation.]" (*Id.* at p. 1023.) A third party does not need to be named or individually identified to be an express beneficiary, rather, a third person may enforce a contract where it is shown that he is a member of a class of people for whose benefit the promise was made. (*Ibid.*)

We apply the independent standard of review when interpreting a contract. (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 551.)

In this case, the release provision of the settlement agreement provides, "[Property Owner] understands that this [release] provision prevents her from asserting any claim against any of the subcontractors or third persons who performed work on

[the property], and that these subcontractors and third persons are hereby deemed to be third party beneficiaries under this AGREEMENT as it pertains to the enforcement of this provision." The foregoing language of the agreement expressly made subcontractors, or third persons who performed work on the property, third party beneficiaries for the sake of enforcing the release provision. Knight was a plumber that worked on the property during the time that Baird was the general contractor. As a result of Knight's status as subcontractor, or as a person who worked on the property, Knight is a beneficiary of Property Owner's express promise to not assert any claim against subcontractors or persons who worked on the property. Accordingly, Knight is an intended beneficiary of the release provision.

The attorney's fees clause in the agreement reflects, "In the event of litigation involving the provisions of this AGREEMENT, the prevailing party shall be entitled to reasonable attorney's fees and costs." Based upon a plain reading of the foregoing language, the attorney's fees clause is applicable to all of the provisions in the agreement. Since the release provision permits Knight to "enforce" the release, it follows that Knight would be able to secure an award of attorney's fees, since the attorney's fees clause (1) applies to all the provisions in the agreement; and (2) does not limit the term "prevailing party" to signatories. Thus, it appears from the language of the settlement agreement that Knight, as a subcontractor or person who worked on the property, was intended to benefit from Property Owner's promises to (1) not make a claim, and (2) pay attorney's fees in the event of Property Owner losing in litigation.

Property Owner argues that Knight was not an intended beneficiary of the attorney's fees clause, because Knight was only an intended beneficiary of the release provision, not the attorney's fees provision. As set forth *ante*, the attorney's fees clause is applicable to all of the provisions in the settlement agreement. There is no language limiting the fees provision to the signatories or to litigation between the signatories. Accordingly, we find Property Owner's argument unpersuasive.

6. *RES JUDICATA*

Property Owner's contentions related to the principle of res judicata are not clearly set forth, because there are a mixture of assertions raised under various headings and subheadings. The primary argument that we are able to discern is as follows: The trial court erred by awarding Knight his attorney's fees associated with the arbitration, because the fee issue is res judicata due to Knight not requesting attorney's fees at the arbitration. We disagree.

The doctrine of res judicata precludes parties from relitigating an issue that has been finally determined by a competent judicial body. (*Levy v. Cohen* (1977) 19 Cal.3d 165, 171.) The concept of res judicata also applies to issues that could have been raised, but were not. Stated differently, "[i]f the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions.'" (*Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 755.)

It is settled that the doctrine of res judicata applies to arbitration proceedings. (*Thibodeau v. Crum*, *supra*, 4 Cal.App.4th at p. 755.) The power of the arbitrator is derived solely from the arbitration agreement. Parties are obliged "to place before their arbitrator all matters within the scope of the arbitration, related to the subject matter, and relevant to the issues." (*Ibid.*)

It appears that the parties agree that the issue of attorney's fees was not raised in the Board's arbitration proceedings. Accordingly, based upon the foregoing laws, we must determine if the issue of attorney's fees was within the scope of the arbitration, such that it could have been raised at arbitration. The record includes the Board's "Mandatory Arbitration Program Guide" (the Guide). The Guide provides, "The arbitrator has the authority to rule on the claims asserted and to award money damages." Attorney's fees are typically not included within the definition of "damages." (*Woodward v. Bruner* (1951) 104 Cal.App.2d 83, 85-86.) Since attorney's fees typically are not "damages" it appears that an award of fees was beyond the scope of the arbitrator's authority.[3]

Moreover, the "Submission to Mandatory Arbitration" form, which Property Owner completed and signed, reflects an agreement that the only issues submitted for arbitration will be "those issues reported to the Registrar and found by the Registrar to be [a] possible violation of contractors['] license law[s]." The issue of attorney's fees

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[3] We note that in the instant case, as part of the breach of contract cause of action, the trial court awarded, as damages, the attorney's fees associated with the arbitration; however, the attorney's fees associated with the trial were awarded separately from the damages.

would not qualify as a possible violation of contractors' license laws, because fees do not concern construction. Consequently, it appears that the issue of attorney's fees was beyond the scope of the arbitrator's authority. We find further support for this conclusion in the Guide, which notes that the arbitrators are people "who have been trained to resolve consumer/contractor disputes." There is nothing indicating that the arbitrators are qualified or experienced in deciding issues of attorney's fees. In sum, the issue of attorney's fees was outside of the arbitrator's authority. Accordingly, the issue of attorney's fees was not res judicata, because it was not within the scope of the arbitration.

