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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE ex rel. ALLSTATE INSURANCE COMPANY, Plaintiff and Respondent, v. HISHAM MUHYELDIN et al., Defendants and Appellants.	B150524 (Los Angeles County Super. Ct. No. BC207709)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry W. Shatford, Judge. Affirmed with directions.

W. Kenneth Teebken; Law Offices of Joseph La Torre and Joseph La Torre for Defendants and Appellants.

Manning & Marder, Kass, Ellrod, Ramirez, Dennis B. Kass, David J. Wilson and Julie M. Fleming for Plaintiff and Respondent.

INTRODUCTION

This action arises out of an insurer's lawsuit against three physicians and their medical clinics. The insurer alleged the defendants had committed widespread fraud by submitting hundreds of false claims to it. After a lengthy jury trial, a jury found in the insurer's favor, resulting in an award of slightly more than $7 million. The court awarded costs and attorney fees to the insurer under the appropriate statutory provision. A judgment was entered and this appeal followed. We find no merit to any of the appellate contentions and therefore affirm the judgment. In addition, we direct the trial court to determine and award to the insurer a reasonable amount of appellate attorney fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

Penal Code section 550 (section 550) criminalizes the act of knowingly presenting to an insurance company a false claim for benefits. Insurance Code section 1871.7, subdivision (b) (section 1871.7) creates civil liability for violating section 550. It provides: "Every person who violates any provision of . . . Section . . . 550 . . . of the Penal Code shall be subject, in addition to any other penalties that may be prescribed by law, to a civil penalty of not less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000), plus an assessment of not more than three times the amount of each claim for compensation . . . . The penalty prescribed in this paragraph shall be assessed for each fraudulent claim presented to an insurance company by a defendant and not for each violation."

Allstate Insurance Company (Allstate) sued Drs. Hisham Muhyeldin, Feras Haddad, and Elyas Khury and various health clinics owned by the three physicians

(collectively defendants). It claimed defendants had violated section 550 and therefore were liable under section 1871.7 for civil penalties and assessments.

Allstate presented two specific theories of fraud to the jury. The first theory was that defendants presented false claims by intentionally and knowingly using improper billing codes--Current Procedural Technology (CPT) Codes--to inflate their bills. CPT codes were jointly developed by the American Medical Association and the Health Care Financing Administration and are the standardized nomenclature for use in insurance claims. By using a false CPT code to describe an examination, defendants represented that a particular exam was more comprehensive than that actually performed. The second theory was that defendants knowingly billed for services that were never performed. Allstate paid a significant amount of money on all of these claims.

Pursuant to the parties' stipulation, evidence was presented to the jury on 40 claims that were a representative cross-section of the 318 false claims upon which Allstate sued. The claims ranged from $325 to $5,470. The samples were based upon factors such as the patient's age, the amount of the bill, the CPT code(s) used, the individual defendant who signed the medical report, and the clinic from which the bill originated. Defendant Muhyeldin was involved in all 40 claims; defendant Khury was involved in 13 of the 40 claims; and defendant Haddad was involved in 9 of the 40 claims. The parties further agreed the jury's findings on the 40 claims would "be applied on a *pro rata* basis to the remaining underlying claims. This shall apply to all damage and penalties allowed pursuant to *Insurance Code* § 1871.7."

Trial lasted almost six weeks. Allstate's witnesses included doctors who had worked with defendants, the patients for whom the false claims were submitted, and various experts. In addition, Allstate called defendants as adverse witnesses, relied upon some expert testimony, and introduced many documentary exhibits.

The defense presented three brief witnesses. As explained in closing argument, the defense theory was that defendants did perform the services represented on the claim forms sent to Allstate.

