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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DILLINGHAM-RAY WILSON, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent; CBI SERVICES, INC., Real Party in Interest and Respondent.	B192900 (Los Angeles County Super. Ct. No. BC208414)

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter D. Lichtman, Judge. Affirmed in part, reversed in part and remanded with directions**.**

Watt, Tieder, Hoffar & Fitzgerald, Gregory J. Dukellis, Jared M. Wayne; Monteleone & McCrory, Patrick J. Duffy III and Andrew W. Hawthorne for Plaintiff and Appellant.

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of part II of the Discussion.

Rockard J. Delgadillo, City Attorney, Michael L. Claessens, Assistant City Attorney; Greines, Martin, Stein & Richland, Irving H. Greines, Feris M. Greenberger, Peter O. Israel; Akermann Senterfitt, Nowland C. Hong, Thomas J. Casamassima and Michael S. Simon for Defendant and Respondent.

Dennis J. Herrera, City Attorney, Danny Chou, Chief of Complex and Special Litigation, and Kathleen Morris, Deputy City Attorney for League of California Cities and California State Association of Counties as Amici Curiae on behalf of Defendant and Respondent.

Kirkpatrick & Lockhart Preston Gates Ellis, Timothy L. Pierce and Hector H. Espinosa for Real Party in Interest and Respondent.

The City of Los Angeles (City) obtained millions of dollars worth of construction work that it does not want to pay for. It believes it is absolved of any obligation to pay by Public Contracts Code section 7107[1] and *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228 (*Amelco*) on the theory that they dictate a method of proving contract damages, a method that the contractor, Dillingham-Ray Wilson (DRW), says is impossible under the circumstances. Below, DRW asserted its own claims and pass-through claims of subcontractors against the City for breach of a public works contract and obtained an award in excess of $36 million for delays, unpaid contract retention, prompt pay penalties, prejudgment interest and attorney fees. But prior to that, the trial

[1] All further statutory references are to the Public Contracts Code unless otherwise indicated.

court granted in limine motions and excluded $25 million of DRW's claims on the theory that it could not document its actual costs as required by contract, it was not permitted to prove damages with engineering estimates, and it was not entitled to prove damages using a modified total cost theory. In the published portion of this opinion, we conclude that the trial court erred because section 7107 and *Amelco* impact the measure of damages, not the method of proving them, and also because a modified total cost theory is permissible. Further, DRW is entitled to litigate whether it was required to document its actual costs as a condition of payment.

By cross-appeal, the City requests reversal of the judgment on the theory that the trial court committed evidentiary and jury instruction error. Also, the City argues that the trial court erred when it granted prompt pay penalties and attorney fees pursuant to section 7107, subdivision (f), and attorney fees pursuant to the California False Claims Act. In the unpublished portion of this opinion, we conclude that these arguments lack merit. However, we also conclude that the City raises at least one valid point, which is that the trial court lacked statutory authority to grant continuing prompt pay penalties after judgment was entered.[2]

Because prompt pay penalties cannot continue after judgment is entered, we modify the award in favor of DRW to reflect that interest on the prompt pay penalties shall accrue at 7 percent legal interest postjudgment. As modified, the award in favor of DRW is affirmed. The judgment, however, is reversed and remanded for a trial on DRW's excluded claims.[3]

FACTS

After competitive bidding, DRW was awarded a public works contract (C-741 contract) by the City to expand the digester capacity at the Hyperion Wastewater

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[2] Government Code section 12650 et seq.

[3] The pretrial proceedings and trial presented the trial court with difficult legal and logistical issues that were made even more difficult by the inability of trial counsel to adequately define the case and state the law. Given this context, the trial court's effort to resolve these issues was admirable.

Treatment Plant. The City was permitted to retain up to 10 percent of each progress payment (retention) and hold those funds in an interest-bearing escrow account. Additionally, it could deduct liquidated damages for delays from any payments made. During construction, the City issued over 300 change orders containing more than 1,000 changes to the plans and specifications. On rare occasions, the City directed DRW to perform changes on a time and materials basis. In general, the City requested an estimate of the cost of work, told DRW to commence work and agreed the parties would negotiate a lump sum payment at a later date. Though the parties agreed on the compensation payable for some of the time and materials change orders and lump sum change orders, not all the change orders were settled. When DRW completed the project, it asked for an equitable adjustment to compensate it for work performed without a price, and for the expenses and losses incurred due to the City's interference and delays. The City refused. In addition, the City assessed liquidated damages against DRW for delays and did not release the retention funds from escrow.

DRW sued the City for breach of contract. The City cross-complained. The City's claim for breach of contract alleged, inter alia, that DRW was liable for liquidated damages. Other claims were asserted against DRW and a subcontractor, CBI Services, Inc. (CBI), for fraud and violation of the California False Claims Act in connection with their requests for payment.

Based on *Amelco* and section 7105, subdivision (d)(2),[4] the City filed motions in limine to preclude DRW from presenting a total cost claim to the jury, and from proving

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[4] Section 7105, subdivision (d)(2) provides in part: "Contracts of public agencies, excluding the state, required to be let or awarded on the basis of competitive bids pursuant to any statute may be terminated, amended, or modified only if the termination, amendment, or modification is so provided in the contract or is authorized under provision of law other than this subdivision. The compensation payable, if any, for amendments and modifications shall be determined as provided in the contract. The compensation payable, if any, in the event the contract is so terminated shall be determined as provided in the contract or applicable statutory provision providing for the termination."

its damages with engineering estimates. The trial court precluded a total cost theory of damages on the grounds that DRW's evidence in support of the theory was insufficient, and ruled that a modified total cost theory was not recognized in California. Next, the trial court ruled that General Conditions Section 38 (GC Section 38) of the C-741 contract required DRW to proceed on a time and materials basis and document actual costs any time the parties did not agree on a lump sum. DRW was precluded from introducing evidence or presenting argument to the jury that it was entitled to recover damages resulting from changes or extra work calculated by any method other than as provided in the C-741 contract. The trial court held a hearing and found that the in limine rulings barred three of DRW's 10 damages claims: (1) claim No. 3 for the difference between the City's estimates and DRW's estimates on lump sum change orders when the parties did not agree on a price; (2) claim No. 5 for additional payments due from the City because of breaches of the implied warranty of correctness of the plans and for other breaches of contract;[5] and (3) claim No. 6 for the cost of inefficient labor caused by breach of the implied warranty of correctness of the plans.

The case proceeded to trial on DRW's claims for delay damages, wrongfully withheld retention and prompt pay penalties, and on the City's cross-complaint. Following the presentation of evidence, the trial court instructed the jury and tasked it with interpreting the C-741 contract.

The jury rendered a general verdict with special interrogatories. The jury found that the City breached the C-741 contract and caused DRW damages. Under section 7107, the jury concluded that the City's assessment of liquidated damages was unreasonable. Next, the jury found that the City was not entitled to an offset for

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[5] If a contractor makes a misinformed bid because a public entity issued incorrect plans and specifications, precedent establishes that the contractor can sue for breach of the implied warranty that the plans and specifications are correct. The contractor may recover "for extra work or expenses necessitated by the conditions being other than as represented. [Citations.]" (*Souza & McCue Constr. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510 (*Souza*).)

liquidated damages, and that it was not entitled to recover on its False Claims Act claims and fraud allegations. The judgment for DRW awarded $12,369,880 in contract damages; prejudgment interest on the contract damages; $15,035,533 in prompt payment penalties pursuant to section 7107, subdivision (f); and postjudgment prompt pay penalties until the retention funds were paid to DRW. In posttrial motions under the California False Claims Act, DRW was awarded $1,634,188.50 in attorney fees and CBI was awarded $1,211,858 in attorney fees. Based on section 7107, subdivision (f), the trial court awarded DRW $3,799,048.74 in attorney fees expended to recover the withheld retention funds.[6]

These timely appeals followed.[7]

DISCUSSION

I.