Property Owner appears to assert that the issue of attorney's fees was within the scope of the arbitration because Code of Civil Procedure section 1283.4 reflects that an *arbitration award* "shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." Code of Civil Procedure section 1283.4 discusses the required contents of an *arbitration award*; it does not set forth the power of an arbitrator or the scope of a Board arbitration. As a result, we are not persuaded by Property Owner's argument.

Next, Property Owner cites Business and Professions Code section 7085.5, subdivision (r)(1), which provides, "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the board's referral and the requirements of the board. The arbitrator, in his or her sole discretion, may award costs or expenses." Property Owner does not explain which portion of this statute gives the arbitrator the authority to award attorney's fees. For example, Property Owner does

not explain whether the arbitrator derives his or her power to award fees from the "any remedy or relief" clause or the "costs and expenses" clause. (Bus. & Prof. Code, § 7085.5, subd. (r)(1).) This court cannot make arguments for the benefit of Property Owner. (*Inyo Citizen for Better Planning v. Board of Supervisors* (2009) 180 Cal.App.4th 1, 14 [Fourth Dist., Div. Two] (*Inyo*).) Consequently, to the extent Property Owner asserted an argument regarding Business and Professions Code, section 7085.5, subdivision (r)(1), the argument is forfeited. (*Inyo*, at p. 14.)

7. *ATTORNEY'S FEES*

In Knight's respondent's brief, he requests that attorney's fees be awarded to him, in the event that this court affirms the judgment of the trial court. Knight does not explain why he is entitled to attorney's fees on appeal, or whether this court has the authority to award him attorney's fees. For example, Knight does not address the general rule that "when a judgment is rendered in a case involving a contract that includes an attorney fees and costs provision, the 'judgment extinguishes all further contractual rights, including the contractual attorney fees clause. [Citation.] Thus in the absence of express statutory authorization, . . . postjudgment attorney fees cannot be recovered.' [Citation.]" (*Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, 934.) This court cannot make arguments for the benefit of Knight. (*Inyo*, *supra*, 180 Cal.App.4th at p. 14.) Consequently, we do not address this contention any further, because Knight has not explained to this court whether there is any legal basis for awarding him attorney's fees. (*Ibid*.)

B. CROSS-APPEAL

1. *PROCEDURAL HISTORY*

The trial court issued a tentative decision in this case on March 20, 2009. (Cal. Rules of Court, rule 3.1590.) In the tentative decision, the trial court gave a variety of reasons for denying Knight's malicious prosecution cause of action. First, the trial court concluded that a malicious prosecution cause of action cannot be based upon a complaint to a state licensing board. In reaching the foregoing conclusion, the trial court noted that there was little evidence in the record that the Board investigated Property Owner's allegations before referring the case to mandatory arbitration. However, the trial court determined that it must presume that the Board performed its official duties. (Evid. Code, § 664 [presumption that an official duty has been regularly performed].) Second, the trial court reasoned that a malicious prosecution cause of action cannot be based upon a mandatory Board arbitration. Third, the trial court held that a mandatory Board arbitration is analogous to a small claims action, and therefore cannot support a malicious prosecution cause of action.

In the trial court's May 14, 2009, judgment, it ordered that Knight take nothing from Property Owner on the malicious prosecution cause of action; in this judgment, the trial court did not give reasons for its decision. On July 31, 2009, the trial court issued an amended judgment. In the amended judgment, the trial court did not give any reasons for denying the malicious prosecution cause of action.

2. *INVESTIGATION*

Knight contends that the trial court erred when issuing its decision(s) because the court relied, in part, on evidence related to the adequacy of the Board's investigation. Specifically, Knight argues, "The trial court and the parties got so hung up in issues concerning the adequacy of the [Board's] investigation that [Knight's] actual claim of damages based upon [Property Owner's] breach of her agreement to refrain from bringing any other actions . . . was overlooked."