The jury deliberated two weeks. The jury found by a special verdict, with two exceptions, defendants had "knowingly upcod[ed] the . . . 40 claims" and had "knowingly bill[ed] for services not rendered" on the 40 claims.[1] Based upon the mandate of section 1871.7, the jury assigned a penalty for each claim for the individual defendant of either $7,500 or $10,000. As determined by the jury, the total penalties for the three defendant doctors are: $400,000 against defendant Muhyeldin ($10,000 on each of the 40 claims); $70,000 against defendant Haddad ($7,500 each on 8 claims and $10,000 on the ninth claim); and $90,000 against defendant Khury ($7,500 each on 12 claims). The jury also imposed the maximum assessment for each claim: a sum equal to three times the amount of the fraudulent bill.

Applying the parties' stipulation to project the jury's verdict on the 40 claims over the entire 318 false claims upon which Allstate had sued resulted in an award of $7,028,080. The court awarded Allstate $656,900 in attorney fees and $183,035 in costs, resulting in a judgment in excess of $8 million.

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[1] The jury found defendant Khury was not liable for upcoding one of the medical bills and was not liable on one of the claims for which a bill was submitted for services never rendered.

DISCUSSION

A. STANDING

Defendants first contend Allstate lacked standing to bring this action. Defendants interpret section 1871.7 to require Allstate to show defendants employed cappers to procure clients in order for Allstate to be able to sue them.[2] The contention lacks merit because it is based upon an incorrect construction of the operative statutory provisions.

Section 1871.7, subdivision (e)(1) provides: "Any interested persons, including an insurer, may bring a civil action *for a violation of this section* for the person and for the State of California. The action shall be brought in the name of the state." (Italics added.) This provision creates a qui tam action: "An action brought under a statute that allows a private person [e.g., Allstate] to sue for a penalty, part of which the government or some specified public institution will receive." (Black's Law Dictionary (7th ed. 1999) p. 1262.) Consequently, Allstate's complaint alleged: "This is an action to recover damages and civil penalties on behalf of the People of the State of California ex rel. Allstate Insurance Company . . . ."[3]

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[2] Defendants first raised this contention in the trial court in their unsuccessful motion for a judgment notwithstanding the verdict. By minute order, the trial court denied the motion without a statement of reasons.

[3] The action was prosecuted solely by Allstate because the Attorney General, district attorney, and insurance commissioner chose not to intervene. (See § 1871.7, subd. (e)(2).)

Notwithstanding the clear statutory language authorizing this action, defendants urge that "Section 1871.7(e) . . . permits civil qui tam suits against doctors that use cappers to procure clients and patients. There exists no proof in the record that [defendants] employed cappers. . . . Without proof that cappers were employed, the Court lacked jurisdiction to enter a judgment against [defendants]."[4] Defendants rely upon subdivision (a) of section 1871.7 which provides, in relevant part: "It is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients . . . to perform or obtain services or benefits . . . under a contract of insurance." However, defendants overlook subdivision (b) of section 1871.7. As set forth above, subdivision (b) creates liability for a civil penalty and assessment based upon the presentation of a fraudulent claim when such presentation violates section 550.[5] Consequently, it is apparent subdivision (e) which authorizes "bring[ing] a civil action for violation *of this section*" authorizes an action based upon the theory a defendant violated either subdivision (a) or subdivision (b). (Italics added.) In other words, the Legislature intended to give private parties the right to sue based upon *any* act stated in subdivisions (a) and (b) that could subject a defendant to civil penalties and damages. It therefore is legally irrelevant Allstate did not proceed upon a "capping" theory.

In a similar vein, defendants contend that since section 550 is found in the Penal Code, "only the government can prosecute under [this] Section[]" so that "[t]o allow a private party [e.g., Allstate] to proceed against [defendants] and

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4 In their reply brief, defendants cast this contention as a failure of proof and a failure to instruct on all required elements of the prima facie case. Regardless of how characterized, the contention lacks merit for the reasons we explain.

5 Section 1871.7, subdivision (b) also creates civil liability for conduct that violates other Penal Code sections criminalizing other forms of insurance fraud.

obtain a judgment is error and deprived [them] of their constitutional rights of due process and protection [*sic*]" under the federal Constitution. This claim is patently meritless for the reasons explained in the previous paragraph.