DRW's Appeal

DRW contends that it is entitled to a reversal of the in limine rulings because the trial court should have submitted the interpretation of GC Section 38(c) to the jury; it is entitled to prove its damages with the best evidence available (which, in this case, is often engineering estimates); and it is entitled to pursue a modified total cost theory of damages. We agree.

A. Standard of review.

When all evidence on a particular claim is excluded based on a motion in limine, the ruling is subject to independent review as though the trial court had granted a motion

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[6] Facts pertinent to the excluded claims have not been adjudicated. Our statement of those facts is based on argument and offers of proof and, as a result, does not give rise to collateral estoppel. On remand, the parties must litigate the relevant facts. As long as the proper law is applied, this opinion in no way precludes the trier of fact from deciding factual issues in favor of the City.

[7] We received briefs from DRW, CBI, and the City and, as amicus curiae, the League of California Cities. CBI was not only a cross-defendant below, it was the real party in interest with respect to a portion of the $25 million in claims that are the subject of DRW's appeal.

for judgment on the pleadings or, if evidence was offered, a motion for nonsuit. (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 634–635, superseded by statute on other grounds as stated in *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1202; *Stein-Brief Group, Inc. v. Home Indemnity Co.* (1998) 65 Cal.App.4th 364, 369 (*Stein-Brief*).) We must disregard adverse conflicting evidence, view the record in the light most favorable to the plaintiff and determine whether the evidence and inferences were sufficient to support a judgment in the plaintiff's favor. (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1327.) If any issues were decided during an in limine proceeding without evidence, we will accept as true the evidence referenced in the plaintiff's arguments and offers of proof. (*Stein-Brief, supra*, 65 Cal.App.4th at p. 369 [accepting as true the "best case scenario" the trial court ordered the plaintiff to submit]; *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677 [finding an inference of injury based on references to evidence in the plaintiff's argument on the motions in limine and in a brief opening statement]; Evid. Code, § 354, subd. (a) [the substance, purpose and relevance of excluded evidence can be made known to a trial court by "questions asked, an offer of proof, or by any other means"].)

In instances in which an in limine ruling does not preclude an entire claim but instead limits the evidence that will be offered to prove a claim, we review the ruling for an abuse of discretion. (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1294.) "[I]f the trial court's in limine ruling was based upon a misinterpretation of applicable law, an abuse of discretion has been shown." (*Ibid.*)

B. GC Section 38(c).

GC Section 38(c)(4) authorized the City's engineer to request a quotation on a proposed change. DRW was required to submit a quotation on a form entitled "Change Order Cost Quotation Form[/]Estimate Summary for Prime Contractor Total Costs." The form, which was only one page, appeared as attachment A to the General Conditions of the C-741 contract. A quotation request was not "considered authorization to proceed with the changed work prior to the issuance of a formal Change Order, unless directed otherwise in writing by the [e]ngineer[.]" With respect to GC Section 38(c)(4) change

orders for which the City directed DRW to commence work and negotiate a price at a later date, and for which the City never agreed on a price or paid, DRW proposed to prove at least some of its damages at trial with engineering estimates.

The City, however, argued that when the parties did not mutually determine a lump sum at a later date, DRW could only be paid under GC Section 38(c)(3). That subdivision provided: "[I]f the method or amount of payment cannot be agreed upon prior to the beginning of the work, and the [e]ngineer directs in writing that the work be done on a [time and materials] basis, [DRW] shall provide labor, equipment, and material necessary to complete the work in a satisfactory manner and within a reasonable period of time. For work performed, payment shall be made for the documented actual cost." The City maintained that this subdivision barred the use of engineering estimates, and that DRW was left holding the bag even if documenting actual costs was impossible.

Confusion arises because GC Section 38(c) stated generally that the cost of changed work was supposed to be formulated in accordance with the provisions of GC Section 38(c)(1) through (12). This could mean, as DRW posited below, that GC Section 38(c)(3) and (c)(4) stand alone as self-contained provisions. Or, assuming without deciding for purposes of this appeal, it could mean that (c)(3) applied to every cost formulation whether the City directed work to be done on a time and materials basis or not, i.e., DRW could not get paid under (c)(4) unless it documented its actual costs as required by (c)(3). Other provisions of the C-741 contract do not eliminate the obfuscation. GC Section 38(b)(4) required the City to agree to an equitable adjustment if a change under GC Section 38 caused an increase in DRW's work, but the terms of GC Section 38(b)(4) did not obligate DRW to document its actual costs. Under GC Section 38(c)(13), DRW was obligated to keep records of the cost of changes and the cost of the base scope of the work. It does not indicate the detail with which those costs were to be tracked. Thus, we conclude that GC Section 38 was reasonably susceptible to more than one meaning and required additional interpretive inquiry. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage Etc. Co.* (1968) 69 Cal.2d 33, 39–40.)

If a contract is ambiguous, parol evidence is admissible to aid interpretation. (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 920.) We may look at, among other things, course of dealings as a practical construction of the terms. And it is permissible to consider the meaning ascribed to language as a matter of custom and practice. (*Franklin v. Marie Antoinette Condominium Owners Assn.* (1993) 19 Cal.App.4th 824, 829.)

DRW presented or adverted to evidence that the parties proceeded under GC Section 38(c)(4). The City never directed DRW to keep track of the cost of the work as it was being performed. This was because the resolution of the changes was dependent on engineering estimates. For some of the work performed under GC Section 38(c)(4), the parties negotiated lump sum payments after the changed work was completed. As for other work, the City did not reject DRW's estimates based on a lack of actual documentation of costs. Rather, the City adopted its own engineering estimates and rejected DRW's estimates as inaccurate. When the City requested an estimate under GC Section 38(c)(4) and the parties could not agree on a price before the work commenced, DRW often asked to proceed on a time and materials basis. With rare exception, the City refused.

As for custom and practice in the public works industry, DRW submitted evidence that time and materials change orders are usually limited to emergency situations or to changes small in cost and scope. For large or complex work, owners prefer using lump sum change orders because time and materials change orders require them to pay for the additional engineering cost of keeping track of the work in the field. Lump sum change orders are often negotiated after the work proceeds so the parties can avoid delays or suspension of the work.

This evidence supports DRW because its interpretation is consistent with the parties' course of dealing as well as custom and practice.

Given the patent ambiguity of GC Section 38 and the extrinsic evidence offered or referenced by DRW in its papers, it was entitled to a trial on contract interpretation. On remand, the trial court must require "the jury to make special findings on the disputed

issues and then base . . . interpretation of the contract on those findings" (*Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 892, fn. 4 (*Medical Operations*), or submit interpretation of ambiguous terms to the jury. (*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1562 [the trial court did not err in submitting interpretation of an ambiguous term to the jury]; *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 (*City of Hope*).)

C. Claim Nos. 3, 5 and 6.

According to DRW, GC Section 38 is not a limitation on the method of calculating breach of contract damages, and the law permits it to prove its damages on claim Nos. 3, 5 and 6 with the best evidence available even if that evidence takes the form of engineering estimates. We agree.

