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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Alpine)

M. PEREZ COMPANY, INC., Plaintiff, Cross-defendant and Appellant, v. BASE CAMP CONDOMINIUMS ASSOCIATION NO. ONE et al., Defendants and Respondents, KERRY MEEKER, Defendant, Cross-complainant and Appellant.	C039827 (Super.Ct.No. 1599)
KERRY MEEKER, Plaintiff and Appellant. v. BASE CAMP CONDOMINIUMS ASSOCIATION NO. ONE et al., Defendants and Respondents.	(Super.Ct.No. 1603)

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II, III, IV, V, VI and VIII.

BASE CAMP CONDOMINIUMS ASSOCIATION NO. ONE, et al., Plaintiffs and Respondents, v. KERRY MEEKER, Defendant and Appellant.	(Super.Ct.No. 1610)

APPEAL from a judgment of the Superior Court of Alpine County, Armando O. Rodriguez, J. (Retired Judge of the Alpine Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Law Office of Robert W. Scharf and Robert W. Scharf for Defendant, Cross-complainant and Appellant.

LaMore, Brazier, Riddle & Giampaoli, Eugene P. LaMore, Gene D. Vorobyov for Plaintiff, Cross-defendant and Appellant.

David A. Bader and Timothy W. Pemberton for Defendants and Respondents.

In this construction defects dispute, the general contractor, Kerry Meeker, doing business as Kerry Meeker Construction (Meeker), appeals from a postjudgment order denying his request for litigation expenses from the property owner, Base Camp Condominiums Association No. One (Base Camp), and a subcontractor, M. Perez Company, Inc., doing business as Henley & Company (Henley). The court concluded that Meeker failed to establish the existence of a contract containing a provision that would permit the recovery of litigation expenses. Henley also appeals from the order, contending it contains two clerical errors. We reverse the judgment, in part.

FACTS AND PROCEDURAL HISTORY

Because the parties have failed to provide this court with a full record of the proceedings below, our review of the facts is severely limited. From the allegations in the pleadings, it appears that Meeker entered into an agreement with Base Camp to remodel the facade of a condominium complex owned by Base Camp, and Meeker entered into a subcontract with Henley to do the stucco portion of the work. A dispute arose regarding performance by the parties under the agreements and liability for defects in the finished product.

On March 3, 1998, Henley sued Meeker and Base Camp. (Case No. 1599.) Henley alleged an April 23, 1997, agreement with Meeker, requiring Meeker to pay Henley $145,896 for labor and materials. Henley further alleged that Meeker breached the agreement by failing to pay $50,000 of the amount due. Henley sought damages in the amount of $50,000, plus attorney fees. The complaint also contained claims for quantum meruit and indebitatus assumpsit, again seeking damages of $50,000. Henley's fourth cause of action sought to foreclose on its mechanics lien. A copy of the alleged agreement was not attached to, or incorporated into, the complaint.

On April 14, 1998, Meeker sued Base Camp. (Case No. 1603.) Meeker alleged that he entered into a written agreement with Base Camp "on or about March 1997." A copy of the agreement was attached to and incorporated into the complaint. Meeker alleged that Base Camp breached the agreement, resulting in damages of

$44,791.61. Meeker also alleged quantum meruit, seeking damages of $127,740.39. Meeker sought attorney fees "to the extent available by either contract, statute or bond."

On July 15, 1998, Base Camp filed a complaint against Meeker and Henley. (Case No. 1610.) Base Camp alleged an April 21, 1997, agreement with Meeker, whereby Meeker would be paid $348,941 for the construction of improvements at the condominium complex. A copy of the agreement was attached to and incorporated into the complaint. It is the same agreement as that attached to Meeker's complaint against Base Camp. Base Camp further alleged that Meeker entered into a written or oral agreement with Henley, to which Base Camp was a third party beneficiary.

Base Camp alleged five causes of action against Meeker and Henley: (1) breach of implied warranty; (2) negligence; (3) breach of contract; (4) breach of the covenant of good faith; and (5) breach of express warranty. On each cause of action, Base Camp sought compensatory damages of $500,000. It also sought attorney fees "as provided under the contract."

Base Camp's answers to the complaints of Meeker and Henley contained general denials and asserted a right to litigation expenses. Meeker's answer to Base Camp's complaint likewise contained a general denial. It also contained an affirmative defense asserting a right to indemnity from those "whose negligence and/or fault proximately contributed to [the] damages . . ." and sought an award of attorney fees. Henley's answer to Base Camp's complaint asserted a general denial and an

affirmative defense that the complaint failed to state a claim sufficient to allow Base Camp to recover attorney fees. Henley sought an award of attorney fees.

Meeker's answer to Henley's complaint is not in the record. However, the record does contain a cross-complaint filed by Meeker against Henley on October 23, 1998. In it, Meeker alleged breach of the April 23, 1997, agreement between Meeker and Henley and a right to indemnity with respect to the Base Camp action. Meeker later filed a first amended cross-complaint, naming two additional cross-defendants not parties to this appeal. Meeker asserted a right to indemnity from the cross-defendants for any judgment that might be entered against him on the complaints filed by Base Camp and Henley. Meeker also claimed a right to attorney fees.

Meeker filed a first amended complaint against Base Camp. For breach of contract, Meeker sought "undisputed" damages of $44,000, plus a penalty of 24 percent per year. Meeker also claimed approximately $166,405.93 for extra work on the project and $100,000 in consequential damages. On his quantum meruit claim, Meeker sought damages of $190,000. Meeker later filed a second amended complaint, alleging consequential damages of $180,000.

Prior to trial, Base Camp offered Meeker $115,000 in settlement pursuant to Code of Civil Procedure section 998. (Further undesignated section references are to the Code of Civil Procedure.) Henley made a section 998 offer to Base Camp to accept $17,500 in settlement.

The three cases were consolidated and tried to a jury. In case No. 1599, the jury returned a general verdict in favor of Henley and against Meeker. The jury awarded damages of $36,676 on the breach of contract claim and $26,654 on the quantum meruit claim. In the other two actions, the jury returned a special verdict. The jury concluded that Meeker was entitled to $44,665 on its contract with Base Camp. The jury also concluded that Meeker was entitled to reimbursement for various additional costs incurred by Meeker on the project, totaling $77,251.

On Base Camp's claims against the other parties, the jury concluded there was no breach of express or implied warranty or breach of contract regarding the "stucco system." However, the jury concluded there had been negligence by both Henley and Base Camp. The jury found Henley 10 percent and Base Camp 90 percent at fault, and found $7,500 in total damages for negligence in connection with the stucco. The jury found no breach of warranty, breach of contract or negligence with respect to the other aspects of the construction project.