B. RETROACTIVE APPLICATION OF SECTION 1871.7

Subdivision (b) of section 1871.7 took effect on January 1, 1996. (Stats. 1995, c. 574 (Sen. Bill No. 465), § 2.) This is the portion of section 1871.7 that provides a cause of action can be grounded upon a defendant's violation of section 550. Prior to 1996 the only provision under which a private party could sue was subdivision (a), the provision prohibiting the use of cappers. Because Allstate never proceeded on a capping theory against defendants, the jury made no finding in that regard. Against this backdrop, defendants now claim "it is unconstitutional to apply the provisions of Code Section 1871.7 retroactively to Penal Code [section 550], which occurred prior to January 1st, 1996, particularly where such violations do not include capping. . . . The jury's verdict was . . . partially based on alleged wrongful conduct prior to January 1, 1996.[7]" Footnote 7 reads: "Pursuant to the Special Verdict claims were submitted to the jury that occurred prior to January 1, 1996." Defendants identify six false claims allegedly presented before 1996.

This contention lacks merit for four separate reasons.

The first reason is that defendants agreed to try the case based upon the 40 sample files. Insofar as is relevant, the parties' stipulation, signed by counsel for both sides, recited:

> "2. That from the 318 claims underlying this action, each side believes the 40 selected exemplars to be an accurate and representative sampling of the medical services rendered by the defendants to those claimants and the documentation by defendants of such medical services;

"3. That *the* sum total of each side's selection, i.e., *forty (40) sets of medical records* (identified with specificity herein below, and hereinafter referred to as the "EXEMPLARS"), *shall be used for all purposes at trial* and presented to the jury as an accurate representation of the medical services rendered by defendants to those claimants and the documentation by defendants of such medical services;

"4. That the jury shall be informed, instructed and/or made aware that

"(a) The EXEMPLARS are only a small but representative portion (40 out of 318) of the total sets of medical records and claims at issue in this action;

"(b) The use of the EXEMPLARS has been recommended by the Court and adopted by the parties for purposes of judicial economy, conservation of court resources, and shortening of the trial time and service of selected jurors;

"(c) That from the 318 claims underlying this action, each side believes the 40 selected to be an accurate and representative sampling of the medical services rendered by the defendants to those claimants and the documentation by defendants of such medical services." (Italics added.)

Because defendants agreed to and did try the case "for all purposes" using these 40 files, they may not, after receiving an adverse verdict,[6] assert an infirmity in some of those files that would have allegedly precluded use of them as exemplars. "'The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only

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[6] Although not noted by either of the parties in their appellate briefs, defendants first raised this contention in their unsuccessful postverdict motion for a new trial.

be unfair to the trial court, but manifestly unjust to the opposing litigant. [Citations.]' [Citations.] 'Application of the doctrine may often be justified on principles of estoppel or waiver.' [Citation.]" (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874.)

The second reason is that defendants misrepresent what the dates in the special verdict reflect. Although the special verdict identifies each of the 40 cases by name and date, the date refers to when the accident or injury occurred for which the patient sought medical treatment. The date does *not* refer to the date defendants engaged in the proscribed conduct by submitting false claims.

The third reason is that defendants misapprehend the operative date for establishing a violation of section 550. Because the gravamen of the crime is the knowing *presentation* of a false claim, no crime occurs until the false claim is presented. In other words, the date of the accident or injury which caused the claimant to seek medical treatment for which defendants ultimately presented a false claim is not relevant to establishing when defendants violated section 550.