Because the C-741 contract is a public contract that was awarded pursuant to competitive bidding, DRW may not sue for abandonment and recover the reasonable value of its services. (*Amelco*, *supra*, 27 Cal.4th at pp. 238–241.) Based on section 7105, subdivision (d)(2), the compensation payable to DRW for amendments and modifications has to be determined as provided in the C-741contract.[8] *Amelco* and section 7105 combine to prevent DRW from seeking to recover anything more for changes than it was entitled to receive by contract. This means that the benefit DRW would have received for change orders if the City performed is the measure of damages. (Civ. Code, § 3300 [the measure of contract damages is the amount which will compensate the aggrieved party for all the detriment proximately caused by a breach]; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442,

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[8] Section 20162 establishes that if a public contract exceeds $5,000, like the C-741 contract, "it shall be contracted for and let to the lowest responsible bidder after notice." (§ 20162.) Because there is no conflict between the City's charter and section 20162 or section 7105, these statutes apply to the City. (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 51; Cal. Const., art. XI, § 5, subd. (a).)

468 [breach of contract damages "may not exceed the benefit which [the plaintiff] would have received had the promisor performed"].)

If, after remand, the trial court or jury interpret the C-741 contract and conclude that GC Section 38 did not require DRW to document actual costs on the change orders issued by the City, and if engineering estimates are the best evidence of damages available, then DRW can offer those estimates to prove its claims. Our holding is in line with the common law of contract damages. (*Record Etc. Co. v. Pageman Hold. Corp.* (1955) 132 Cal.App.2d 821, 823–824 (*Record Machine*) ["'While the actual amount of damages from the breach of a contract may not be susceptible of exact proof, the law does not permit one whose act has resulted in loss to another to escape liability on that account; the law requires only that the best evidence be adduced of which the nature of the case is capable'"].) When it is clear that a party suffered damages, "the fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery. [Citations.]" (*Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 486 (*California Lettuce Growers*).) Of course, a trier of fact will still have to decide if the burden of proof has been met. (Civ. Code, § 3301 ["No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin"].)

If, on the other hand, the trial court or jury conclude that DRW was obligated to document its actual costs on change orders issued by the City, then there is an issue as to whether documenting actual costs was a covenant to perform rather than a condition to payment.[9] And if it was a condition, there is a question as to whether it was excused. If

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[9] "A *covenant* is a *promise* to render some performance. The practical distinction between a condition and a covenant may be illustrated as follows: (1) If B agrees to render some performance to A, provided a condition happens, and the condition does not happen, A's *duty to perform* is *excused*, but A *cannot recover damages* from B. (2) On the other hand, if no condition is stated, and B merely makes a promise, his or her breach of covenant will give rise to a right of action for damages, but will not necessarily excuse A's performance." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 780, pp. 867-868 (italics in original).)

documenting actual costs was not a condition, or if the condition was excused, DRW is entitled to litigate its damages. DRW may use engineering estimates provided it is the best evidence available.

Despite the foregoing, the City argues that DRW cannot possibly have a remedy because section 7105 supersedes *Record Machine* and *California Lettuce Growers* and thereby proscribes DRW from using any method of calculating damages not spelled out in the C-741 contract. This argument fails.

We conclude that section 7105 and the common law of this state are not in conflict because section 7105 does not expressly abrogate common law, and the two can be harmonized.[10] "As a general rule, '[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. [Citation.] "A statute will be construed in light of common law decisions, unless its language '"clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . ." [Citations.]' [Citation.]"' [Citation.] Accordingly, '[t]here is a presumption that a statute does not, by implication, repeal the common law. [Citation.] Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws.' [Citation.]" (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) It is easy to read section 7105 in a way that is compatible with *Record Machine* and *California Lettuce Growers*. Section 7105 impacts the measure of damages for public works contracts, but it does not impact the permissible method of proof. In other words, an award of breach of contract damages under *Record Machine* and *California Lettuce Growers* does not represent a contract modification barred by section 7105.

This leads us to breach of the implied warranty of correctness. *Souza* permitted a contractor to assert this claim against a public entity. (*Souza*, *supra*, 57 Cal.2d at

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[10] At oral argument, the City conceded that section 7105 did not abrogate common law.

pp. 510–511.) Because we are bound by *Souza*, and so is the trial court, DRW must be permitted to pursue its implied warranty of correctness claims to the extent they are not subsumed within a change order. If DRW recovers, the award will not represent a contract abandonment barred by *Amelco*, nor will it represent a payment for an amendment barred by section 7107, subdivision (f). Rather, it will simply represent an award of contract damages under longstanding common law.

D. The modified total cost method of proving damages.

Our last inquiry is whether DRW should have been permitted to present a modified total cost claim to the jury.

Under the total cost method, "damages are determined by 'subtracting the contract amount from the total cost of performance.' [Citation.]" (*Amelco, supra*, 27 Cal.4th at p. 243.) This method may be used only after the trial court determines the following can be shown: (1) it is impractical for the contractor to prove actual losses directly; (2) the contractor's bid was reasonable; (3) its actual costs were reasonable; and (4) it was not responsible for the added costs. (*Id*. at pp. 243–244.) If some of the contractor's costs were unreasonable or caused by its own errors or omissions, then those costs are subtracted from the damages to arrive at a modified total cost. (*Servidone Const. Corp. v. U.S.* (Fed. Cir. 1991) 931 F.2d 860, 862.) "If prima facie evidence under this test is established, the trier of fact then applies the same test to determine the amount of total cost or modified total cost damages to which the plaintiff is entitled." (*Amelco*, *supra*, 27 Cal.4th at p. 244.)

Because *Amelco* recognizes that a contractor can recover on a modified total cost theory, that remedy is available in California. The trial court abused its discretion by not following the confirmed law set forth in *Amelco* and by declining to decide whether DRW demonstrated a prima facie case for determining damages based on a modified total cost theory. On remand, DRW may pursue a modified total cost theory of proving damages if DRW is not required to document its actual costs. If the trial court finds a prima facie case, then DRW shall be entitled to present a modified total cost theory to the jury.

All other issues are moot.[11]

II.

The City's Cross-Appeal

The City argues that the trial court should have interpreted the C-741 contract instead of delegating interpretation to the jury; the trial court committed a host of instructional errors; the prompt pay penalties are illegal; the trial court failed to understand that it had the discretion not to award prompt pay penalties; the jury never decided whether the City was entitled to an offset for liquidated damages; the award of attorney fees under the California False Claims act was impermissible; DRW was not entitled to prompt pay penalties after judgment was entered; and the City should receive a credit against prompt pay penalties for interest DRW received on the retention. We agree that DRW is not entitled to continuing prompt pay penalties after judgment was entered. In all other respects, these arguments lack merit. As we shall demonstrate, the City's approach to this cross-appeal is unavailing.[12]

A. The trial court's determination of contract ambiguity.

The trial court instructed the jury to interpret the C-741 contract. The City contends that this was reversible error because the trial court did not fulfill its duty to identify ambiguous terms and only ambiguous terms can be submitted to a jury for interpretation. (*City of Hope, supra,* 43 Cal.4th at p. 395.) We conclude that the trial court fulfilled its duty. During pretrial proceedings, the trial court found certain provisions to be ambiguous. And by submitting interpretation of the C-741 contract to

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[11] CBI contends that it is entitled to recover on its pass through claims even if we affirm the trial court's in limine rulings. According to CBI, its claims are viable because they are not lump sum claims, its owner interference claim is not governed by the change order provisions, and it offered evidence of its actual costs. Because we have concluded that the in limine rulings were improper, CBI's pass through claims can be tried. We need not reach CBI's specific arguments.