The trial court entered judgment as follows: (1) Meeker to recover from Base Camp $98,531, plus interest from November 6, 2000; (2) Base Camp to recover nothing from Meeker; (3) Henley to recover from Meeker $36,676; and (4) Base Camp to recover from Henley $750.

Meeker filed a motion for indemnity and an award of prevailing party attorney fees. Meeker claimed a right to express and implied indemnity from Henley and a right to prevailing party fees from both Henley and Base Camp. Henley

and Base Camp filed opposition. Henley also filed its own motion for prevailing party status.

On September 28, 2001, the trial court ruled as follows: (1) Meeker prevailed against Base Camp and is allowed his costs (excluding attorney fees) up to the time of Base Camp's section 998 offer; (2) Meeker prevailed against Henley and is allowed one-half of his costs (excluding attorney fees); (3) Henley is entitled to up to one-half of its costs from Base Camp in light of Henley's section 998 offer; and (4) Base Camp did not prevail against Henley, because the $750 recovered was much less than the $134,000 sought.

The court issued a contemporaneous statement of decision explaining the rationale for its ruling. The court indicated that although Meeker prevailed against Base Camp, the jury's special verdict did not contain a finding that a contract existed between those parties that would have permitted an award of litigation expenses. The court also explained that the special verdict contained no finding of a contract between Meeker and Henley that would have permitted an award of litigation expenses or that Base Camp was a third party beneficiary of such contract. Thus, although Henley prevailed against Meeker on Henley's claim, Henley was not entitled to prevailing-party attorney fees. In a subsequent ruling, the court awarded Meeker $2,238 in costs up to the time of Base Camp's section 998 offer.

Henley filed a motion to amend the judgment nunc pro tunc, contending that (1) the judgment incorrectly identified Meeker

as the prevailing party against Henley when, in fact, Henley recovered $36,676; and (2) the award of *up to* one-half of Henley's costs from Base Camp is ambiguous. The record contains no ruling on this motion.

Both Meeker and Henley appeal from the September 28, 2001, order regarding indemnity and prevailing party fees.

DISCUSSION

I

Appealability

Before turning to the primary issues of this appeal, we discuss a few preliminary matters raised by the parties in their briefs.

Base Camp contends Meeker has appealed from a nonappealable order. According to Base Camp, the trial court's September 28, 2001, order is not final on the question of whether attorney fees should be awarded, because the order contemplated a further ruling regarding Base Camp's section 998 offer.

Section 904.1, subdivision (a)(2) permits an appeal from an order made after an appealable judgment. However, not all postjudgment orders are appealable. To be appealable, the order must satisfy two criteria: (1) "the issue[] raised by an appeal from the order must be different from those arising from an appeal from the judgment"; and (2) "'the order must either affect the judgment or relate to it by enforcing it or staying its execution.'" (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652.) Under the second criterion,

postjudgment orders have been held not appealable where, although they follow an appealable judgment, they "are more accurately understood as being preliminary to a later judgment . . . ." (*Id.* at p. 652.)

The order from which this appeal is taken reads, in relevant part:

"I. As between Meeker and Base Camp, Meeker is the prevailing party and awarded allowed costs to the date of rejection of the 998 offer by Base Camp. Meeker is not allowed attorney fees in calculating its pre 998 offer costs.

"II. As between Base Camp and Kerry Meeker, the jury having found and the court having ruled that Base Camp receives nothing by way of compensating damages, they are awarded no costs nor attorney fees, *pending a final hearing on the 998 offer, cited in I above*. . . ." (Italics added.)

Base Camp contends the italicized portion of this order shows that it was not final. Base Camp points out that "[n]owhere does the court determine or state the amount of the attorney fees." Consequently, it argues, the appeal is premature.

Base Camp misreads the court's order. In paragraph I, the court denied Meeker prevailing party attorney fees. In its statement of decision, the court explained that because the jury made no finding of a contract between Meeker and Base Camp entitling either to prevailing party attorney fees, or that Base Camp was a third party beneficiary of a contract between Meeker and Henley, there was no basis for an award of attorney fees to

Meeker. Because the court did not award attorney fees, there was no occasion to determine or state the amount to be awarded.

As to Base Camp's claim against Meeker, the court concluded that Base Camp did not prevail and, therefore, was not entitled to attorney fees. However, the court left open the possibility that Base Camp would be entitled to *costs* in the event it was later determined that Meeker recovered less than the amount of Base Camp's section 998 offer. That determination could not be made at the time of the court's ruling, because the court awarded Meeker costs incurred prior to the section 998 offer and such costs would have to be added to the jury award to determine whether the recovery exceeded the section 998 offer. The amount of Meeker's pre-998 offer costs had not yet been determined.

Notwithstanding the incomplete assessment of costs among the parties, the court finally determined that no party was entitled to indemnity or prevailing party attorney fees. An order awarding or denying attorney fees following a final judgment is appealable. (See *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 205; *San Diego Gas & Electric Co. v. 3250 Corp.* (1988) 205 Cal.App.3d 1075, 1087; *Henneberque v. City of Culver City* (1985) 172 Cal.App.3d 837, 841-842; *Marini v. Municipal Court* (1979) 99 Cal.App.3d 829, 835.) Meeker's appeal is therefore properly before us.

II

Rule 14

Henley contends Meeker's appeal should be rejected at the outset, because Meeker's opening brief violates California Rules of Court, rule 14. That rule requires that each point made in an appellate brief be supported by argument and by citation to authorities. Henley argues that Meeker's brief violates this requirement in several ways: (1) failing to include citations to the record in the argument portion; (2) failing to discuss the basis of the trial court's denial of indemnity, i.e., the absence of a jury finding of an agreement to indemnify; and (3) failing to cite authority for the argument that no jury finding on the existence of an indemnity agreement was necessary.

We disagree. As Henley acknowledges, Meeker included citations to the record in the statement of facts portion of his brief. Although helpful to the court, we are not aware of any requirement that citations be provided each time a fact is repeated in an appellate brief. Henley mentions no specific factual assertion by Meeker that is not supported by a citation to the record in the statement of facts. As to the failure to discuss the basis of the court's denial of attorney fees, Meeker's opening brief does state the basis for the court's ruling. Meeker indicated the trial court concluded that "As to indemnity for attorney fees, there was no finding of a contract by the jury between the parties for attorney fees . . . ." Finally, Meeker provided a legal argument and authorities for

his contention that no jury finding on the existence of an indemnity agreement was necessary, as discussed hereafter.