The fourth reason is that even assuming defendants could now argue some of the claims were time-barred, they have presented this argument in a deficient manner. Because this legal issue (time-barred claims) arises out of the facts, it was defendants' burden as appellants to cite those portions of the reporter's transcript of the lengthy jury trial that would establish the factual predicate of their contention: presentation of a false claim before January 1, 1996, the operative date of section 1871.7, subdivision (b). (See, e.g., *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291.) Appellants have failed to furnish those citations.[7] "We are a busy court which 'cannot be expected to search through a

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[7] The defense motion for a new trial that first raised this contention likewise failed to point to any evidence any of the claims were submitted before January 1, 1996. When both the court and counsel for Allstate pointed out this key evidentiary deficiency at the

voluminous record to discover evidence on a point raised by a party when his brief makes no reference to the pages where the evidence on the point can be found in the record.' [Citations.]" (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.) "'It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations.'" (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

C. BURDEN OF PROOF

Defendants contend: "It was error for the Court to instruct the jury that the burden of proof was by the preponderance of the evidence. . . . [T]he burden of proof under Section 1871.7 is by clear and convincing evidence." (Fn. omitted.) The contention lacks merit.

Defendants argue as follows:[8] The California Legislature modeled "The Insurance Frauds Prevention Act" (Ins. Code, § 1871 et seq.) after the federal False

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hearing on the motion, defense counsel was still unable to identify any claims submitted before January 1, 1996.

[8] Allstate's brief asserts: "Defendants waived this argument by acquiescing in the [trial] court's ruling that the proper burden of proof for this matter is preponderance of the evidence." Although defendants' reply brief does not directly answer this point, the record shows defendants, in fact, did object in the trial court to the use of the instruction. For instance, defendants' motion for a new trial stated: "The Court erroneously instructed the jury, *over Defendants' trial counsel's objection*, that the Plaintiff had the burden of proof by preponderance of the evidence." (Italics added.) And at the hearing on the new trial motion, the court stated: "That [the issue of burden of proof] was argued at great length by counsel in chambers. And I think there is a record made of that argument. And the court came to the conclusion that the argument you [defense counsel] are making is erroneous. . . . [¶] . . . [¶] We went over this at great length and I think there are cases supporting the fact it is by a preponderance of the evidence, not clear and

Claims Act (31 U.S.C. § 3729 et seq.). Federal courts initially held the burden of proof in those actions was clear and convincing evidence. (See, e.g., *U.S. v. Ekelman & Associates, Inc.* (6th Cir. 1976) 532 F.2d 545, 548, and *U.S. v. Ueber* (6th Cir. 1962) 299 F.2d 310, 314-315.) However, in 1986 Congress overruled that line of cases by adding subdivision (c) to title 31 United States Code section 3731 to provide the burden of proof was by the preponderance of the evidence. Defendants then place great significance on the fact that when the California Legislature enacted our state law in 1989, it did not include any provision similar to 31 United States Code section 3731(c) stating the burden of proof was preponderance of the evidence. From this defendants--without citation to *any* legislative history--divine that this omission "is [a] compelling inference that the standard of proof under 1871.7 should be clear and convincing evidence."

This argument overlooks Evidence Code section 115 which states: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

As explained by Witkin, "[e]ven where the theory of the [civil] case involves the accusation of a crime, the burden of proving the crime . . . is met by a preponderance of the evidence; i.e., the high degree of proof demanded in criminal cases is not required in civil cases even on the issue of a crime. [Citations.]" (1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 36, p. 185.) In fact, in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291, the California Supreme Court disapproved earlier cases that had stated in civil cases fraud was to

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convincing. And we spent a lot of time on that point, and I arrived at an opinion on that matter that under California law as it now stands under that statute, it is preponderance of the evidence test not clear and convincing." The issue has therefore been preserved for appellate review.

be proved by clear and convincing evidence and held instead that the proper standard of proof is by a preponderance of the evidence.