[12] In general, we have declined to consider alternative arguments raised by the City for the first time in its reply brief. (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1755, fn. 1.)

the jury, the trial court impliedly found ambiguity in all contractual provisions being litigated. The pivotal question is whether the trial court's ruling was correct. "'The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal.'" (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 713.)

The City declined to analyze the C-741 contract and the extrinsic evidence and explain why the trial court erred in concluding that certain terms were reasonably susceptible to two meanings. Just as importantly, the City failed to explain why the jury's interpretation of the C-741 contract was incorrect and why that led to an unfair judgment in favor of DRW. Only in that instance would we have the power to reverse the judgment. (*Medical Operations*, *supra*, 176 Cal.App.3d at pp. 893–895 [reversing and entering judgment in favor of the defendant after construing the contract based on its language and extrinsic evidence and concluding that contract interpretation should not have been given to the jury].)

B. Jury instructions regarding contract interpretation.

The City argues that the trial court committed the following errors regarding contract interpretation: (1) the trial court did not tell the jury what ambiguous provisions it was supposed to interpret; (2) the trial court instructed the jury to construe a term against the City if the jurors could not agree on the term's meaning; and (3) the trial court told the jury to interpret the C-741 contract in its entirety even though the jury never saw the whole contract.

For purposes of this appeal, we presume error.[13]

Having assumed error, our touchstone is article VI, section 13 of the California Constitution. Section 13 provides in part that "[n]o judgment shall be set aside . . . on the ground of misdirection of the jury, or of the improper admission or rejection of evidence

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[13] Our presumption does not mean that the trial court erred. We make this presumption to expedite our analysis.

. . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) In applying our Constitution and assessing whether an instruction was prejudicial, we view the evidence and inferences in a light most favorable to the appealing party. (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1413 (*Galvez*).) The question is whether the error misled the jury and had a prejudicial influence on the verdict. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670 (*Henderson*); *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682 (*Kinsman*).) "To put it another way, '[where] it seems probable that the jury's verdict may have been based on the erroneous instruction[,] prejudice appears and [an appellate court] "should not speculate upon the basis of the verdict."' [Citations.]" (*Henderson*, *supra*, 12 Cal.3d at p. 670.) There is no precise formula. (*Id*. at p. 671.) A court must examine the "'evidence, the arguments, and other factors to determine whether it is *reasonably probable* that instructions allowing application of an erroneous theory *actually* misled the jury.' [Citation.]" (*Kinsman*, *supra*, 37 Cal.4th at p. 682, citing *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 581, fn. 11 (*Soule*) [the analysis "requires evaluation of several factors, including the evidence, counsel's arguments, the effect of other instructions, and any indication by the jury itself that it was misled"].)

An appellant's task is to demonstrate that the evidence was sufficient to sustain a defense verdict if the jury had been given appropriate instructions, and that there was a reasonable probability that the jury would have reached a different result. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 423, overruled on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154.) Our Supreme Court has recently clarified that "[t]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission." (*Soule*, *supra*, 8 Cal.4th at p. 580; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 203; *Galvez*, *supra*, 88 Cal.App.4th at p. 1423 [citing *Soule* for the proposition that "[t]here is no automatic reversal merely because a trial court has failed to properly instruct a jury"]; *Unlimited Adjusting Group, Inc. v.*

Wells Fargo Bank, N.A. (2009) 174 Cal.App.4th 883, 895 [citing *Soule* for the proposition that there is no rule of automatic reversal or inherent prejudice applicable to any category of civil instructional error].)

Implicit in the City's cross-appeal is a call for us to announce an entirely new standard of review. Cutting against the grain of precedent, the City posits in its opening brief that "[w]hen a jury is erroneously instructed, a reviewing court will not speculate as to the impact those instructions might have had on the jury; rather, the reviewing court will presume the jury followed and was adversely influenced by the erroneous instructions." The City tacitly asks us to apply a rule of automatic reversal. This is so because the City would have us eliminate all inquiry into whether "'it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" (*Soule*, *supra*, 8 Cal.4th at p. 580.) We presume that this is a good faith argument to change the law, and that the City is merely preserving the issue for review at a higher level. We, of course, have no power to do anything but comply with *Henderson*, *Soule* and *Kinsman*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [intermediate courts are bound decisions by our Supreme Court].)

Elsewhere in its opening brief, the City cites *Soule* as holding that instructional error is prejudicial where it seems probable that the error prejudicially affected the verdict. By itself, this statement is not remarkable except for the City's inconsistency. What is remarkable is the novel way the City invites us to apply *Soule*. We are invited to find probable prejudice based on a presumption; tacitly, the City contends that we must presume that when error is coupled with complex issues, it is virtually impossible for a jury to reach the right result.[14] Once again, we are hemmed in by precedent. Based on

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[14] In the respondent's brief, the City stated: "Since the trial court abdicated to the jury its interpretive duties, reversal is compelled without any additional showing of prejudice. But in any event, the abdication resulted in demonstrative prejudice because, to put it mildly, it is entirely possible (the more appropriate words are 'virtually certain' or 'highly probable') that the lay jury could not, on its own, have interpreted the contract as the law requires."

Henderson, *Soule* and *Kinsman*, we must examine the circumstances of the entire case—the evidence, the instructions, the arguments of counsel and any indications from the jury itself it was misled.

At this juncture, the City must explain why the language of the C-741 contract and the defense evidence supported a verdict in its favor. Which provisions were pivotal? (It could not be GC Section 38(c)(3) because it was interpreted by the trial court.) What was the proper interpretation? Was the C-741 contract reasonably susceptible to that interpretation? What evidence offered by the City supported that interpretation? Did the jury impliedly adopt an interpretation that was not permitted by the contractual language? What arguments were presented to the jury? Did the jury indicate that it was misled? In its opening brief, the City never says. Having opted not to apply the appellate law that binds us, the City cannot prevail. (*Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811.)[15]

C. The special instruction on breach of contract.

The City argues that it was prejudiced by the following special instruction: "[The City] breached the contract if it prevented or hindered the performance of the contract by Dillingham-Ray Wilson. [¶] Every construction contract includes an implied promise that the contractor will be allowed to construct the project in accordance with the terms of the contract without interference by the owner. If the owner refuses to comply with this promise, it is a breach of the contract by the owner. [¶] If, for example, you determine that [the City] or its engineer delayed responding to Dillingham-Ray Wilson's requests for information or delayed correcting errors in the design of the project, and these delays

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[15] According to DRW, most of its delay damages were caused by changes to the number and design of pipe supports. We are told that the City's defense was that Specification 15(g) of the C-741 contract required DRW to design the pipe supports and it was responsible for the delays. Thus, supposedly, the issue was the interpretation of Specification 15(g). Nowhere in the City's opening brief does it discuss the impact of the jury instructions on that provision. In addition, we are told that the parties disputed the meaning of the scheduling provisions in the C-741 contract. Again, the City provides no analysis of the pertinent provisions.

prevented or hindered Dillingham-Ray Wilson's performance of the contract, this is a breach of the contract by [the City]."