We find two problems with Knight's contention. First, Knight cites the trial court's reasoning related to the malicious prosecution cause of action, and then seems to argue that the reasoning led to the wrong result in the breach of contract cause of action. Knight's reasoning does not correlate, since he is discussing separate causes of action. Second, Knight is attacking the trial court's reasoning related to the malicious prosecution cause of action. This court does not review a trial court's reasoning; rather, we review the results of the trial court's reasoning. (*Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 692, fn. 13 (*Economic*); *Luther Burbank Savings & Loan Assn. v. Comm. Const., Inc.* (1998) 64 Cal.App.4th 652, 660 (*Luther*); *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 843 (*Kaldenbach*).) Consequently, Knight's contention about incorrect reasoning does not raise an issue that we can review. For the foregoing reasons, we do not discuss this contention any further.

3. *EVIDENCE CODE SECTION 664*

Knight contends that the trial court erred in applying Evidence Code section 664 when resolving the malicious prosecution cause of action. Knight's contention focuses on the trial court's reasoning, rather than the result reached by the trial court. Stated differently, Knight's analysis does not explain how the application of Evidence Code section 664 led to an incorrect result; rather, Knight's analysis simply concludes that the Evidence Code section is inapplicable. As set forth *ante*, this court does not review a trial court's reasoning; rather, we review the results of the trial court's reasoning. (*Economic*, *supra*, 57 Cal.App.4th at p. 692, fn. 13; *Luther*, *supra*, 64 Cal.App.4th at p. 660; *Kaldenbach*, *supra*, 178 Cal.App.4th at p. 843.) Knight's contention about the trial court's incorrect reasoning does not raise an issue that we can review. Accordingly, we do not discuss this contention any further.

4. *REFERRAL*

Knight contends that the Board's referral to mandatory arbitration does not equate with an independent investigation. Knight does not connect this contention to any legal point. Consequently, we are unable to determine the exact legal argument being advanced by Knight. Since we cannot determine the point that Knight is trying to make, we do not discuss this contention any further. (*Legg v. Teneycke* (1956) 144 Cal.App.2d 584, 586.)

5. *CONTROLLING CASE*

Knight contends that the trial court erred when it reasoned that *Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310 controls the issue of whether a cause of action for

malicious prosecution may be based upon a favorable arbitration result. Again, Knight's contention focuses on the reasoning that the trial court used to reach its conclusion, rather than the result reached by the court. As set forth *ante*, this court does not review a trial court's reasoning; rather, we review the results of the trial court's reasoning. (*Economic*, *supra*, 57 Cal.App.4th at p. 692, fn. 13; *Luther*, *supra*, 64 Cal.App.4th at p. 660; *Kaldenbach*, *supra*, 178 Cal.App.4th at p. 843.) Knight's contention about the trial court's alleged incorrect analogy does not raise an issue that we can review. Accordingly, we do not discuss this contention any further.

6. *SMALL CLAIMS*

Knight contends that the trial court erred when it reasoned that the Board's mandatory arbitration is similar to a small claims proceeding. As set forth *ante*, we do not review a trial court's analogies. (*Economic*, *supra*, 57 Cal.App.4th at p. 692, fn. 13; *Luther*, *supra*, 64 Cal.App.4th at p. 660; *Kaldenbach*, *supra*, 178 Cal.App.4th at p. 843.) Since Knight's contention does not raise an issue that we can review, we do not discuss this contention any further.

7. *SANCTIONS*

In her respondent's brief, Property Owner asserts that Knight's cross-appeal is frivolous, and Property Owner requests this court to consider sanctioning Knight or Knight's appellate counsel. Property Owner provides no legal authority for the argument that this court should impose sanctions. This court is not inclined to act as cocounsel and furnish a legal argument as to why sanctions should be imposed.

Consequently, we treat the argument as forfeited. (*Doe v. Lincoln Unified School Dist.* (2010) 187 Cal.App.4th 1286, 1288.)

**DISPOSITION**

The judgment is affirmed in the appeal and the cross-appeal. The parties are to bear their own costs on the appeal and the cross-appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ MILLER
J.

We concur:

/s/ McKINSTER
Acting P. J.

/s/ KING
J.