Defendants also argue that because "Punitive Damages and Penalties are being extrapolated" the burden should be proof by clear and convincing evidence. We disagree. Defendants' analogy to punitive damages is flawed. Subdivision (c) of section 1871.7 explicitly provides: "The penalties set forth in subdivision (b) are intended to be remedial rather than punitive . . . ." In any event, the Legislature is certainly aware of its ability to impose a higher standard of proof on recovery of damages if it so chooses. For example, in 1987 the Legislature amended the Civil Code to require that in order to recover punitive damages, the plaintiff must prove "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) This amendment was passed two years before the Legislature enacted "The Insurance Frauds Prevention Act." Clearly, if the Legislature had wished to impose this higher evidentiary standard on an action to recover damages under section 1871.7, it would have so stated. It did not. "'It still remains true, as it always has, that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not find expression in their words.' [Citations.] . . . 'Words may not be inserted in a statute under the guise of interpretation.' [Citation.]" (*City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 793-794.) Consequently, the principle embodied in Evidence Code section 115--that the applicable burden is by a preponderance of the evidence--applies.

In sum, the trial court properly instructed on and the jury correctly applied the preponderance of the evidence standard.

D. EXCESSIVE DAMAGES

Defendants next contend the damage award is excessive. Their arguments in this regard are not persuasive.

They urge "the 40 claims presented to the jury were not relevant to determining the 275 claims not presented to the jury." In so arguing, they attempt to contradict the explicit term of the stipulation, executed by all parties, that governed the trial. In particular, the stipulation recited: "[A]ny verdict reached by the jury as to the assessment of liability, damages and penalties as to the [40] EXEMPLARS shall be applied on a *pro rata* basis to the remaining underlying claims. This shall apply to all damage[s] and penalties allowed pursuant to *Insurance Code* § 1871.7" Defendants are bound by this stipulation and cannot for the first time on appeal challenge its use at trial. (See *In re Marriage of Mahone* (1981) 123 Cal.App.3d 17, 21-22.)

Defendants also argue, in essence, the damage award is excessive because the evidence is insufficient to support the jury's finding they knowingly presented false claims to Allstate. We decline to consider this claim. Defendants' cursory argument on this point, unsupported by any citations to the record, is clearly deficient. "[S]tatements of fact contained in the briefs which are not supported by the evidence in the record must be disregarded. [Citations.]" (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361.)

E. VIOLATION OF THE EIGHTH AMENDMENT

Defendants next contend the award of damages violates the eighth amendment because it "was vastly disproportionate to any wrong that might have been proven" and consequently "amount[s] to cruel and unusual punishment."

Although defendants filed a lengthy (and unsuccessful) motion for a new trial, they did not include as one of its grounds that damages were excessive.[9] The general rule is that failure to move for a new trial on that ground precludes a party from complaining on appeal that the damages awarded were excessive. "The rule is a sound one. The trial court is in a better position than a reviewing court to determine whether a jury verdict was influenced by passion or prejudice. Moreover, the power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. [Citation.] Consequently, where the ascertainment of the amount of damage requires resolution of conflicts in the evidence or depends on the credibility of witnesses, the award may not be challenged for inadequacy or excessiveness for the first time on appeal. To permit a party to do so without a motion for new trial would unnecessarily burden reviewing courts with issues which can and should be resolved at the trial court level. [Citation.]" (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.)

It is particularly appropriate to apply this principle to bar defendants from now raising any claim of excessive damages because "The Insurance Frauds Prevention Act" specially affords them an opportunity to raise such a claim in the trial court. Subdivision (c) of section 1871.7 provides: "The penalties set forth in

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[9] The motion raised some of the same claims raised on this appeal: erroneous instruction on burden of proof and improper retroactive application of section 1871.7.

subdivision (b) are intended to be remedial rather than punitive, and shall not preclude, nor be precluded by, a criminal prosecution for the same conduct. *If the court finds, after considering the goals of disgorging unlawful profit, restitution, compensating the state for the costs of investigation and prosecution, and alleviating the social costs of increased insurance rates due to fraud, that such a penalty would be punitive* and would preclude, or be precluded by, a criminal prosecution, *the court shall reduce that penalty appropriately*." (Italics added.)