According to the City, this instruction was a formula instruction, i.e., it directed a verdict for DRW in the event that the jury found certain facts to be true. (*Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 180.) "The propriety of such an instruction depends upon whether it includes all of the legal elements essential to a verdict. [Citation.]" (*Ibid*.) In the 1970's, it was held that "[w]hen the formula instruction is based on an incorrect or unauthorized premise . . . it constitutes reversible error even if a correct instruction is given in another part of the instructions as a whole [citation]." (*Hubbard v. Calvin* (1978) 83 Cal.App.3d 529, 534 (*Hubbard*).) To the extent that *Hubbard* recognizes a rule of reversal per se, we decline to follow it. We are bound by *Henderson*, *Kinsman*, *Soule* and the California Constitution to assess whether the alleged error was prejudicial.

We presume for purposes of this appeal that the special instruction was an erroneous formula instruction. But the City relied on *Hubbard* and failed to engage in harmless error analysis. This charge of error is moot. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

D. Evidence of project events predating December 31, 1995.

With change order 180 (CO 180), the parties entered into an interim time impact settlement and agreed on time extensions for delays from September 3, 1993, through December 31, 1995. Only one time extension was considered compensable. Agreement on a change in contract price due to the compensable time extension was deferred to a later date. In CO 180, the City stated that it remained "willing to resolve any direct costs issues [related to the compensable time extension] that DRW and its subcontractors and suppliers may have incurred." Over the City's objection, the trial court permitted DRW to present evidence of project events transpiring before January 1, 1996. The jury was given a limiting instruction and told not to consider the evidence when determining the City's claim for liquidated damages or DRW's claim for delay damages. The jury was also told that it could consider the evidence "as evidence showing a pattern, if any, of the

City not granting timely time extensions and/or not following the time extension provisions of the [C-741 contract]."

The City argues that the trial court should have excluded all evidence of project events predating December 31, 1995, because CO 180 settled all the parties' related claims. As an addendum, it argues that the limiting instruction invited the jury to draw liability conclusions regarding unresolved claims based on evidence of settled claims. Springing off this assignment of error, the City contends that we have no choice but to reverse the entire judgment.

Again, for purposes of appeal only, we presume error.

As we stated above, article VI, section 13 of the California Constitution dictates that we cannot reverse unless there has been a miscarriage of justice. And according to our Supreme Court, state law error "generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. [Citation.]" (*Soule, supra,* 8 Cal.4th at p. 574.) Regarding evidentiary error, the City is silent as to the standard of review it believes should govern. From the tenor of its arguments, we glean that the City believes reversal is mandated if erroneously admitted evidence is of a type that could, in the abstract, lead a jury down the wrong path. To prevail on that theory, the City will have to take its argument to our Supreme Court.

In general, we presume that a jury followed a trial court's limiting instruction. (*People v. Lindberg* (2008) 45 Cal.4th 1, 26.) We therefore presume the jury did not consider any of the pre-December 31, 1995, project events when awarding damages. The City offers no argument to overcome that presumption. In particular, it makes no effort to demonstrate that it was reasonably probable that it would have obtained a better verdict in the absence of the evidence being admitted. Presumably, the City believes that the breach of contract damages would have been smaller. Why? According to the City, about $8 million of the award for breach of contract related to the wrongfully withheld

retention.[16] By inference, approximately $4 million of the award pertained to delay damages. But the City fails to argue that the evidence of delay damages is deficient and that the only explanation for the award is that the jury based its award on settled claims. What was the evidence? What were the arguments? The City is mum.[17] We therefore perceive no prejudice.

E. The award of retention funds, prompt pay penalties and attorney fees.

The City maintains that the award of retention funds, prompt pay penalties and attorney fees must be reversed because it is illegal to penalize the City for asserting a claim with probable cause; the jury was not properly instructed on how to resolve whether the City had a right to assess liquidated damages and withhold the retention; the issue of whether the City had a right to assess liquidated damages or withhold the retention was never decided; the award of penalties was discretionary but viewed by the trial court as mandatory; if the penalties are improper, the award of attorney fees under section 7107 must be reversed; and the trial court erred by ordering that prompt pay penalties accrue after judgment. Except as to the prompt pay penalties that accrue after judgment, we find no error.

1. <u>The measure of wrongful withholding.</u>

A public entity must release the retention funds withheld from a contract within 60 days after the date of completion of the work of improvement. However, "[i]n the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount." (§ 7107, subd. (c).)

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[16] The City tells us that it withheld $7,795,000 in retention funds and that this entire sum was awarded by the jury.

[17] DRW represents that it offered evidence of pre-December 31, 1995, project events to prove excuse of contract conditions, and to prove course of dealing to aid interpretation of ambiguous scheduling provisions. It notes that even though CO 180 established time extensions, it did not resolve compensation disputes. These issues are absent from the City's opening brief.

The trial court awarded penalties and attorney fees based on section 7107, subdivision (f). That statute provides: "In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs." (§ 7107, subd. (f).)

The City argues that a dispute must be bona fide and DRW argues that it must be in good faith. We perceive no distinction. Section 7107, subdivision (e), which applies when a contractor withholds a subcontractor's retention, refers to a "bona fide dispute" rather than just a "dispute." Because the purpose of section 7107 is to encourage timely payment (*Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401 (*Martin Brothers*)), we construe section 7107, subdivision (c) in conformity with section 7107, subdivision (e) so that both permit the withholding of retention funds only if a dispute is bona fide. *Martin Brothers* equates a bona fide dispute with a good faith dispute, which is consistent with *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 556 ["City's successful defense of the section 7107 cause of action required proof of a good faith dispute that warranted withholding the money"].

Our analysis establishes that the award must be upheld if it was supported by substantial evidence that the City disputed payment in bad faith and therefore wrongfully withheld the funds. Only if reasonable minds cannot differ is the question of bad faith otherwise one of law for the courts to decide. (See *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 350 ["Although an insurer's bad faith is ordinarily a question of fact to be determined by a jury considering the evidence of motive, intent and state of mind, '[t]he question becomes one of law . . . when, because there are no conflicting inferences, reasonable minds could not differ. [Citation.]'"; *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, 998

[in assessing whether a settlement was made in good faith, "[g]ood or bad faith is a question of fact in each case"].)

2. Legality of the award.

The City argues that an award of penalties for bad faith conduct is unconstitutional if a public entity acted with probable cause. To support this proposition, the City relies on *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 886 (*Sheldon Appel*) [holding that the question for the probable cause analysis in a malicious prosecution action is whether any reasonable attorney would have thought the claim was tenable], *Dalrymple v. United States Auto. Assn.* (1995) 40 Cal.App.4th 497 [probable cause analysis in a malicious prosecution action is a legal question], and *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 335 [discussing the court's history of protecting the right of free access to the courts and declaring a statute unconstitutional because it required a public school teacher who requested a hearing regarding a dismissal to pay one-half the cost of the administrative law judge after the teacher did not prevail]. These cases amply establish that probable cause is a legal question, but none of them discuss the constitutionality of penalties awarded pursuant to section 7107 when the public entity acted in bad faith but may have had an objectively tenable position. In consideration of the dearth of supporting citations, we easily conclude that the City's argument has been forfeited.

3. Instructional error.

The trial court instructed the jury regarding section 7107 and liquidated damages. The City, however, contends that the jury instructions were erroneous. It seeks reversal on the grounds that the trial court failed to instruct that: (1) the City was permitted to withhold the retention and avoid penalties as long as there was a good faith dispute over liquidated damages, (2) the dispute could arise at any time and did not have to be voiced within 60 days of project completion, and (3) the City's right to liquidated damages depended on specific provisions in the C-741 contract set forth in section 10 of the General Requirements.