III

Statement of Decision

Base Camp contends Meeker failed to object to the trial court's statement of decision and is now precluded from asserting a contractual right to indemnity or prevailing party fees. Section 632 requires the trial court to "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon request of any party appearing at the trial . . . ." Upon issuance of a statement of decision, section 634 permits a party to state any objections in order to avoid implied findings in favor of the prevailing party. Any party failing to raise objections "waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

Base Camp argues that because the court indicated in its statement of decision the prevailing party is not entitled to attorney fees unless a contract so provides, and Meeker was not awarded prevailing-party attorney fees, the court impliedly found there was no contract between Meeker and Base Camp. Base Camp further argues that the court impliedly concluded either that there was no contract between Meeker and Henley or that Base Camp was not a third party beneficiary of such contract.

Base Camp's argument is not well taken. Despite the caption placed on the document by the trial court, it is clear the court's statement of decision was not intended to comply with section 632. Although the statement explains the rationale for the trial court's ruling, it was issued the same day as that ruling, thus affording none of the parties an opportunity to object to the findings therein. Although the parties requested a statement of decision at the hearing, there is no indication they ever enumerated the issues to be covered in it. It appears the trial court issued the statement as a means of explaining the basis for its rulings, not as a means to afford the parties an opportunity to object and seek clarification. Hence, the preclusive effect of section 634 did not come into play. Furthermore, the implied findings, which Base Camp claims the court made, are contradicted by the court's express explanation that it would not allow indemnity or prevailing party fees because the special verdict did not contain any findings to support such an award.

IV

Indemnity

We turn now to Meeker's claim that he was entitled to indemnity from Henley.

"Indemnity means 'the obligation resting on one party to make good a loss or damage another party has incurred.' [Citation.] An indemnitor is the party who is obligated to pay another. An indemnitee is the party who is entitled to receive

the payment from the indemnitor. [¶] An indemnity obligation arises from two general sources. First, it may arise from 'express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances.' [Citation.] Courts interpret contractual indemnity provisions under the same rules governing other contracts, with a view to determining the actual intent of the parties. [Citations.]

"Indemnity may also arise based on equitable considerations. [Citation.] Unlike contractual indemnity which looks to the parties' intent, equitable indemnification focuses on principles of fairness and justice and 'is designed to apportion loss among tortfeasors in proportion to their relative culpability . . . .' [Citation.] [W]here parties have expressly contracted with respect to the duty to indemnify, the extent of that duty is generally determined from the contract and not by reliance on the independent doctrine of equitable indemnity." (*Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856, 864.)

Unless a contrary intention appears, "[a]n indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion[.]" (Civil Code, § 2778, subd. 3.) This includes reasonable attorney fees. (See *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1293.)

The record before us contains a document purporting to be a subcontract between Meeker and Henley. It contains the following provision: "Subcontractor also agrees to fully defend, indemnify and forever hold harmless, and to reimburse Contractor for any loss, claims, or liability arising out of the negligence of Subcontractor, no matter how slight; default or breaches of contract by Subcontractor or its subcontractors and suppliers; defective or non-performing materials supplied and installed by Subcontractor or its subcontractors and suppliers; and breaches of warranty by Subcontractor or its subcontractors and suppliers."

Henley contends Meeker is not entitled to rely on the foregoing indemnity provision, because the jury's special verdict failed to include any findings on the existence of a contract between those parties or whether such contract contained an indemnity provision. Henley argues that the question of whether a contract exists is one of fact for the jury, and because Meeker failed to obtain a jury finding on the issue, he has waived his indemnity claim. Meeker counters that the existence of the subcontract was not disputed at trial, and the interpretation of a written contract is a question of law for the court. Meeker has the better arguments.

"[A] special verdict is that by which the jury finds the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall

remain to the court but to draw from them conclusions of law." (§ 624.) "The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. '[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings . . . .'" (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855.)

The responsibility for failing to obtain a particular finding in a special verdict falls on the party attempting to enforce the judgment. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 961-962.) The failure of that party to submit a special verdict form addressing the issue waives it on appeal. (*Heppler v. J.M. Peters Co.*, *supra*, 73 Cal.App.4th at p. 1287.)

Where a conclusion of law requires a particular finding of fact, the absence of that finding in a special verdict will preclude the conclusion of law, even where substantial evidence supports the finding of fact. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, *supra*, 13 Cal.App.4th at p. 961.) However, where there is no dispute over the fact, it may be determined by the court as a matter of law. (See *Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 587.)

In its complaint, Henley alleged it entered into a contract with Meeker on April 23, 1997, requiring Meeker to pay Henley $145,896 for labor and materials. Although Henley did not incorporate the written agreement into its complaint, the date

and amount alleged are the same as in that document. Meeker's cross-complaint alleged breach of the April 23, 1997, agreement as well. At trial, testimony was presented by at least three witnesses that the April 23, 1997, written agreement was the operative subcontract between Meeker and Henley. The record contains no contrary evidence.

Henley contends evidence regarding the indemnity provision itself was in dispute. Henley argues that in signing the subcontract, its representative crossed out one of the indemnity provisions in the contract form submitted by Meeker. Thus, according to Henley, there was no meeting of the minds regarding the terms of the agreement.

As a general matter, where an offer and acceptance do not mirror each other in all material terms, there has been no meeting of the minds and no contract is formed. (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855-856.) The acceptance is considered to be a counteroffer. However, where the acceptance differs from the offer, the offeror's subsequent performance of the contract according to the terms of the counteroffer will be considered an acceptance of the counteroffer. (See *Ten Winkel v. Anglo California S. Co.* (1938) 11 Cal.2d 707, 717-718; 14 Cal.Jur.3d (1999) Contracts, § 64, p. 300.)

The provision crossed out by Henley has no bearing on this dispute. Both parties signed an agreement containing the indemnity provision at issue here and proceeded with performance under the agreement. Except for the crossed-out provision, the

parties did not dispute the terms of their agreement at trial. "Where the parties try the case on the assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, or that other steps affecting the course of the trial are correct, neither party can change this theory for purposes of review on appeal." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 399, pp. 451-452.) It is too late for Henley to claim that the written contract was not the agreement between the parties. The indemnity provision in that agreement is enforceable as a matter of law.

Henley nevertheless contends "the record contains absolutely no evidence that the parties intended to require Henley to indemnify Meeker in situations[] in which Henley was **essentially blameless** for Meeker's loss or damage." According to Henley, the evidence presented at trial established that the stucco damage was caused primarily by Meeker and Base Camp.