Subdivision (c) clearly contemplates a fact-driven inquiry based upon the specific evidence produced at trial. Defendants' failure to advance this claim in their new trial motion deprived Allstate of any opportunity to argue to the trial court why the award, given the evidence presented at trial and the salutary goals of the statutory scheme, was appropriate. Furthermore, the trial court, having heard all the evidence, would have been in the best position to determine whether the jury's award has crossed over from being remedial to punitive. Because this claim was not presented to nor ruled upon by the trial court we decline to consider it.

Defendants' citation to *U.S. v. Mackby* (9th Cir. 2001) 261 F.3d 821 does not compel a contrary result. In that case, the federal appellate court held that the Eighth Amendment's prohibition on "excessive fines" potentially applied to the treble damages and civil penalty assessment provisions of the federal False Claims Act. (*Id.* at pp. 829-831.) In particular, the court noted the United States Supreme Court had recognized the purpose of the federal law "is at least in part punitive" and "the sanctions represent a payment to the government, at least in part, as punishment." (*Id.* at p. 830.)

There are several significant differences between the federal and state statutory schemes. As *Mackby* noted: "The language of the [federal act] does not specify whether its sanction of $5,000 to $10,000 per claim is meant to be punitive or remedial. [Citation.]" (*Id.* at p. 830.) Here, in contrast, subdivision (c) of

section 1871.7 explicitly states: "The penalties set forth in subdivision (b) are intended to be remedial *rather than punitive* . . . ." (Italics added.) Furthermore, the federal act does not contain a provision similar to subdivision (c) of section 1871. 7 which authorizes the trial court to reduce the penalty if, after engaging in a balancing process, the trial court finds the "penalty would be punitive." Consequently, because California's statutory scheme contains sufficient safeguards to prevent an award from running afoul of the Eighth Amendment, it is imperative a defendant first bring a claim of constitutional impropriety in the trial court in order to preserve the issue for appellate review. Defendants failed to do so in this case. We disagree with their assertion, unsupported by citation to any authority, that "[t]he fact that [their] attorneys did not request such a reduction at the trial level, should have prompted the trial court to do so."

F. TESTIMONY OF TWO EXPERT WITNESSES

Defendants next attack the testimony of two individuals called by Allstate. Because defendants failed to object to either witness's testimony, the claims of error have been waived.

Defendants first complain about the testimony of Dr. Jacqueline Ganjeh. The witness, who had worked with defendant Muhyeldin, was called to testify by Allstate. Prior to trial, she had reviewed 17 or 18 patient charts. At trial, she was asked whether the correct code was used to bill for the service(s) provided. She replied the correct codes were not used. All of her testimony was received without any objection from the defense. Defendants have therefore waived the right to challenge on appeal the admissibility of her testimony on any ground, including lack of foundation to establish her expertise. (*Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, fn. 13 at pp. 1226-1227; *Gaehwiler v. Occupational*

Safety & Health Appeals Bd. (1983) 141 Cal.App.3d 1041, 1046; Evid. Code, § 353, subd. (a).)

Defendants seek to avoid the force of this analysis by citing to *Strickland v. Washington* (1984) 466 U.S. 668 to argue their trial counsel's failure to object resulted in constitutionally deficient representation so that the issue has been preserved for appellate review. Defendants have conflated two distinct concepts. Because the federal Constitution guarantees a criminal defendant the right to effective assistance of counsel, a criminal defendant can raise a claim that trial counsel's performance fell outside the range of competence demanded of attorneys in criminal cases. (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 542.) That concept, however, does not apply to civil actions. Instead, a client's sole remedy is to sue counsel for legal malpractice. (See, in general, 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, §§ 311-354, pp. 380-436.)[10]

Defendants next complain about the testimony of Jerry Browne who had qualified as a handwriting expert in approximately 350 hearings or trials. He examined the signatures of defendants' patients on multiple documents and opined the patients had signed the documents at the same time although the services were ostensibly rendered at different times. This was part of the evidence to show defendants billed for services that had never been rendered. Defendants now urge "Mr. Browne's approach was psuedo-science approach at best and/or a guessing game at worst" so his testimony "should have been stricken as evidence and the Judge erred in allowing such evidence to be presented to the jury at least without a limiting instruction." Once again, defendants' failure to object to any aspect of

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10 Counsel who conducted the trial were the fourth set of attorneys to represent defendants. A fifth set of attorneys were retained to argue the postverdict motion. Appellate counsel is the sixth set to represent defendants.

Browne's testimony or to request a limiting instruction bars appellate consideration of these claims.

G. SUFFICIENCY OF THE EVIDENCE

Although defendants never explicitly advance a specific contention the evidence is insufficient to sustain the judgment, they argue as much at various points in their prolix briefs. In so arguing, defendants merely present a one-sided recitation of the evidence. This deficient presentation results in a waiver of any claim of insufficient evidence.

"'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.] Defendants' contention herein 'requires defendants to demonstrate that there is *no* substantial evidence to support the challenged findings.' [Citations.] A recitation of only defendants' evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if, as defendants here contend, 'some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

H. THE TRIAL COURT'S AWARD OF ATTORNEY FEES

After the jury returned with its special verdict, Allstate moved for costs and attorney fees. Allstate relied upon section 1871.7, subdivision (g)(2)(B), which provides: "If the person bringing the action, as a result of a violation of this section has paid money to the defendant . . . in the underlying claim, then he or she

shall . . . receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant."

The parties extensively litigated the amount Allstate could claim. The court ultimately awarded Allstate costs and attorney fees in the amount of $839,935.

In a completely conclusory manner, defendants now contend the award of attorney fees was in error because it was "excessively based upon an expanded (treble) judgment." In their reply brief they simply add: "[T]he attorneys fee award was based on an improper award of punitive damages and as such are themselves punitive and cruel and unusual." In other words, their attack on the attorney fee award is derivative of the argument the judgment itself is excessive, an argument we have declined to address because it was not raised below. As defendants have abandoned any other claim of error in regard to the award of attorney fees, we reject this final contention for the same reasons.

I. AWARD OF ATTORNEY FEES AND COSTS ON APPEAL

Lastly, Allstate has requested an award of appellate attorney fees and costs in the event it prevails on this appeal. As we found all of defendants' contentions to be without merit, Allstate is the prevailing party on appeal.

Allstate relies upon subdivision (g)(2)(B) of section 1871.7, the language of which is set forth above. That statute entitled Allstate as the prevailing party in the trial court to an award of attorney fees and costs. "A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]" (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500.) Here the statute does not expressly provide otherwise. Nor do defendants argue it does not apply to appellate attorney fees.

We will therefore grant Allstate's request and direct the trial court to determine the amount of recovery. (See, e.g., *Grade-Way Construction Co. v. Golden Eagle Ins. Co.* (1993) 13 Cal.App.4th 826, 838.)

DISPOSITION

The judgment is affirmed. Allstate will recover reasonable costs and attorney fees on appeal, the amount of which will be determined by the trial court.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

VOGEL (C.S.), P.J.

We concur:

EPSTEIN, J.

CURRY, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE ex rel. ALLSTATE INSURANCE COMPANY, Plaintiff and Respondent, v. HISHAM MUHYELDIN et al., Defendants and Appellants.	B150524 (Los Angeles County Super. Ct. No. BC207709) ORDER

THE COURT:*

The opinion in the above-entitled matter filed on September 18, 2003, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be partially published in the Official Reports and it is so ordered.

Pursuant to California Rules of Court, rules 976(b) and 976.1, the following portions of this opinion are certified for publication: Introduction; Factual and Procedural Background; Discussion; part A. Standing; part C. Burden of Proof; and Disposition.

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*VOGEL (C.S.), P.J. EPSTEIN, J. CURRY, J.