Like before, we presume error for purposes of discussion.[18]

The City made no attempt to demonstrate that the alleged instructional error regarding liquidated damages and withholding of the retention misled the jury and influenced the verdict. (*Henderson*, *supra*, 12 Cal.3d at p. 670.) In particular, we note that the City did not dissect the specific evidence establishing DRW's liability for liquidated damages, nor did the City direct our attention to evidence that the retention was subject to a good faith dispute. The City suggests that there is a good faith dispute as a matter of law because there was conflicting evidence. But if there was conflicting evidence, the issue was a question of fact. Absent from the City's briefs is a critical discussion of when and why liquidated damages were assessed and whether the assessment of liquidated damages was based on a contractual interpretation that was decided in favor of DRW. In that vacuum, we are left unable to discern the probable impact of the instructional error. We easily conclude that the City's argument is waived. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366.)[19]

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[18] In its reply, the City states: "Where the jury instructions remove an important issue from the jury, the error violates the constitutional right to jury trial, and therefore 'is reversible error per se, without the need to demonstrate actual prejudice.'" As authority, the City cites *Collins Development Co. v. D.J. Plastering, Inc.* (2000) 81 Cal.App.4th 771, 778. The case is inapposite. Instead of submitting an important issue on a contract claim to the jury, the trial court decided the issue on the basis of posttrial briefs. The court concluded that because the plaintiff was entitled to have the issue tried to a jury, the trial court deprived the plaintiff of a constitutional right and reversal was automatic. (*Id.* at pp. 777–778.) Here, however, the section 7107 and liquidated damages issues were submitted to the jury.

[19] In its discussion of instructional error regarding liquidated damages, the City set forth "the pertinent facts." (Emphasis omitted.) The City cited General Requirements section 9.15 of the C-741 contract, which instructed DRW to submit a time impact analysis and request a time extension if it experienced delays. The City also cited General Requirements section 10. That provision subjected DRW to liquidated damages if it did not complete work within the time fixed either by the original terms of the C-741 contract or an approved time extension. The other facts the City adverted to were procedural facts about the trial. Though the City cited various facts in its discussion of

4. Determination of the City's right to liquidated damages and the retention.

The jury rendered a general verdict with special interrogatories and found that the City's liquidated damages were not reasonable considering the factual circumstances at the time they were assessed. A general verdict must be construed as a finding in DRW's favor on all theories supported by substantial evidence. (*Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47, 57.)

The City asks us to conclude that the jury never determined whether the City's liquidated damages were permitted under the C-741 contract, and whether there was a legitimate dispute such that section 7107, subdivision (c) permitted it to withhold the retention. The problem for the City is that it did not cite a single case authorizing us to reverse a general verdict on the basis that special interrogatories did not include all necessary findings for liability. In essence, the City contends that the retention award was not supported by substantial evidence. However, the City did not discuss and apply the substantial evidence test. We have been given no hint by the City as to the specifics of its liquidated damages claims. Under the C-741 contract, DRW was potentially subject to liquidated damages for delays. What delays were caused by DRW? Or were the delays caused by the City's design defects? If there was a dispute, was the dispute fabricated? What precluded that finding? The answer is unknown to us, and we will not engage in speculation. Once again we find that an appellate point has been forfeited. "It is the duty of appellants' counsel . . . 'by argument and the citation of authorities to show that the claimed error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)[20]

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whether its position regarding the withholding was legally tenable, we decline to guess to what extent those facts are relevant to whether instructional error regarding liquidated damages requires reversal.

[20] DRW, in essence, contends: The parties disputed who was supposed to design the pipe supports. The City asserted that DRW was supposed to design the pipe supports and assessed liquidated damages for delays caused by the necessity of changes to the design. However, the jury interpreted the C-741 contract as requiring the City to design the pipe

5. The nature of the trial court's authority to award penalties.

Next, the City argues that the imposition of penalties was discretionary but the trial court did not exercise discretion because it viewed the penalties as though they were mandatory. We cannot concur.

Section 7107, subdivision (f) provides that if retention payments are not made when required, "the public entity . . . withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount." Case law reviewing statutory language establishing that a defendant "'shall be subject to'" penalties has held that they are mandatory. (*Party City Corp. v. Superior Court* (2008) 169 Cal.App.4th 497, 511 (*Party City*).)

The City's reliance on *People v. Meloney* (2003) 30 Cal.4th 1145 (*Meloney*) for a different rule is misplaced. The *Meloney* court held that trial courts have discretion under Penal Code section 1385 to strike enhancements even though Penal Code section 12022.1, subdivision (b) provides that certain defendants "'*shall be subject to* a penalty enhancement of an additional two years in state prison.'" (*Meloney*, *supra*, 30 Cal.4th at p. 1155.) Section 7107, subdivision (f) is not a sentence enhancement and there is no statute permitting a trial court to strike penalties. As a result, *Meloney* provides no grounds to depart from *Party City*.

6. Imposition of section 7107, subdivision (f) attorney fees.

The City contends that the award of attorney fees under section 7107, subdivision (f) must be reversed because there was no jury instruction and no lawful determination that the retention was wrongfully withheld. This argument is unavailing because the City did not adequately attack the judgment by arguing and demonstrating that it is not supported by substantial evidence. Nor did it argue that it is reasonably probable it would have obtained a better result if the jury had been properly instructed. Impliedly, we are asked to act as coappellate counsel. We have no obligation to do so. Moreover, we are

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supports. As a result, the jury concluded that the City was responsible for all design delays related to pipe supports, not DRW.

obligated to presume that the judgment appealed from is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

7. Continuation of the penalty after judgment.

The judgment provides that penalty interest will continue to accrue at the monthly rate of $159,500 per month until the penalty is paid. According to the City, the award is unlawful. We agree. The 2 percent per month charge imposed by section 7107, subdivision (f) does not continue to accrue after judgment because it would be the equivalent of postjudgment interest which may not exceed 10 percent per annum. (*S&S Cummins Corp. v. West Bay Builders, Inc.* (2008) 159 Cal.App.4th 765, 781–782 (*S&S*).) In the absence of legislation setting postjudgment interest at 10 percent, the rate of interest is 7 percent. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 344–345.)

DRW urges us to split from *S&S*. Because it was issued by another appellate court in another district, we are not bound by it. Still, we generally follow the decisions of other appellate courts unless there is good reason to disagree. (*Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1023.) Good reason, we are told, can be found in *Miller v. Givens* (1994) 30 Cal.App.4th 18, 21 (*Miller*) and *Walker v. Belvedere* (1993) 16 Cal.App.4th 1663, 1669 (*Walker*). *Miller* held that Code of Civil Procedure section 685.040 permitted a plaintiff to recover attorney fees incurred to enforce a judgment if the judgment included an award of attorney fees. The statute was intended to change the common law rule that an attorney fees clause in a contract merges into a judgment and cannot be the basis for a postjudgment award. (*Miller*, *supra*, 30 Cal.App.4th at p. 22.) In *Walker*, the court concluded that "a judgment against a negligent permissive driver does not, in and of itself, extinguish the Vehicle Code statutory liability of the vehicle's owner." (*Walker*, *supra*, 16 Cal.App.4th at p. 1669.) From these two opinions, DRW draws the conclusion that the doctrine that all claims merge into a judgment does not extinguish statutory liability. But *Miller* and *Walker* contain narrow holdings on unrelated statutes and cannot be read as broadly as DRW desires, particularly in light of the established precedent of *S&S*.