Henley ignores the language of the subcontract and the findings of the jury. As indicated previously, the contract provides that Henley shall "fully defend, indemnify and forever hold harmless" Meeker for any loss arising out of Henley's negligence "no matter how slight." "Indemnity agreements are construed under the same rules which govern the interpretation of other contracts. [Citation.] Accordingly, the contract must be interpreted so as to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) The intention of the parties is to be ascertained from the 'clear and explicit' language of

the contract. (Civ. Code, §§ 1638-1639.) And, unless given some special meaning by the parties, the words of a contract are to be understood in their 'ordinary and popular sense.' (Civ. Code, § 1644.)" (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 504.)

The language of the subcontract could not be clearer. It requires indemnification in the event of Henley's negligence, "no matter how slight." There is no need to resort to other evidence of intent. At any rate, Henley cites no such evidence. "When the parties knowingly bargain for the protection at issue, the protection should be afforded." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633.) Here, the jury found both Henley and Base Camp negligent in connection with the construction. Meeker was not found to be negligent. Henley's fault was assessed at 10 percent. Under the broad language of the indemnity provision, this slight negligence was sufficient to invoke Henley's obligation to Meeker.

Henley also contends its obligation to indemnify Meeker should be limited to its percentage of fault. However, the breadth of an obligation to indemnify is determined by the language of the parties' agreement. (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.*, *supra*, 53 Cal.App.4th at p. 504.) Here, there is no limitation in the subcontract on Henley's obligation.

That does not mean, however, that Henley is responsible for all of Meeker's litigation expenses. Meeker's right to indemnity covered only the cost of defending third party claims

asserted against Meeker because of Henley's negligence. Here, that would include only the claim for negligence asserted by Base Camp in connection with the stucco damage. It would not include other claims by Base Camp, litigation expenses incurred by Meeker in his suit against Base Camp for breach of contract, or costs incurred in the breach of contract dispute between Meeker and Henley. Absent a prevailing-party-attorney-fee provision, to be discussed later, Meeker is not entitled to the cost of enforcing its right to indemnity. (*Otis Elevator Co. v. Toda Construction* (1994) 27 Cal.App.4th 559, 564.) To the extent the various expenses incurred by Meeker cannot be differentiated between the various aspects of the consolidated litigation, it will be up to the trial court to make a proper allocation.

Before leaving the issue of indemnity, we address one more point raised by Base Camp in its responding brief. Base Camp contends an issue of fact exists over the terms of the agreement between it and Meeker, i.e., whether that agreement contained an indemnity requirement. The record contains a written contract purporting to be the agreement between Meeker and Base Camp. This contract, entitled "Standard Form of Agreement Between Owner and Contractor," contains a list of contract documents, including one named "Conditions of the Contract (General, Supplementary and Other Conditions)," where the general conditions are defined as the "General Conditions of the Contract for Construction, AIA Document A201, 1987 Edition." Sections 3.18.1 through 3.18.3 of this general conditions

document have been replaced with an attached addendum No. 2. Addendum No. 2 contains indemnity provisions, whereby Meeker agreed to indemnify Base Camp on all work to be performed under the contract. Base Camp cites evidence in the record, demonstrating that a factual dispute exists over whether addendum No. 2 was part of the agreement.

This is a red herring. In his motion below, Meeker did not seek indemnity from Base Camp, no doubt because the indemnity provision in addendum No. 2 required Meeker to indemnify Base Camp, not the reverse. Even where an indemnity provision requires the indemnitor to pay the indemnitee's attorney fees to defend an action covered by the indemnity, this is not the same as a prevailing-party-attorney-fee provision. Addendum No. 2 cannot be the basis of any claim by Meeker against Base Camp.

Having concluded that Meeker is entitled to express contractual indemnity from Henley, it is unnecessary to determine whether Meeker is also entitled to equitable indemnity. Where express indemnity exists, it overrides equitable principles. (*Maryland Casualty Co. v. Bailey & Sons, Inc.*, *supra*, 35 Cal.App.4th at p. 864.)

V

Prevailing Party Litigation Expenses From Henley

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) The prevailing party is defined as "the party with a net monetary

recovery . . . ." (§ 1032, subd. (a)(4).) Section 1033.5 lists the items allowable as costs and includes attorney fees when authorized by contract, statute, or law. (§ 1033.5, subd. (a)(10).) However, where a prevailing party fails to accept a timely offer to settle and then obtains a less favorable recovery in the action, the prevailing party is not entitled to postoffer costs but instead must pay the postoffer costs of the opponent. (§ 998, subds. (c)(1) and (d).)

Meeker contends he was the prevailing party in his litigation with Henley and, therefore, was entitled to an award of costs and attorney fees. Meeker cites a provision of the subcontract that reads: "In the event any action is maintained at law or in equity arising out of this contract, venue shall be in Sacramento County, California. Should any party to this contract institute any legal proceedings, for any reason, then the prevailing party shall be entitled to full reimbursement of [its] attorney fees, court costs, expert witness fees, and expenses."

Meeker's theory that he was the prevailing party is premised on his claim that with a favorable ruling on the indemnity issue (as we have concluded), he has realized all his "litigation objectives" against Henley. Meeker downplays Henley's recovery of $36,676 on its claim against Meeker, arguing this recovery "was generally undisputed," and was less than the $50,000 Henley was seeking.

The prevailing party for an award of attorney fees pursuant to contract is not necessarily the prevailing party for purposes of a cost award under section 1032. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1142.) In determining litigation success for purposes of a contractual attorney fees award, "courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 877.) "If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees. '[I]n deciding whether there is a "party prevailing on the contract," the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.'" (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.)

In this matter, Henley sought an award from Meeker in the amount of $50,000 and recovered $36,676. Although Meeker contends the $36,676 amount was generally undisputed, we cannot determine this from the record before us. At any rate, there is nothing in the record to suggest that recovery by Henley, in any amount, was undisputed. In his cross-complaint against Henley,

Meeker alleged, among other things, breach of contract, negligence and a right of indemnity. Meeker sought damages in the amount of $500,000. Meeker recovered no damages on any of his claims against Henley. On his indemnity claim, it cannot be determined at this time what Meeker will ultimately recover. Thus, it must be left to the trial court to determine, in its sound discretion, whether either party prevailed.

If the court determines Meeker was the prevailing party, he will be entitled to an award of attorney fees pursuant to the subcontract. However, such award will be limited to the expenses incurred in enforcing Meeker's indemnity rights, because this is the only portion of the contract on which Meeker prevailed. This will include expenses incurred in establishing Henley's negligence, upon which the right to indemnity is based, but will not include expenses associated with other claims between the parties.

VI

Prevailing Party Litigation Expenses From Base Camp Pursuant to the Meeker-Henley Subcontract

Meeker contends he is entitled to prevailing party attorney fees from Base Camp based on the Meeker-Henley subcontract. His argument is based on Civil Code section 1717 and may be summarized as follows: Base Camp sued Meeker on both the Meeker-Base Camp contract and the Meeker-Henley subcontract and sought an award of attorney fees. Only the subcontract contained an attorney fee provision. Base Camp claimed to be a third party beneficiary of the subcontract. Meeker prevailed in

the action. Because Base Camp would have been entitled to recover attorney fees had it prevailed on its claim against Meeker, Meeker is entitled to attorney fees from Base Camp under Civil Code section 1717.

Civil Code section 1717, subdivision (a) provides, in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Civil Code Section 1717 makes reciprocal an otherwise unilateral attorney fee provision, thereby "ensuring mutuality of remedy" where a contract provides for attorney fees to one party but not the other. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611.)

Meeker's argument hinges on whether Base Camp was a third party beneficiary of the subcontract. If not, there was no basis for Base Camp to have claimed attorney fees under the subcontract, and therefore no basis for an award of fees to Meeker.

"'Under California law third party beneficiaries of contracts have the right to enforce the terms of the contract under Civil Code section 1559 which provides: "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."'

[Citation.] The promise in such a situation is treated as having been made directly to the third party. [Citation.] The third party need not be identified by name. It is sufficient if the third party belongs to a class of persons for whose benefit the contract was made. [Citation.] It is not necessary, however, that the contract be exclusively for the benefit of the third party; he need not be the sole or primary beneficiary." (*Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1064; see also 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 665, p. 603.)

Traditionally, third party beneficiaries were classified as donee, creditor, or incidental beneficiaries. A person was considered a donee beneficiary "if the promisee's contractual intent is either to make a gift to him or to confer on him a right against the promisor." (*Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 400-401.) A person was a creditor beneficiary if "the promisor's performance of the contract will discharge some form of legal duty owed to the beneficiary by the promisee." (*Id.* 11 Cal.3d at p. 400.) All others came under the category of incidental beneficiaries. (See 14 Cal.Jur.3d (1999) Contracts, § 255, p. 665.) Normally, only donee or creditor beneficiaries were entitled to enforce the agreement. (*Martinez v. Socoma Companies, Inc.*, *supra*, 11 Cal.3d at p. 400.)

The Restatement Second of Contracts adopted a simpler classification scheme based on intended and incidental beneficiaries. The general rule reads: "(1) Unless otherwise

agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either [¶] (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or [¶] (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. [¶] (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary." (Rest.2d Contracts, § 302, pp. 439-440.)

Under the Restatement Second of Contracts, the intent of the contracting parties controls. Third party enforcement is permitted only where the parties so intended. For example, in *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, the court held that a sublessee was entitled to enforce the original lease despite not being a party to that agreement. (*Id.* at p. 377.) The original lease expressly stated that the lessor consented to the sublease of the premises by the lessee, and specifically named the sublessee. (*Ibid.*) In finding that the sublessee could enforce the contract, the court relied on "settled law that 'if a lessor has expressly agreed to a sublease, the sublessee is a third party beneficiary to the implied covenant of quiet enjoyment in the original lease and has the right to go directly against the lessor for its breach.' (*Marchese v. Standard Realty & Dev. Co.* (1977) 74 Cal.App.3d 142, 147 [141 Cal.Rptr. 370].)" (*Real Property Services Corp. v. City of Pasadena*, *supra*, 25 Cal.App.4th at p.

383.) The court continued: "Where there is a sufficient nexus between the lessor and sublessee, a nonsignatory sublessee is entitled to enforce an attorney fee provision in the lease as a third party beneficiary against a signatory landlord." (*Ibid.*)

In *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, a company (Sessions) that provided payroll services to a subcontractor (Mackey), under payment provisions in a contract between the subcontractor and the general contractor (Noble), sought to enforce an attorney fee provision in that contract. The court concluded that the payroll company was not entitled to enforce the provision, because the circumstances demonstrated that the contracting parties had not intended that it be able to do so. The court explained: "The contract does not show that Mackey and Noble agreed or intended to include Sessions within the attorney fee provision. Indeed, the contract expressly disclaims that it creates any rights or confers any benefits on third parties: 'Except as specifically prescribed herein, *this Agreement shall not create any rights of or confer any benefits upon, third parties.*' (Italics added.) The contract also permits recovery of attorney fees '[i]n the event it becomes necessary for *either party* to enforce the provisions of this Agreement . . . .' (Italics added.) '[E]ither' refers only to the two parties to the contract, Noble and Mackey. If they wanted to include someone else, their contract would have referred to 'any' party. Moreover, the word 'party' limits recovery of attorney fees to a 'party' to the contract, reflecting intent of Noble and Mackey

to exclude nonsignatories, such as Sessions, from the scope of the attorney fee clause." (*Id.* at pp. 680-681.)

There is nothing in the Meeker-Henley agreement to suggest that the parties intended Base Camp to be able to enforce the attorney fee provision therein. Although Base Camp was mentioned in that agreement, this was only by way of background to identify the project for which the subcontract was to be performed. In *Real Property Service Corp.*, the sublessee was not only acknowledged by the lessor but essentially stepped into the shoes of the lessee under the lease. Here, Base Camp continued to look to Meeker for construction of the improvements and Henley looked to Meeker for payment on the subcontract. Although the attorney fee provision of the Meeker-Henley agreement referred to "any party," rather than "either party," there is nothing to suggest this was intended to open up the provision to enforcement by anyone other than the signatories. Base Camp was an incidental beneficiary of the Meeker-Henley subcontract in that as the owner of the property, it stood to benefit from completion of the work under the subcontract. However, there is nothing to suggest that the parties entered into the subcontract for the express purpose of benefiting Base Camp. Base Camp would have benefited from the subcontract just as the parties' employees or creditors would have benefited. However, such incidental benefit is not enough to give rise to a right of action. Thus, because Base Camp would not have been able to enforce the attorney fee provision against Meeker, Meeker cannot enforce it against Base Camp.