S&S explained that if it interpreted section 7107, subdivision (f) as operating postjudgment, "we would essentially be adopting a position that permits the Legislature to skirt the limitations of article XV, section 1 of the California Constitution by denominating a usurious postjudgment interest rate as either a penalty or a prompt payment charge. By allowing prompt payment charges to accrue after entry of judgment here, we would in effect be allowing [the plaintiff] to receive 24 percent per annum interest on a substantial portion of the judgment, an amount more than twice that permitted by the Constitution. Such a result is in plain contravention of the Constitution's limitation on interest that may be imposed after judgment, even though the Legislature chose to call the 2 percent per month rate a 'charge' instead of 'interest.'" (*S&S*, *supra*, 159 Cal.App.4th at p. 782.) DRW asks us to reject any analysis that equates a charge with interest and find that the California Constitution permits a usurious postjudgment charge at the same time that is proscribes usurious interest. Based on policy considerations and stare decisis, we decline. Whether it is called a charge or interest, it is designed for one thing, which is to compensate a plaintiff for delayed satisfaction of judgment. The spirit of our Constitution requires us to treat these equal concepts in a unitary way.

DRW's last defense of the award of postjudgment penalties is procedural. It contends that the issue is not ripe for review because the postjudgment penalties have not been collected. Unlike DRW, we do not perceive the judgment as preliminary to some later proceeding just because it will have to file a petition for writ of mandate under Government Code section 970.2 to compel satisfaction of the judgment if the City does not voluntarily pay. The judgment was a final determination of DRW's rights and liabilities and was therefore appealable. (*In re Marriage of Dupre* (2005) 127 Cal.App.4th 1517, 1525.)

F. The award of attorney fees under the California False Claims Act.

A person who knowingly presents a false claim for payment to the state or any political subdivision is liable for treble damages. (Gov. Code, § 12651, subd. (a)(1).) "If the state [or] a political subdivision . . . proceeds with the action, the court may award to

the defendant its reasonable attorney's fees and expenses against the party that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought solely for purposes of harassment." (Gov. Code, § 12652, subd. (g)(9).)

The trial court found that the City's California False Claims Act claims were clearly frivolous and awarded DRW and CBI over $2.8 million in attorney fees. The City argues that the award of attorney fees must be reversed because the trial court's findings were deficient, the City's claims were not made in bad faith and did not lack probable cause, and the record fails to establish that the City should have known the claims lacked merit.

These arguments are unavailing.

1. Standard of review.

A trial court's award of attorney fees is generally reviewed for abuse of discretion. (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452.) "An abuse of discretion occurs only where it is shown that the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review that requires us to uphold the trial court's determination, even if we disagree with it, so long as it is reasonable. [Citation.]" (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864.) A trial court decision that contravenes the applicable principles of law is outside the scope of discretion and necessarily considered grounds for reversal. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393.) We review the factual findings upon which a trial court relies under the substantial evidence rule. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 698.)

2. The meaning of clearly frivolous; the role of factual findings.

In determining whether an appeal is frivolous, cases have applied two standards: subjective and objective. The first requires an inquiry into whether the party acted in bad faith. The second examines whether a reasonable attorney would agree that a position taken was totally and completely devoid of merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649 (*Flaherty*).) The latter test was adopted by our Supreme Court as the test

for determining whether an action was brought with probable cause. (*Sheldon Appel, supra,* 47 Cal.3d at pp. 885–886.) The City urges us to hold that its claims under the California False Claims Act were not clearly frivolous unless they were brought in bad faith and lacked probable cause.

The suggested holding holds no sway.

When interpreting a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) We must "look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.]" (*Id*. at pp. 1386–1387.) A court will not give a statute's language a literal meaning """if doing so would result in absurd consequences which the Legislature did not intend." [Citations.] . . . Thus, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."""" (*People v. Townsend* (1998) 62 Cal.App.4th 1390, 1395.)

Government Code section 12652, subdivision (g)(9) is disjunctive. This means that a party moving for attorney fees can recover if it proves that an action was clearly frivolous. It need not also prove that the claim was clearly vexatious and brought solely for purposes of harassment. Is this an objective or subjective analysis? The word "clearly" implicates an objective analysis because it connotes that the conclusion is transparent on its face.[21] Our analysis is bolstered by recognizing that under Code of

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[21] The City argues that a "clearly frivolous" claim must be something worse than a "frivolous" claim. If we tried to distinguish "clearly frivolous" from "frivolous," our

Civil Procedure section 128.5, subdivision (a), a trial court can sanction a party for "bad-faith actions or tactics that are frivolous." Whether an action is frivolous under Code of Civil Procedure section 128.5, subdivision (a) "is governed by an objective standard. But the statute also requires a finding of subjective bad faith, i.e., 'a showing of improper purpose.'" (*Orange County Dept. of Child Support Services v. Superior Court* (2005) 129 Cal.App.4th 798, 804.) If the Legislature had intended attorney fees under Government Code section 12652, subdivision (g)(9) to be awarded only if an action was brought in bad faith *and* lacked probable cause, it would have use language similar to Code of Civil Procedure section 128.5.

Because the California False Claims Act is similar to the Federal False Claims Act,[22] we can turn to federal decisions for guidance. (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 802.) Interpreting the Federal False Claims Act, the court in *Pfingston v. Ronan Engineering Co.* (9th Cir. 2002) 284 F.3d 999, 1006 (*Pfingston*), held: "An action is 'clearly frivolous' when 'the result is obvious or the appellant's arguments of error are wholly without merit.' [Citations.] An action is 'clearly vexatious' or 'brought primarily for purposes of harassment' when the plaintiff pursues the litigation with an improper purpose, such as to annoy or embarrass the defendant. [Citation.]" In *Mikes v. Straus* (2001) 274 F.3d 687, 705 (*Mikes*), the court affirmed an award of attorney fees under the Federal False Claims Act. Adopting the standard for attorney fees under title 42 United States Code section 1988, the court stated: "A claim is frivolous when, viewed objectively, it may be said to have no reasonable chance of success, and present no valid argument." (*Mikes*, *supra*, 274 F.3d at p. 705.) The court recognized that "there could be an award for attorneys' fees upon a finding that . . .

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holding would be an abstraction that would be useless to the bench and bar. We have opted for a commonsense interpretation.

claims were objectively frivolous, irrespective of plaintiff's *subjective intent*." (*Ibid*.) *Pfingston* and *Mikes* provide additional support for our statutory interpretation. They eschew subjective inquiry and instead apply an objective standard to determine whether an action is frivolous. That standard is functionally equivalent to a determination that an action lacks probable cause.

On a different point, we agree with the City. Whether an action was objectively frivolous depends on whether it was brought without probable cause, and that issue is a question of law. (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 875.) But we disagree with the City to the extent it contends that the relevant inquiry is whether a defendant set forth a prima facie case of a false claim, and that factual findings play no part in the analysis. While the defendant's subjective evaluation of legal tenability is irrelevant, its belief """"*in a state of facts* is itself a fact which it is proper to submit to the jury for its consideration; and whenever the good faith of the defendant, or [its] knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that question to the jury. . . . """" (*Id*. at pp. 879–880, citing *Franzen v. Shenk* (1923) 192 Cal. 572, 582.) Insofar as a factfinder plays a role, its findings are reviewed for substantial evidence. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 698 [after a trial court finds a plaintiff guilty of bad faith tactics under Code of Civil Procedure section 128.5, an appellate court must review the findings under the substantial evidence rule].)