Furthermore, Meeker misreads Base Camp's request for attorney fees in his quest to obtain reciprocal benefits. In the breach of contract claim of Base Camp's complaint, Base Camp alleged that it "has performed all conditions, covenants and promises required of [it] under the contract set forth above; which contract includes provisions entitling the prevailing party in this litigation to recover its costs and attorney's fees." Later, Base Camp sought an award of attorney fees "as provided under the contract." However, the complaint specifically defines "the contract" to be that between Meeker and Base Camp, not the subcontract. Nowhere in the complaint did Base Camp seek an award of attorney fees under the subcontract.

VII

Prevailing Party Litigation Expenses From Base Camp Pursuant to the Meeker-Base Camp Contract

No doubt recognizing that the indemnity provisions in addendum No. 2 to the Meeker-Base Camp agreement do not constitute a prevailing-party-attorney-fee provision, Meeker does not assert a direct right to recover attorney fees pursuant to that contract. Those provisions required Meeker to indemnify Base Camp against any third party claims arising from Meeker's performance under the agreement. This includes an obligation to "[r]eimburse [Base Camp] . . . for any and all legal expense incurred" in connection with any action covered by the indemnity provisions or to enforce the indemnity. Such a clause is not a prevailing-party-attorney-fee provision within the meaning of

Civil Code section 1717, but an enumeration of the scope of the indemnity. (*Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1337.)

Nevertheless, Meeker contends Base Camp is judicially estopped to deny that the Meeker-Base Camp agreement contained a prevailing-party-attorney-fee provision in light of Base Camp's request for attorney fees. As explained previously, Base Camp sought an award of attorney fees in its breach of contract claim against Meeker based on the Meeker-Base Camp agreement. Meeker argues that Base Camp alleged the existence of a prevailing-party-attorney-fee provision in the Meeker-Base Camp agreement and is now estopped to contend otherwise.

"Judicial estoppel is an equitable doctrine aimed at preventing fraud on the courts." (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850.) It prohibits a party from taking inconsistent positions in the same or different judicial proceedings. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) Judicial estoppel "'"is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process . . . . 'The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings."' . . . Judicial estoppel is 'intended to protect against a litigant playing "fast and loose with the courts."'"' [Citation.] 'It seems patently wrong to allow a person to abuse the judicial

process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.'" (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 181.)

In *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175 (*International Billing Services*), this court applied judicial estoppel under circumstances similar to those presented here. There, the plaintiff company brought a trade secret action against three former employees and others and sought attorney fees pursuant to a provision of the employment agreements. (*Id.* at pp. 1179-1180.) The defendants prevailed and the trial court awarded them attorney fees. (*Id.* at pp. 1180, 1182.)

On appeal, the company argued that the agreement did not contain a prevailing party attorney fee clause but rather an indemnity provision. (*International Billing Services, supra,* 84 Cal.App.4th at pp. 1182-1183.) The provision in question required the employee to "'promise to reimburse'" the company for attorney fees in the event of litigation. (*Id.* at p. 1182.) If the provision was an attorney fee provision, it was subject to reciprocity under Civil Code section 1717. If it was an indemnity provision, it was not. We concluded that any ambiguity in the provision must be construed against the drafter, i.e., the company (Civ. Code, § 1654), and, therefore, the trial court properly found that the provision authorized the fee award. (*International Billing Services*, *supra*, 84 Cal.App.4th at pp. 1184-1186.)

Having concluded that the provision permitted an award of attorney fees to the prevailing party, the matter before us was resolved. However, in dicta, we took the opportunity to address another chronic problem -- the misuse of attorney fee claims. We explained: "[T]he question whether a given provision *is* a fees provision, which one might think was readily ascertainable, results in frequent, protracted, litigation which ties up the courts and parties long after the merits of a decision are settled. Time and again in civil cases, often those with parties willing and able to spend thousands or tens of thousands of dollars on the issue, the fees debate assumes a life of its own. 'The prospect of court-awarded attorney fees plays a significant part in determining a strategy for initiating or defending litigation. Litigation costs (including the potential fee award) can be enormous, sometimes rivaling or even exceeding the amount involved on the merits . . . .' [¶] . . . [F]ee litigation has become a specialty of some lawyers and a 'fees phase' of cases is foreordained. This wasteful consumption of judicial resources and client money serves no public purpose and impairs the image of the legal profession." (*Id.* at pp. 1186-1187.)

In order to discourage overreaching attorney fee claims, we announced the following rule: "Where a party claims a contract allows fees and prevails, it gets fees. Where it claims a contract allows fees and loses, it must pay fees." (*International billing services, supra,* 84 Cal.App.4th at p. 1190.) In other words, even where the contract does not contain

an attorney fee provision, if a party claims that it does and loses the case, it will be required to pay the prevailing party's attorney fees. However, we emphasized that this rule "applies only where a party brings a breach of contract action and the contract contains some provision which the party asserts operates as a fees provision." (*Id.* at p. 1187.) Thus, it is not enough that the losing party claimed a nonspecific right to attorney fees. It must be a claim that a contract on which a cause of action for breach of contract is premised contains an attorney fee provision.

This is such a case. In its claim for breach of contract against Meeker, Base Camp alleged that it had performed all conditions, covenants and promises under its contract with Meeker, "which contract includes provisions entitling the prevailing party in this litigation to recover its costs and attorney's fees." However, a review of the contract reveals no prevailing-party-attorney-fee provision. Addendum No. 2 contains indemnity provisions, which provide that the indemnitor shall "[r]eimburse Owner or its officers, directors, members, agents, employees, or property manager, or any of them, for any and all legal expenses incurred by any of them in connection herewith *or in enforcing the indemnity granted in this Addendum* . . . ." (Italics added.) Through the reciprocity of Civil Code section 1717, this provision would permit the prevailing party in any action brought to enforce the indemnity to recover attorney fees. However, Base Camp did not seek indemnity in its complaint against Meeker.

Nevertheless, under the *International Billing Services dictum*, because Base Camp claimed a contractual right to attorney fees and lost its case, Meeker would be entitled to attorney fees. However, as we shall explain, we believe *International Billing Services* sweeps too broadly and decline to follow it in this instance.

International Billing Services was based primarily on Civil Code section 1717. We noted: "Generally, where the losing party would have obtained fees had it won, it is liable for fees if it lost, such as where a nonsignatory to a contract asserts entitlement to fees based on a contract, loses the case, then seeks to avoid an adverse fee award. [Citation.] The reciprocity provision of [Civil Code] section 1717 was designed to prevent overreaching in litigation. Absent the reciprocity provision, contracting parties with superior economic bargaining power would routinely insert one-sided fees provisions in contracts. In the event of a dispute, and regardless of the merits *vel non* of the disputant's claims, the drafting party would have an unfair litigation advantage from the outset: Even if it lost, it would only have to pay contract damages; if it won, the weaker party would also have to pay fees. 'One-sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims. [Citation.] [Civil Code s]ection 1717 was obviously designed to remedy this evil." (*International Billing Services*, *supra*, 84 Cal.App.4th at pp. 1187-1188.)

We continued: "'If a party to a contract can claim a right to recover attorney's fees pursuant to a provision in a contract and then deny the effect and application of that provision if his opponent prevails, [Civil Code] section 1717's purposes would be thwarted and attorney's fees claims could be used as instruments of oppression. Specifically, uncertainty about a party's rights and obligations with respect to ultimate recovery of attorney's fees would create pressure to settle unmeritorious claims.'" (*International Billing Services*, *supra*, 84 Cal.App.4th at p. 1188.)

While stating that we had "no quarrel with the cases holding Civil Code section 1717 was not designed 'to extend the right to recover attorney fees to persons who themselves could not have been required to pay attorney fees in the event their adversary prevailed in the action'" (*International Billing Services, supra,* 84 Cal.App.4th at p. 1189), we adopted a rule which did just that. If a party claims a contractual right to attorney fees, but the contract does not contain such a provision, that party will not be able to recover attorney fees, even if it prevails in the litigation. However, under *International Billing Services*, if the party loses the litigation, it will be required to pay the opponent's attorney fees.

In *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295, the beneficiary of a testamentary trust brought an action against lenders to remove a cloud on the title to real property that had been encumbered by loans to the trustee, and the trial

court granted summary judgment to the lenders. The Court of Appeal affirmed, including the portion of the judgment denying the lenders' claim for prevailing party attorney fees. (*Id.* at pp. 1297-1298.) On the attorney fee claim, the court rejected an estoppel theory, explaining: "The California Supreme Court has determined that one may only recover attorney's fees pursuant to [Civil Code] section 1717 if one 'would have been liable' for such fees had the opposing party prevailed. (*Reynolds Metals Co. v. Alperson* [(1979)] 25 Cal.3d [124] 129.) Judging by this language, *Reynolds* and [Civil Code] section 1717 require that the party claiming a right to receive fees establish that the opposing party *actually* would have been entitled to receive them if he or she had been the prevailing party." (*Leach v. Home Savings & Loan Assn.*, *supra*, 185 Cal.App.3d at pp. 1306-1307.)

In *Sessions Payroll Management, Inc. v. Noble Construction Co.*, *supra*, 84 Cal.App.4th 671, the prevailing defendant argued that it was entitled to an award of attorney fees because the plaintiff's complaint prayed for attorney fees. The trial court awarded such fees, but the Court of Appeal reversed. Relying on *Leach* and other cases rejecting an estoppel theory, the court explained: "[The *Reynolds Metals*] test requires a party claiming attorney fees to establish that the opposing party actually would have been entitled to receive them if the opposing party had prevailed. The mere allegation in a complaint that the plaintiff is entitled to receive attorney fees does not provide a sufficient basis for awarding them to

the opposing party if the plaintiff does not prevail. Where, as in *Leach*, the plaintiff did not sign the contracts containing attorney fee provisions, the plaintiff had no independent right to recover fees under contractual attorney fee clauses. Therefore the defendants, as prevailing parties, could not recover attorney fees from the plaintiff." (*Sessions Payroll Management, Inc. v. Noble Construction Co.*, *supra*, 84 Cal.App.4th at pp. 681-682; see also *Sweat v. Hollister* (1995) 37 Cal.App.4th 603, 616-617, disapproved on another ground in *Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 609, fn. 5; *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 548-549; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 962, fn. 12; *Wilson's Heating & Air Conditioning v. Wells Fargo Bank* (1988) 202 Cal.App.3d 1326, 1333, fn. 7.)

We believe the foregoing cases state the correct rule. Consistent with both *Reynolds Metals Co.* and Civil Code section 1717, a prevailing party is entitled to attorney fees only if it can prove it would have been liable for attorney fees had the opponent prevailed. The problem with *International Billing Services* is that it assumes the underlying litigation is over the validity of the contract in general or the attorney fee provision in particular. Where a plaintiff claims breach of a contract containing an attorney fee provision and the defendant asserts there is no contract and wins, it will have established that there is no contract and, hence, no attorney fee provision. Nevertheless, since the plaintiff would have been entitled to

attorney fees if the plaintiff had succeeded in proving there was a contract, courts have recognized a right of the defendant to recover attorney fees even if defendant proves there was no contract, in order to further the purposes of Civil Code section 1717. (See *Santisas v. Goodin*, *supra*, 17 Cal.4th at pp. 610-611; *Hsu v. Abbara, supra,* 9 Cal.4th at pp. 870-871.)

However, where the underlying litigation is not over the validity of the contract or the attorney fee provision, this rationale disappears. Where a plaintiff claims breach of a contract containing an attorney fee provision and the defendant does not deny the existence of the contract, litigating instead the issue of breach, success by the defendant does not entail a finding that there is no contract, and hence no attorney fee provision. The prevailing party, whether plaintiff or defendant, would be entitled to attorney fees under the contract. By the same token, where the contract does not contain an attorney fee provision, even though the plaintiff seeks attorney fees, success by the plaintiff on the breach of contract claim does not entail a finding of a valid attorney fee provision. The prevailing party would not be entitled to attorney fees. Thus, the distinction is between success on the underlying claim of breach and success in proving there is an applicable attorney fee provision.

International Billing Services says: "Where a party claims a contract allows fees and prevails, it gets fees. Where it claims a contract allows fees and loses, it must pay fees." (*International Billing Services*, *supra*, 84 Cal.App.4th at p.

1190.) This conclusion is correct only if the litigation is over the validity of the attorney fee provision. A more precise statement of the rule would be: Where a party claims that a contract allows fees and proves it, that party gets fees. Where a party claims that a contract allows fees and does not prove it, the opponent gets fees.

The fallacy of the rule stated in *International Billing Services* is the assumption that if the party who claims that a contract allows fees prevails in the underlying litigation, it gets attorney fees. In truth, the party must still prove that the contract allows attorney fees. The mere allegation is not enough. It is only where the parties litigate the existence of an attorney fee provision and the party claiming such a right prevails that the party should be entitled to attorney fees. Under such circumstance, if the opponent succeeds in proving there is no attorney fee provision, it should be awarded its fees in order to further the purpose of Civil Code section 1717.

International Billing Services relied on the doctrine of judicial estoppel to reach the conclusion that a party claiming attorney fees is later estopped from denying an attorney fee provision. As a general matter, judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance,

fraud or mistake." (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 183.)

In *International Billing Services*, we paid little heed to the third requirement, explaining that "In some jurisdictions, judicial estoppel requires a prior success on the fact asserted. In this respect, it works as a corollary to issue preclusion. This assumes the estoppel works, if at all, only in subsequent litigation or proceedings, but this is not always so. [Citations.] The doctrine '"'is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process . . . .'"' [Citations.] '"It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite."' [Citations.] The principle is not limited to successive actions." (*International Billing Services*, *supra*, 84 Cal.App.4th at pp. 1190-1191.)

Assuming the application of judicial estoppel does not require proof of success on the first position taken, we nevertheless do not believe *International Billing Services* made proper use of the doctrine. As noted previously, judicial estoppel "is an equitable doctrine aimed at preventing fraud on the courts." (*In re Marriage of Dekker*, *supra*, 17 Cal.App.4th at p. 850.) It "is an extraordinary remedy that should be applied with caution." (*Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 598.) Where a litigant is uncertain that a contractual provision allows the recovery of

attorney fees, it is not improper to assert a claim based on that provision, just as it is not improper for the opponent to claim the provision does not allow such recovery. But those parties should not be estopped thereafter to assert contrary positions if their interests become reversed. *International Billing Services* asserts that the plaintiff who claims a contractual right to attorney fees is estopped to claim otherwise after it loses the underlying litigation. However, the same principle should apply to the prevailing defendant. If the defendant denied that the plaintiff had a contractual right to attorney fees, it should be equally estopped to assert otherwise thereafter. There is no reason in law or logic why judicial estoppel should apply to one but not the other. Equity suggests that it apply to neither.

In *International Billing Services*, we discussed the policy reasons for applying the rule adopted therein: "'For section 1717 to function as intended, parties need reasonable prospective assurance of whether they will or will not be able to recover their attorney's fees if they win, and whether they will have to pay their opponent's fees if they lose.'" (*International Billing Services*, *supra*, 84 Cal.App.4th at p. 1188.)

Certainty that parties will or will not be able to recover attorney fees is not the purpose of Civil Code section 1717. That section is designed to assure fairness between the parties. As explained previously, *International Billing Services* fails to

serve this purpose by allowing attorney fees to one party where the other would not be entitled to them.

There is no incentive for a party to raise a frivolous claim for attorney fees in order to "threaten a litigant with the prospect of an adverse attorney fees award and avoid the same fate if unsuccessful," as asserted in *International Billing Services*. (*International Billing Services*, *supra*, 84 Cal.App.4th at p. 1191.) As explained by Justice Raye in his concurring opinion, "[a] party asserting that a contractual provision authorizes the award of attorney fees takes a calculated risk that the court may agree the contract authorizes fees but nonetheless find in favor of the defendant on the underlying claim. That risk is a sufficient deterrent to reckless claims." (*International Billing Services*, *supra*, 84 Cal.App.4th at p. 1198 (conc. opn. of Raye, J.).)

It is also asserted in *International Billing Services* that the rule stated therein "should reduce protracted litigation regarding the precise scope of a fees provision and provide parties necessary certainty." (*International Billing Services*, *supra*, 84 Cal.App.4th at p. 1192.) However, as explained by Justice Raye, it is doubtful that disputes over attorney fees require protracted litigation and, in any event, a similar amount of litigation may be required to resolve the question whether either party ever made a claim for attorney fees. (*International Billing Services*, *supra*, 84 Cal.App.4th at pp. 1197-1198 (conc. opn. of Raye, J.).)

In sum, there is no sound policy or legal basis for the broad rule adopted by this court in *International Billing Services*. That rule would instead violate the very policy considerations it purports to serve. We agree with the many state court decisions refusing to apply estoppel against a losing party who sought attorney fees under circumstances where that party would not have been entitled to such fees had it prevailed.

We emphasize the foregoing discussion applies only to cases where attorney fees are sought for the cost of the underlying litigation. Meeker sought fees for the cost of defending against the claims asserted by Base Camp. A different situation arises where the prevailing party is seeking fees for the cost of litigating the right to attorney fees. For example, if party A claims breach of contract by party B, but party B prevails in the action, party B would be entitled to attorney fees for the cost of the litigation only if party A would have been so entitled had it prevailed. However, after completion of the underlying litigation, the parties may litigate the right to attorney fees. In our example, party B would assert a right to attorney fees, while party A would claim there is no such right. If party B prevails, it will be entitled to attorney fees for the entire litigation, including the cost of proving the right to attorney fees. But what if party A prevails? Under that circumstance, party A would have proven there is no contractual right to attorney fees. However, consistent with *Reynolds Metals* and Civil Code section 1717, party A should be awarded

fees for the separate litigation over the right to attorney fees.

In this matter, Base Camp lost the underlying litigation but, as we have concluded, won the battle over the right to attorney fees. Base Camp would therefore be entitled to attorney fees for the costs of defeating Meeker's claim for attorney fees. However, because Base Camp did not seek such an award, and did not appeal the judgment below, it has waived any claim for such fees.

VIII

Cross-Appeal

Henley contends the trial court made two clerical errors in its postjudgment ruling. First, the court's order indicated that Meeker was the prevailing party over Henley, when in fact Henley recovered $36,676 from Meeker. Second, Henley contends the court's award to Henley of "up to" one-half of its costs from Base Camp is too uncertain to be enforced.

As to the first purported clerical error, Henley's claim is moot. We have determined previously that in light of Meeker's right to indemnity, the trial court must reconsider who was the prevailing party. As to the second, we disagree this was a clerical error.

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1133.) A clerical error must

be distinguished from a judicial error. A judicial error occurs where the order issued was the order intended by the court, even though erroneous. A judicial error cannot be corrected by the trial court after it has become final. (*Estate of Eckstrom* (1960) 54 Cal.2d 540, 544; *West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 951.)

On the record before us, there is nothing to suggest that the trial court did not intend to award Henley "up to" one-half of his costs. While this may appear hopelessly confusing, the trial court will have an opportunity to modify the ruling, if it so chooses, on remand.

DISPOSITION

The order of September 28, 2001, regarding indemnity and prevailing party attorney fees is reversed and the matter is remanded to the trial court for further proceedings consistent with the views expressed in this opinion. Base Camp shall receive its costs on appeal from Meeker. Meeker shall receive its costs on appeal from Henley. Henley shall bear its own costs on appeal. **(CERTIFIED FOR PARTIAL PUBLICATION.)**

HULL, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.