3. The sufficiency of the trial court's analysis.

Below, the City suggested that the trial court should use the federal standard to decide the issue of attorney fees. Citing *Pfingston*, the City pointed out to the trial court that the Ninth Circuit has held that a false claims action is clearly frivolous when the result is obvious or the arguments are wholly without merit. In granting attorney fees for

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22 The Federal False Claims Act, at title 31 United States Code section 3730, subdivision (d)(4), provides that "the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds

RW, the trial court stated: "[T]he court adopts the federal standard and specifically finds that the false claims pursued by the City were clearly frivolous, because the result was obvious. And the City's arguments were wholly without merit." According to the trial court, "there was just nothing to support" the false claim allegations. The ensuing order averred: "This Court's findings and award of fees . . . are based upon, among other things, this Court's discretion under [Government Code section 12652, subdivision (g)(9)] . . . and this Court's personal observations of the trial and evidence presented. This Court finds that there was no credible evidence in support of the City's false claims allegations brought against DRW."

On appeal, the City argues that the trial court abused its discretion by applying *Pfingston* instead of following California law. We see it differently. The objective standard identified by *Flaherty*—a reasonable attorney would agree that a position taken was totally and completely devoid of merit—is functionally equivalent to the federal standard. At best, the City is disputing semantics rather than substance, which is not enough to elicit a reversal. The trial court's finding that the false claims allegations were wholly without merit is sufficient to establish that no reasonable attorney would have concluded anything other.

4. The interim adverse judgment rule.

The City argues that because the trial court held an Evidence Code section 402 hearing and found that there was sufficient evidence to submit the false claims allegations to the jury, the law bars a finding that the City's claims were clearly frivolous. This position does not comport with precedent.

Case law establishes that a victory at trial, even if reversed on appeal, conclusively establishes that an action was brought with probable cause. (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1052 (*Plumley*).) """The rationale is that approval by the trier of fact, after a full adversary hearing, sufficiently demonstrates that an action was legally tenable. [Citation.] To put it differently, success at trial shows that the suit was not

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that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or

among the least meritorious of meritless suits, those which are totally meritless and thus lack probable cause.' [Citation.]" (*Ibid.*) The denial of summary judgment may suffice to establish probable cause. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 384.) This rule, called by some cases the interim adverse judgment rule, does not apply when "the underlying victory was obtained by fraud or perjury." (*Plumley*, *supra*, 164 Cal.App.4th at p. 1053.)

There is no case law applying the interim adverse judgment rule to rulings made in connection with Evidence Code section 402 hearings. This is with good reason. While the rule has been applied to "[c]laims that have succeeded at a hearing on the merits" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 818 [superseded by statute on other grounds as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547]), the merits of claims are not decided at Evidence Code section 402 hearings. The purpose of a hearing under Evidence Code section 402 "is to decide preliminary questions of fact upon which the admissibility of evidence depends." (*People v. Superior Court* (*Blakely*) (1997) 60 Cal.App.4th 202, 209, fn. 6.) The statute does not authorize the trial court to determine the existence of triable issues of fact or otherwise decide the merits. (Evid. Code, § 402, subd. (b).) We decline to extend the interim adverse judgment rule to rulings on the admissibility of evidence.[23]

5. Sufficiency of the evidence.

The City informs us that it presented substantial evidence that DRW and CBI submitted false claims. But that is not the issue. The issue is whether there was sufficient evidence that the City lacked the knowledge or belief that DRW and CBI knowingly submitted false claims. Impliedly, the trial court found in favor of DRW on

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brought primarily for purposes of harassment."

[23] In its reply brief, the City argues for the first time that the trial court's denials of DRW and CBI's motions for nonsuit and directed verdict on the False Claims Act allegations are a further basis to apply the interim adverse judgment rule. Fairness militates against our consideration of this argument. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.)

this issue and relied upon that finding when determining that the City's claim was wholly without merit. The City failed to demonstrate that the factual underpinning of the ruling was deficient. We are not told, for example, that the judgment is based on unreasonable inferences, speculation or conjecture. (*In re H.B.* (2008) 161 Cal.App.4th 115, 120 ["[a] judgment is not supported by substantial evidence if it is based solely upon unreasonable inferences, speculation or conjecture"].) We can only conclude that this portion of the appeal lacks merit. Furthermore, the City failed to set forth the facts supporting the attorney fee award. When an appellant challenges factual findings, it is "'required to set forth in [its] brief all the material evidence on the point and not merely [its] own evidence.' [Citations.] An appellant's failure to state all of the evidence fairly in [its] brief waives the alleged error. [Citation.]" (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274.)

Having decided to forego the analysis called for by the standard of review, the City's arguments are forfeited.

6. The punishable period of conduct.

The City argues that the attorney fee award must be reversed because the trial court did not determine when it became clear that the California False Claims Act claims lacked merit. It suggests that it should not be punished for the period of time it asserted its claims not knowing they lacked probable cause. This argument is a red herring. Simply put, the City is trying to bring bad faith into an analysis where it does not belong. If the claims lacked probable cause at the time the trial court ruled, they lacked probable cause the moment they were first presented. Because the standard is objective, the trial court did not have to determine what the City believed and when it became aware that its position was frivolous. Consequently, we have no choice but to conclude that the trial court ruled within the bounds of reason.

G. Interest earned in escrow.

Under the judgment, DRW received the retention funds, which included the market rate interest that those funds earned in escrow, and also a 2 percent monthly charge on the same funds. The City contends that DRW was entitled to the market rate

interest or the 2 percent monthly charge, but not both. This argument is based on the dictate in section 7107, subdivision (f) that the 2 percent monthly charge shall be "in lieu of any interest otherwise due." DRW argues that it owned the market rate interest via section 22300 and the City is not entitled to a credit.

We agree with DRW.

Section 22300, subdivision (b) provides: "Upon satisfactory completion of the contract, the contractor shall receive from the escrow agent all securities, interest, and payments received by the escrow agent from the owner, pursuant to the terms of this section." Subdivision (c) defines an interest-bearing demand deposit account as a security and provides that the "contractor shall be the beneficial owner of any securities substituted for moneys withheld and shall receive any interest thereon." (§ 22300, subd. (c).) Subdivision (f)(5) adds: "The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner." (§ 22300, subd. (f)(5).) The question is whether section 22300 interest qualifies as "interest otherwise due."

The phrase interest otherwise due in section 7107 is ambiguous. It could simply refer to any statutory award of interest designed to compensate for loss of use of funds, such as the remedy provided by Civil Code section 3287 for prejudgment interest. Or the phrase could refer to any interest on the original principal, whatever the source of that interest might be. The first interpretation would compensate the contractor for the loss of use of interest earned in escrow. The second interpretation would require a trial court to give a public entity a credit for interest earned in escrow and the contractor would not be compensated by statute for the loss of use. We conclude that the consequence of the second interpretation is untenable because it is unfair to the contractor. Aside from that, it would undermine the purpose of section 7107, which is to encourage prompt payment. (*S&S, supra*, 159 Cal.App.4th at p. 777.) The financial disadvantage to withholding retention funds would be softened.

DISPOSITION

The award is modified to reflect that DRW is entitled to 7 percent interest on the prompt pay penalties. As modified, the award in favor of DRW is affirmed. The judgment is otherwise reversed and remanded for further proceedings on DRW's excluded contract claims.

DRW and CBI shall recover their costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD