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Damages

Party may recover attorney fees as damages for breach of settlement agreement (Fybel, J.)

Copenbarger v. Morris Cerullo World Evangelism, Inc.

C.A. 4th; October 19, 2018; G054731

The Fourth Appellate District reversed a judgment and remanded. The court held that plaintiff had the right to recover the attorney fees it incurred as the result of defendant’s breach of their prior settlement agreement, but needed to prove the amount of fees incurred.

Lloyd Copenbarger, as trustee of the Hazel I. Maag Trust, sued Morris Cerullo World Evangelism, Inc. for declaratory relief and breach of a settlement agreement made to resolve various disputes, including an unlawful detainer action. Copenbarger alleged Cerullo breached the settlement agreement by failing to dismiss with prejudice the unlawful detainer action. He sought, as damages, attorney fees incurred in that action from the date of the settlement agreement to the date on which Cerullo ultimately dismissed the action. Following a bench trial, the trial court found Cerullo had breached the settlement agreement by not timely dismissing with prejudice the unlawful detainer action. As damages, the court awarded Copenbarger $118,000—representing the attorney fees claimed to have been incurred during the relevant time period.

Cerullo appealed, arguing (1) Copenbarger could not as a matter of law recover the attorney fees incurred in the unlawful detainer action as damages for breach of the settlement agreement because attorney fees are costs of suit, and (2) Copenbarger failed to present competent evidence sufficient to prove the amount of damages.

The court of appeal reversed, holding that Copenbarger could recover, as damages for breach of the settlement agreement, the attorney fees incurred by the trust in the unlawful detainer action. One of the purposes for entering into the settlement agreement was to avoid continuing to run up attorney fees in the unlawful detainer action. Had Cerullo performed its obligations under the settlement agreement by dismissing the action, the trust would not have incurred those fees. The court nonetheless reversed the judgment against Cerullo because there was a wholesale failure of proof as to the amount of fees incurred by the trust. At trial, Copenbarger did not attempt to authenticate as business records its attorney invoices and admit them into evidence. Nor did he present testimony from the trust’s attorneys, or anyone else, regarding the work performed in the unlawful detainer action and the billing rates for that work. Copenbarger offered only his own testimony about the invoices. That testimony was hearsay and violated the secondary evidence rule. Further, Copenbarger conceded that he did not know what the trust’s attorneys did in the unlawful detainer action. This evidence was insufficient to support the judgment. The court accordingly reversed with directions to enter judgment in favor of Cerullo.

Family Law

Child properly found to have three legal parents (Duarte, J.)

C.A. v. C.P.

C.A. 3rd; November 13, 2018; C084473

The Third Appellate District affirmed a judgment. The court held that the record supported the family court’s finding that it would be detrimental to the minor child not to recognize both her mother’s husband and her mother’s former lover as her parents.

While married to J.P., C.P. had an affair with C.A. and conceived a child. J.P. and C.P. remained married and raised the child together. They also allowed C.A. to have a role in the child’s life, and she developed a bond with him and his close relatives. After three years, C.A. filed a petition seeking confirmation of his paternal rights.

Over the objections of J.P. and C.P., the trial court ruled that C.A. was the child’s third parent under Family Code §7612(c). The court explained that this was the “rare” case envisioned by the Legislature in which it would be detrimental to the child not to legally recognize all three of the adults in her life as her parents.

The court of appeal affirmed, holding that the family court did not err in finding C.A. to be a third parent. In so ruling, the family court gave “significant weight to the strong, long and enduring bond” shared by C.A. and the child for more than three years. The family court noted that J.P. also had a strong bond with the child, having been a part of her life since she was born. The family court observed that the child was fortunate “to have two devoted fathers that care deeply for her, love her and are prepared to continue to play an active role in her life.” On this record, the family court did not err in finding that §7612(c) applied, allowing a finding of more than two parents. Such a finding did not unconstitutionally threaten either the marriage of J.P. and C.P. or their parenting rights.
The child was born in July 2012 to wife, who was then and remains married to husband. In November 2015, plaintiff filed the instant petition to confirm his relationship with the child, change her name, and obtain paternity testing. After an interim order for paternity testing, a court trial was held, after which the trial court granted plaintiff some of the relief he sought.

Defendants do not explicitly attack the sufficiency of the evidence, the key facts were not disputed, and the trial court did not find defendants credible on some key points. In particular, the trial court faulted wife for her “misleading portrayal” that minimized plaintiff’s involvement in the child’s life at an earlier hearing. The minimization led the court to deny plaintiff’s request for temporary visitation orders, a request that it otherwise would have found appropriate. But the court found plaintiff’s involuntary separation from the child due to “lack of candor” by wife did not break the strong bond defendants had allowed plaintiff to develop with the child.

Defendants never questioned plaintiff’s status as the child’s biological father, a fact each defendant had known before the child was born. Wife led plaintiff to believe she was separated but continued to cohabit with husband without plaintiff’s knowledge. Plaintiff and wife were coworkers, and wife wanted to ensure other coworkers did not find out about the affair, which caused plaintiff to refrain from seeking paternity leave from their employer. Plaintiff was involved with the child’s early medical evaluations and treatment, openly held her out as his daughter, received her into his home, paid child support, and had regular visitation until defendants cut him off after he filed the instant petition. Plaintiff’s close relatives (sister, nieces, and mother) also developed relationships with the child. Plaintiff had thought the child bore his last name until he saw a prescription bottle showing other parents as the child’s biological father, a fact each defendant had known before the child was born. Wife led plaintiff to believe she was separated but continued to cohabit with husband without plaintiff’s knowledge. Plaintiff and wife were coworkers, and wife wanted to ensure other coworkers did not find out about the affair, which caused plaintiff to refrain from seeking paternity leave from their employer. Plaintiff was involved with the child’s early medical evaluations and treatment, openly held her out as his daughter, received her into his home, paid child support, and had regular visitation until defendants cut him off after he filed the instant petition. Plaintiff’s close relatives (sister, nieces, and mother) also developed relationships with the child. Plaintiff had thought the child bore his last name until he saw a prescription bottle showing otherwise, when the child was about eight or nine months old.

When the child was about 18 months old, all parties participated in autism screening and therapy for her. Neither defendant refused plaintiff’s informal child support payments, set in an amount determined by wife. Plaintiff only stopped paying when defendants refused to let him continue to see the child. Plaintiff respected the marriage and wanted to co-exist with husband; in turn, husband was committed to maintaining his marriage and conceded that if the roles were reversed he would want to be recognized as a third parent.

The trial court found “no doubt” the child was “well bonded to and loved by each of her three parents.”

The wife in a married couple (defendants C.P. and J.P., wife and husband) conceived the child with a coworker (plaintiff C.A.), but hid that fact from wife’s employer and initially—from husband. The marriage remains intact and wife and husband parent the child. For the first three years of the child’s life, the couple allowed plaintiff to act in an alternate parenting role, and the child bonded with him and his close relatives. Defendants excluded plaintiff from the child’s life when he filed the instant petition seeking legal confirmation of his paternal rights. The trial court found that wife misled the court at an interim custody hearing, prolonging what the court later viewed as an unwarranted separation. Despite this period of separation, the court found the child was still bonded to all three parents and found this to be a “rare” case where, pursuant to statutory authority, each of three parents should be legally recognized as such, to prevent detriment to their child. Defendants appeal. We shall affirm.

BACKGROUND

The child was born in July 2012 to wife, who was then and remains married to husband. In November 2015, plaintiff filed the instant petition to confirm his relationship with the child, change her name, and obtain paternity testing. After
ents who shall share custody, with mediation to resolve any conflicts, and also adds plaintiff’s last name to the child’s existing set of names, though not as her last name.

Defendants timely appealed. We denied their interim petition for writ of supersedeas, but granted their request for calendar preference.

DISCUSSION

Defendants head four different claims in their opening brief. The root of all their claims is that the trial court erred in finding that plaintiff was a third parent.

We first explain that we presume the trial court’s findings are supported by the evidence. (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881.) Although defendants purport to raise purely legal issues, “legal issues arise out of facts, and a party cannot ignore the facts in order to raise an academic legal argument.” (Western Aggregates, Inc. v. County of Yuba (2002) 101 Cal.App.4th 278, 291.) “[I]n addressing [their] issues we will not be drawn onto inaccurate factual ground.” (Ibid.)

I

Three-Parent Finding

Defendants primarily contend the trial court should not have found plaintiff was a third parent under the relevant statutes, and make the subsidiary claims that such a finding interferes with the state’s interest in preserving the institution of marriage and impinges on their parental rights. As we explain, we disagree.

A. Preface

We begin with the observation that defendants repeatedly rest their arguments on an inaccurate premise, that because by statute husband is conclusively presumed to be the child’s father, the child cannot have more than one father. In other words, they interpret the “conclusive” presumption to be an “exclusive” presumption, the application of which precludes the operation of any other presumptions of parenting. This view does not comport with the statutory scheme or extant precedent.

Centuries ago, noted legal reformer William Murray, Earl of Mansfield, referenced a rule that spouses could not give evidence that a child born during the marriage was not born of the marriage. (Goodright v. Moss (K.B. 1777) 2 Cowp. [vol. 2] 591, 592 [98 Eng.Rep. 1257] [“the law of England is clear, that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage”]; see Black’s Law Dict. (10th ed. 2014) Lord Mansfield’s rule, p. 1086.) This generally meant the child was conclusively presumed to be the husband’s child; the rule and its accreted corollaries and exceptions ensured a child would be deemed “legitimate” for various largely antiquated reasons. (See Estate of Mills (1902) 137 Cal. 298, 301-304; Michael H. v. Gerald D. (1989) 491 U.S. 110, 124 [105 L.Ed.2d 91, 107] [“The presumption of legitimacy was a fundamental principle of the common law”]; Jaen v. Sessions (2d Cir. 2018) 899 F.3d 182, 188; 10 Witkin, Summary of Cal. Law (11th ed. 2017) Parent and Child, Evidence of Marriage, §§ 5, 15-20, pp. 35-36, 46-53; 1 Bishop, New Commentaries on Marriage, Divorce, and Separation (2d ed. 1891) The Marriage Disclosed in the Proofs of Pedigree and Legitimacy, §§ 1167-1182, pp. 503-509 [describing development of the rule and some exceptions]; Annot., Who May Dispute Presumption of Legitimacy of Child Conceived or Born During Wedlock (1979) 90 A.L.R.3d 1032, § 2(a); Elrod, Child Custody Prac. & Proc. (Mar. 2018 update) Historical Perspective, § 1:3 [the presumption “was one of the strongest presumptions known to the law” and was strengthened via Lord Mansfield’s rule].)


“The Legislature . . . used this conclusive presumption fiction for three public policy reasons, namely, (1) preservation of the integrity of the family; (2) protection of the innocent child from the social stigma of illegitimacy; and (3) a desire to have an individual rather than the state assume the financial burden of supporting the child.” (In re Marriage of B. (1981) 124 Cal.App.3d 524, 529-530.) Thus, although originating in ancient social contexts, valid reasons for the rule remain.

The presumption continues in California today: “Except as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.” (Fam. Code, § 7540.) In turn, section 7541 allows blood tests to be used to rebut the presumption, provided the husband or presumed father moves for testing within two years of the child’s birth. (§ 7541, subd. (b).)

“The law concerning children born to married women when there is a dispute over paternity is a latter-day admixture of ancient common law presumptions and ideas, statutes, statutory interpretation and legislative acquiescence, common law accretion and constitutional imperatives, all in the face of the technological ability, developed only recently, to positively identify who a biological father really is.” (Brian C., supra, 77 Cal.App.4th at pp. 1202-1203.) Since then, the Legislature has responded to new scientific advances and new ways people now choose to form relationships. But the legal changes express a consistent desire to preserve stability for the innocent children who have no control over what their various parents have chosen to do with their lives. (See, e.g., id. at pp. 1209, 1219; Rodney F. v. Karen M. (1998) 61 Cal.App.4th 233, 239-240 (Rodney F.) purported biological father with no relationship with a child born of a married couple could not overcome presumption husband was the fa-
father under this statute. The question is whether he can be
natural child.” Defendants do not challenge the sufficiency
of the evidence showing that plaintiff has satisfied this statu-
sion (d), which provides that a person “is presumed to be the
biological father—"from also being treated as a father to the
child. That is a critical difference under the statutory scheme,
as we next explain.

B. Application of the Statute

As stated, there is no dispute that husband is presumed to
be at least a father of the child under section 7540. Plaintiff
is also presumed to be a father, under section 7611, subdivi-
sion (d), which provides that a person “is presumed to be the
natural parent” if the “presumed parent receives the child into
his or her home and openly holds out the child as his or her
natural child.” Defendants do not challenge the sufficiency
of the evidence showing that plaintiff has satisfied this stat-
ute. Therefore, they cannot deny that plaintiff is a presumed
father under this statute. The question is whether he can be
deemed a third parent, as the trial court deemed him.

Sess.)) included a statement of legislative intent as follows:

“(a) Most children have two parents, but in rare cases,
children have more than two people who are that child’s
parent in every way. Separating a child from a parent has
a devastating psychological and emotional impact on
the child, and courts must have the power to protect chil-
dren from this harm.

“(b) The purpose of this bill is to abrogate In re M.C.
(2011) 195 Cal.App.4th 197 insofar as it held that where
there are more than two people who have a claim to
parentage under the Uniform Parentage Act, courts are
prohibited from recognizing more than two of these
people as the parents of a child, regardless of the
circumstances.

“(c) This bill does not change any of the requirements
for establishing a claim to parentage under the Uniform
Parentage Act. It only clarifies that where more than two
people have claims to parentage, the court may, if it
would otherwise be detrimental to the child, recognize
that the child has more than two parents.

“(d) It is the intent of the Legislature that this bill will
only apply in the rare case where a child truly has more
than two parents, and a finding that a child has more
than two parents is necessary to protect the child from
the detriment of being separated from one of his or her
parents.” (Stats. 2013, ch. 564, § 1.)

To advance the public policy reflected by these explicit
legislative findings, section 7612, subdivision (c) now pro-
vides as follows:

“In an appropriate action, a court may find that more
than two persons with a claim to parentage under this
division are parents if the court finds that recognizing
only two parents would be detrimental to the child. In
determining detriment to the child, the court shall con-
sider all relevant factors, including, but not limited to,
the harm of removing the child from a stable placement
with a parent who has fulfilled the child’s physical needs
and the child’s psychological needs for care and affect-
ion, and who has assumed that role for a substantial
period of time. A finding of detriment to the child does
not require a finding of unfitness of any of the parents or
persons with a claim to parentage.”

Defendants contend plaintiff lacked standing to bring this
case because he could not rebut the conclusive presumption
that husband was the child’s father. We disagree. The “di-
vision” referred to by the quoted subdivision (“a claim to
parentage under this division”) is division 12 of the Family
Code, which governs parent and child relationships. It be-
gins with section 7500 and ends with section 7962. There-
fore, both defendant husband (by virtue of section 7540)
and plaintiff (by virtue of section 7611, subd. (d)) have “a
claim to parentage under this division” as provided by sec-
tion 7612, subdivision (c). Under section 7630, subdivision
(b), “[a]ny interested party may bring an action at any time”
(italics added) to determine the existence, if any, of a parental
relationship under section 7611, subdivision (d). Thus, plain-
tiff had statutory authority to bring this action. (See J.R. v.
W. (2009) 175 Cal.App.4th 1119, 1133 (“There are no time
limits or standing requirements for challenging, or asserting,
a section 7611, subdivision (d) presumption”).

The fact that defendant husband’s claim to parentage
arises from a conclusive statutory presumption (§ 7540) and
plaintiff’s claim arises from a rebuttable statutory presum-
tion (§ 7611, subd. (d)), does not change the fact that each
man has a claim that arises “under” division 12 of the Family
Code. (See Brian C., supra, 77 Cal.App.4th at pp. 1219-1221
[in part (at p. 1220) rejecting the “ludicrous result that a man
could fit within a statutory category of presumed fatherhood
and still not have standing to establish paternity”]; Miller v.
(b) gave standing to seek paternity to a man who claimed
parentage based on § 7611, subd. (d), notwithstanding the
existence of a conclusively presumed father under § 7540];
[couple could have excluded purported biological father, but
because they “allegedly permitted the biological father to
receive the child into his home and hold him out as his child,
the biological father may assert the rebuttable presumption provided by section 7611, subdivision (d).” (Craig L.)

Defendants point to statements in part of the legislative history to argue the three-parent statute was not meant to be applied where a stable marriage exists. But the relevant report explains that “cases involving more than two parents are, almost by definition, complicated and will require courts to balance many competing interests” and the bill allows a three-parent result “in very narrow situation when necessary to prevent detriment to the child.” (Assem. Com. on Jud., Rep. on Sen. Bill No. 274 (2013-2014 Reg. Sess.) as amended May 14, 2013, p. 6.) The report notes, consistent with the statute, that the bill requires a showing of detriment to the child and that the court must act in “the child’s best interest, including the need for stability” before making a three-parent order. (Id. at p. 7.) If the Legislature wanted to limit the bill’s application to cases where no stable marriage existed, it easily could have said so. Instead, it directed courts to consider “all relevant factors.” (§ 7612, subd. (c).) We may not insert into a statute words that are not there. (See Trackman v. Kenney (2010) 187 Cal.App.4th 175, 184-185.) “If the Legislature has provided an express definition, we must take it as we find it. [Citation.]” (Adoption of Kelsey S. (1992) 1 Cal.4th 819, 826.)

Defendants point to Rodney F., supra, 61 Cal.App.4th 233 in support of their claim plaintiff lacked any standing once (in their view) the conclusive presumption that husband was the child’s father became unrebuttable after two years. But Rodney F. is factually distinguishable. That case involved a purported biological father of the child born of a marriage who had no contact with the child. He did not claim to have held the child out as his own (cf. § 7611, subd. (d)). (Rodney F., at p. 236.) In those circumstances, the appellate court held the conclusive presumption could not be rebutted, as the claimant was not a presumed father under section 7611. (Rodney F., at pp. 238-239.) Here, as just explained, plaintiff is a presumed father because he claimed (and thereafter proved) that he received the child into his home and held her out as his own, thereby conferring standing to press his “claim to parenthood” under section 7612, subdivision (c).

In re Donovan L. (2016) 244 Cal.App.4th 1075 is instructive. There, the appellate court acknowledged the conclusive presumption in favor of the husband, but then proceeded to examine the then-new three-parent statute, something it would have no reason to do if—as defendants in this case assert—such inquiry was rendered unnecessary by the conclusive presumption. (Id. at pp 1086-1094; see also In re M.Z. (2016) 5 Cal.App.5th 53, 64-66.) Ultimately, Donovan L. concluded it was not appropriate to find the child had three parents because the biological father in that case lacked a parent-child relationship with the child. (Donovan L., at pp. 1092-1094.) For that reason, the appellate court found the husband’s conclusive presumption defeated the biological father’s claim to parenthood. (Id. at p. 1094.) Here, a bonded relationship still existed, though it was interrupted by defendants after this petition was filed, and further interfered with by wife’s misrepresentations. Contrary to defendants’ view, Donovan L. implicitly supports plaintiff’s claim to parentage in this case. (See also Martinez v. Vaziri (2016) 246 Cal.App.4th 373, 382-389 [reversing where claimant uncle had relationship with the child but trial court took too narrow a view of detriment and denied his petition; the fact the child had two parents and a stable placement did not mean child would not suffer detriment from severance of relationship with uncle].)

Similarly, in In re L.L. (2017) 13 Cal.App.5th 1302, a biological father’s exclusion from his child’s life during a period after he met the presumed parent criteria under section 7612, subdivision (d) did not deprive him of presumed parent status. (L.L., at pp. 1310-1312; see also In re J.O. (2009) 178 Cal.App.4th 139, 148-151.) That is, such status (i.e., having the child in his home) did not have to exist at the moment of the court order. However, the L.L. court reversed a three-parent finding because no substantial evidence showed the biological father there had an extant relationship with the child, a result consistent with the Donovan L. holding. (L.L., at pp. 1315-1317.) In contrast, in this case the trial court found extant bonds between plaintiff and the child were not broken.

The mere fact plaintiff and the child had not seen each other for some time before the trial did not mean there was no extant bonded relationship, as defendants assert. Defendants point to a passage of a case stating: “A judgment of presumed parenthood represents a finding that, at the time of entry of the judgment, the person qualified as a presumed parent.” (In re Alexander P. (2016) 4 Cal.App.5th 475, 491.) We do not read this language to mean that someone who is a presumed father under section 7611, subdivision (d) necessarily or automatically loses such status merely because of a temporal gap in visitation. Whether the bond remains intact at the time of judgment is a fact-bound decision for the trial court to make. Although defendants warp specific words and phrases from the court’s ruling to argue it found no bond existed, the court found plaintiff “has an existing and significant bond” with the child. The passages on which defendants rely addressed how to cure the interim harm to that extant bond caused by the involuntary separation defendants themselves caused.

Section 7612, subdivision (b) provides: “If two or more presumptions arise under Section 7610 or 7611 that conflict with each other, or if a presumption under Section 7611 conflicts with a claim pursuant to Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” Section 7611 in part references the conclusive presumption provided by section 7540, and also includes in subdivision (d) the presumption relied on by plaintiff, based on his holding out the child as his own. Thus, as the trial court recognized, “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” (§ 7612, subd. (b).) Policy in cases such as this has been set by the Legislature.
In lieu of determining which one of the two (or more) presumptions should prevail to the exclusion of all competing presumptions, section 7612, subdivision (c), quoted ante, now offers an alternative by allowing more than two parents to be recognized. A court may so do “if the court finds that recognizing only two parents would be detrimental to the child.” In making such a finding, the court shall “consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time.” (§ 7612, subd. (c).) There is no need to find that any of the persons with a claim to parentage are unfit, and no such finding was made herein.

Although defendants do not head and directly argue a challenge to the sufficiency of the evidence, the tenor of their briefing—including their repeated claims that a “stable” marriage exists and therefore the child does not need a third parent—invites us to expound on the trial court’s detailed findings.

The trial court discussed all appropriate factors before making the “rare” case finding. The court distinguished this case from others where a married couple consistently excluded a biological father, because here defendants allowed plaintiff (and his close relatives) to establish a bond with the child. The court found the child “must be protected from the detriment of being separated from one of her three parents. The court finds it would be detrimental to [her] to recognize only two parents, thus separating her from either [husband or plaintiff]. Moreover, it would be detrimental to [the child] and her progress to not allow [both men] to participate in legal custody decision-making such as health and education. The evidence establishes [she] is a child who would benefit greatly from the continued love, devotion and day to day involvement of three parents.”

The trial court gave “significant weight to the strong, long and enduring bond shared by [the child and plaintiff] from the time leading up to her birth and from her birth and following for more than three years. [Plaintiff] was deeply involved in [her] life until he was unilaterally excluded from visits . . . after he filed his petition for custody. It is also established [that husband] has a strong bond with [her] and has been part of her life since she was born. Both [men] provided persuasive and convincing testimony regarding . . . their affection and love for [her]. She is fortunate, to have two devoted Fathers that care deeply for her, love her and are prepared to continue to play an active role in her life.” Plaintiff wanted “to respectfully co-exist with” husband, who himself had admitted “that if he stood in [plaintiff’s] shoes he would want to be acknowledged as a third parent and have a role as a parent.”

The trial court did not find defendants’ desire to govern the child’s medical care sufficient to tip the scales in their favor, and found “it would be detrimental to [the child] if the court were to only recognize two parents when considering the evidence presented on her autism diagnosis. . . . The court finds each parent has the ability to contribute to and support [the child] through her childhood as she engages in the required therapies associated with her diagnosis to assist her in becoming a happy, healthy and self-supporting adult.” The relatively short time during which plaintiff had been excluded was lengthened by wife’s actions at an earlier hearing, resulting in an ill-informed ruling. But that gap did not break the bond plaintiff had developed with the child for over three years, and could be dealt with by a “measured pace of reconnection facilitated by a professional.” Nor would recognizing plaintiff’s role remove the child from a stable home; instead, restoring something akin to the prior schedule “allows for continued consistency and stability” and “preserves the bonds created by more than three years of continuing care and contact exercised by both [men].”

Thus, the record shows that the trial court carefully and conscientiously conducted the weighing process contemplated by the Legislature before finding that this was one of the “rare” cases permitted by statute, where a child truly has three parents, and depriving her of one of them would be detrimental to her.

Defendants have not pointed to any part of the statutory scheme that exempts conclusive factors under section 7540 from the text of the three-parent statute (§ 7612, subd. (c)) and its immanent purpose to preserve extant parent-child relationships. Nor have they shown that the conclusive presumption under which defendant husband claims fatherhood vitiates the rebuttable presumption under which plaintiff claims fatherhood. (See Craig L, supra, 125 Cal.App.4th at pp. 50-51 [decided before three-parent statute; courts resolve competing paternity claims by balancing factors, a per se rule “in favor of preserving any marriage, without regard to the harm the child might suffer, is at direct odds with the entire statutory framework”].)

C. Constitutional Claims

In two sparsely analyzed claims, defendants contend that if the statutory scheme authorizes the result herein, it violates constitutional norms in two ways. First, they contend it impinges on the state’s right to protect marriage. Second, they contend it impinges on their ability to exercise their parental rights. But defendants do not contend the statutory scheme is facially unconstitutional, and their as-applied challenges falter on the facts as found by the trial court.

1. Protecting Marriage

Defendant’s claim that the judgment attacks the institution of marriage fails because the state expresses its will primarily through statutes passed by the Legislature and signed by the Governor. (See, e.g., People v. Knowles (1950) 35 Cal.2d 175, 181-182.) By such means, the state now authorizes three-parent findings in “rare” cases. (See Stats. 2013, ch. 564, § 1(a).) The trial court, following the text of the relevant statutes, found the child would suffer detriment if she had
only two parents. (See § 7612, subd. (c).) The state’s interests in promoting and defending both the institution of marriage and the stability of a given child’s life have been protected by the judgment under attack.

Although state governments have long promoted marriage as a source of stability, what constitutes a marriage--and the scope of legislative authority over marriage--has lately been the subject of significant changes. (See In re Marriage Cases (2008) 43 Cal.4th 757; Obergefell v. Hodges (2015) 576 U.S. ___ [192 L.Ed.2d 609].) Today, stable social compacts that differ from the “traditional” husband-and-wife combination are protected. This does not diminish the state’s interest in protecting children and ensuring that their best interests are promoted, regardless of the actions of their parents.

The statute implemented by the judgment is carefully designed to avoid detriment to a child by the removal from his or her life of a true third parent. Indeed, as one court explained, “'[d]etriment' was selected as a standard for permitting more than one presumed parent after the Governor vetoed a bill that would have made the decision dependent on the ‘best interest of the child.’” (In re Alexander P., supra, 4 Cal.App.5th at p. 497.) By heightening the standard that had to be met to declare a third parent, the Legislature was treading carefully. But defendants do not--and cannot--deny that protecting children from detriment is a constitutionally valid public policy.

Instead, defendants make the following claim:

“Assuming this Court holds that despite the conclusive presumption of Family Code section 7540, a child may have two fathers, it should require a court to take into account the state’s interest in maintaining marriage in deciding whether it may be to the child’s detriment to find that he or she has two parents. In other words, before a court may determine that a man with whom the mother had an affair while married to the child’s conclusively presumed father under Family Code section 7540 may be a third parent under Family Code section 7612(c), it must first determine the effect such a determination will have on the marriage and on the stability of the subject child’s life if the third parent ultimately ruins that marriage.” (Italics added.)

First, we observe that defendants provide no authority for the implicit proposition that a child’s detriment should be subordinated to a marriage’s detriment. The adult parties to a marriage will either work out any marital challenges they face, or they will not. But generally, even if a marriage fails, the parties thereto will remain lawful parents of any child therefrom.

Second, the trial court did consider and address the status of the marriage as we outlined ante. Defendants paint plaintiff as a would-be homewrecker, and point out that they have other children together who could be impacted by a divorce. But the trial court found wife misled plaintiff, causing him to believe she and husband were separated. Before the child was born, all parties knew plaintiff was the biological father and, with that knowledge, defendants allowed plaintiff to parent the child and she bonded with him and his relatives. For defendants now to claim plaintiff poses such a severe threat to their marriage that he should be excluded despite the finding that his exclusion would be detrimental to the child rings hollow.

Third, the trial court explicitly found defendants “intend to remain married notwithstanding [husband’s] acknowledgment that he was stressed by the affair” and that at trial “he expressed his renewed commitment to [his wife].”

Fourth, the trial court found plaintiff “articulated his goal to respectfully co-exist with” husband, to whom he had apologized for the situation he had unwittingly caused and had not been aware of husband’s role in the child’s life (due to concealment of facts by wife). Further, the court found plaintiff had no desire to supplant husband, but instead wanted “a plan that would allow [the child] to have a relationship with all parents,” and husband acknowledged that if the men’s positions were reversed, he, too, would want paternal recognition. Thus, the record shows both men understand and accept the difficulties inherent in the situation neither of them caused and, to their credit, both want the best outcome for the child.

Prior cases--albeit predating the three-parent statute--have emphasized that the burden of a paternity finding similar to the one in this case may or may not threaten a particular marriage, depending on the facts. (See, e.g., H.S. v. Superior Court (2010) 183 Cal.App.4th 1502, 1507; Craig L., supra, 125 Cal.App.4th at p. 51; Brian C., supra, 77 Cal.App.4th at pp. 1216-1219; Michael H. v. Gerald D. (1987) 191 Cal. App.3d 995, 1009 [predating the three-parent statute and noting on the facts of that particular case, “the significant interest of the state in protecting the welfare of [the child] is best served by upholding the conclusive presumption that Gerald D. is her legal father”].)

Thus, defendants’ claim that the judgment under review unconstitutionally threatens their specific marriage lacks any factual basis. And because defendants have not argued the statute is unconstitutional in all applications, they have forfeited any such claim. (See In re S.C. (2006) 138 Cal.App.4th 396, 408; In re Marriage of Nichols (1994) 27 Cal.App.4th 661, 672-673, fn. 3.)

2. Protecting Paternal Rights

In another sparsely reasoned claim, defendants contend that by recognizing plaintiff as a father, husband’s status as a father was diminished. Within this claim they also assert their joint parental rights are diminished. These claims largely rest on the erroneous view about the “conclusive” presumption of husband’s paternity that we have already rejected.

Defendants point out that “[a] parent’s right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not
be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood.” (In re Marquis D. (1995) 38 Cal.App.4th 1813, 1828.) We agree. But what defendants overlook is that plaintiff, too, is a parent. He is the biological father of the child, who has consistently supported her both financially and otherwise. As we have explained, the fact defendant husband is conclusively presumed to be the child’s father does not exclude the possibility that she may have a second father.

Defendants do not challenge the facts showing that ousting plaintiff from the child’s life will cause her detriment. Regardless of how it happened, the fact remains that the child’s biological father is an important part of her life. For defendants to allow plaintiff to bond with the child and then cut him off when he tried to formalize the arrangement threatened detriment to the child.

In short, we find no infringement of defendants’ constitutional rights to parent the child (and their other children) on the facts as found by the trial court.

II

Paternity Test

Defendants contend the trial court had no legal basis to order a paternity test, in part because plaintiff lacked standing to request such a test.

Putting aside the fact that the notice of appeal was taken from the March 14, 2017 judgment and not from the much earlier February 16, 2016 testing order, the issue is moot because we cannot undo that which was done. (See Consol. etc. Corp. v. United A. etc. Workers (1946) 27 Cal.2d 859, 863; In re Pablo D. (1998) 67 Cal.App.4th 759, 761 [“we cannot rescind services that have already been received”].)

Moreover, as the trial court found, and as the trial testimony showed, neither defendant disputed that plaintiff was the child’s biological father. For over three years he treated the child as his daughter with the consent of defendants. As plaintiff’s counsel correctly points out, the testing merely provided evidence that was cumulative of what everyone already knew. Thus, if the testing order was made in error, defendants have not shown any prejudice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.)

Finally, the statute under which the testing was ordered permits such testing in any action where paternity “is a relevant fact.” (§ 7551.) Defendants argue that because of the conclusive presumption that the husband is the child’s father (§ 7540) and the two-year period for testing provided by a connected statute (§ 7541, subd. (b)), there was no point to ordering genetic testing, that is, it would not resolve any relevant fact involved in this case. We have already answered that argument adversely to defendants.

DISPOSITION

The judgment is affirmed. Defendants shall pay plaintiff’s costs on appeal. (See Cal. Rules of Court, rule 8.278.)

Duarte, J.

We concur: Hull, Acting P. J., Murray, J.

3. Defendants could have prevented plaintiff from meeting the definition of a presumed father by excluding him from the child’s life from the moment of birth. (See Dawn D. v. Superior Court (1998) 17 Cal.4th 932, 942 [biological father’s desire to establish a relationship with his child is not a fundamental liberty interest protected by the due process clause]; In re Kianna A. (2001) 93 Cal.App.4th 1109, 1114 [“the unwed biological father of a child conceived during and born into an existing marriage may be barred by the conclusive presumption from developing a relationship with the child against the married couple’s wishes”]; Rodney F., supra, 61 Cal.App.4th at p. 239.) But they did not choose that avenue. They instead allowed plaintiff to form a bond with the child, pay support for her, hold her out as his own, receive her into his home, and introduce her to his close relatives, with whom she bonded during the first three years of her life. (See Craig L., supra, 125 Cal.App.4th at p. 43 [couple could have excluded purported biological father, but did not].) The end result of this series of decisions by defendants was the situation facing the trial court.
LLOYD COPENBARGER, as Trustee, etc., Plaintiff and Respondent,

v.

MORRIS CERULLO WORLD EVANGELISM, INC., Defendant and Appellant.

No. G054731
In The Court of Appeal of the State of California
Fourth Appellate District
Division Three
(Super. Ct. No. 30-2012-00605730-CU-BC-CJC)
Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Reversed and remanded. Filed October 19, 2018
Certified for publication November 13, 2018

COUNSEL
Galuppo & Blake, Louis A. Galuppo, Steven W. Blake, Andrew E. Hall and Daniel T. Watts for Defendant and Appellant.
HamptonHolley, George L. Hampton IV, Colin C. Holley and Laura J. Petrie for Plaintiff and Respondent.

ORDER
Defendant and Appellate Morris Cerullo World Evangelism, Inc. has requested that our opinion, filed on October 19, 2018, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c)(3), (4), (5), and (6). The request is GRANTED. The opinion is ordered published in the Official Reports.

FYBEL, J.
WE CONCUR: O'LEARY, P. J., BEDSWORTH, J.

OPINION

INTRODUCTION

Lloyd Copenbarger, as Trustee of the Hazel I. Maag Trust (the Maag Trust), sued Morris Cerullo World Evangelism, Inc. (MCWE) for declaratory relief and breach of a settlement agreement made to resolve various disputes, including an unlawful detainer action. The Maag Trust alleged MCWE breached the settlement agreement by failing to dismiss with prejudice the unlawful detainer action and sought, as damages, attorney fees incurred in that action from the date of the settlement agreement to the date on which MCWE did dismiss the action.

Following a bench trial, the trial court found MCWE breached the settlement agreement by not timely dismissing with prejudice the unlawful detainer action. As damages, the court awarded the Maag Trust $118,000—representing the attorney fees it claimed to have incurred during the relevant time period.

On appeal, MCWE does not challenge the finding that its failure to dismiss the unlawful detainer action constituted a breach of the settlement agreement. Instead, MCWE makes a number of arguments challenging the damages awarded. Most significantly, MCWE argues (1) the Maag Trust could not as a matter of law recover its attorney fees incurred in the unlawful detainer action as damages for breach of the settlement agreement because attorney fees are costs of suit, and (2) the Maag Trust failed to present competent evidence sufficient to prove the amount of damages.

It appears to us the Maag Trust could recover, as damages for breach of the settlement agreement, its attorney fees incurred in the unlawful detainer action. One purpose for the Maag Trust entering into the settlement agreement was to avoid continuing to run up attorney fees in the unlawful detainer action; had MCWE performed its obligations under the settlement agreement by dismissing the action, the Maag Trust would not have incurred those fees.

We reverse the judgment against MCWE, however, because there was a wholesale failure of proof of the amount of damages on the part of the Maag Trust. At trial, the Maag Trust did not attempt to authenticate as business records its attorney invoices and admit them into evidence. Nor did the Maag Trust present testimony from its attorneys, or anyone else, of billing rates and the work performed in the unlawful detainer action. The Maag Trust offered only the testimony of Lloyd Copenbarger, whose testimony about the invoices was hearsay and violated the secondary evidence rule, and who testified he did not know what the Maag Trust’s attorneys did in the unlawful detainer action. As the evidence was insufficient to support the judgment, we reverse with directions to enter judgment in favor of MCWE on the Maag Trust’s complaint.

FACTS

MCWE is the lessee of a 50-year ground lease (the Ground Lease) of real property (the Property) in Newport Beach. The Property was improved with an office building and marina (the Improvements). The Ground Lease terminates on December 1, 2018.

In 2004, MCWE subleased the Property and sold all of the Improvements to NHOM (the Sublease). The Sublease terminates on November 18, 2018. Paul Copenbarger and Kent McNaughton were the members and managers of NHOM.

To acquire the Sublease and fund the purchase of the Improvements, NHOM obtained a $1.15 million loan from Plaza del Sol Real Estate Trust (Plaza del Sol) and a $3 million loan from the Maag Trust. Lloyd Copenbarger, who is Paul Copenbarger’s brother, is the trustee of the Maag Trust. The $3 million loan from the Maag Trust was evidenced by a promissory note (the Maag Note) and secured by a first priority deed of trust on the Sublease and the Improvements (the Maag Deed of Trust).

In 2010, the Maag Trust offered to make NHOM’s cash flow as “rather grim.” Necessary maintenance and repairs were not made, and NHOM’s property manager began notifying NHOM of deferred maintenance issues at the Property. In late August 2009, the Maag Trust notified NHOM of defaults of NHOM’s obligations under the Maag Note, including failure to maintain the Property and to make timely loan payments.

In 2011, the Maag Trust entered into an “Agreement re: Assignment and Transfer of Promissory Note and Deed of Trust and Ground Lease Enforcement” (the Agreement Re: Assignment). Under the terms of the Agreement Re: Assignment, the Maag Trust agreed to make certain payments on the Plaza del Sol Note, reimburse Plaza del Sol for real property taxes it paid on the Improvements and the Property, and make future payments to Plaza del Sol in an amount equal to payments due on the Plaza del Sol Note as such payments became due. MCWE and Plaza del Sol agreed not to declare a default under the Sublease on account of then-existing defaults so long as the Maag Trust made the agreed-upon payments.

In June 2011, MCWE commenced an unlawful detainer action against NHOM, Orange County Superior Court Case No. 30-2011-00485656 (the UD Action), based on allegations NHOM failed to maintain and undertake required repairs to the Improvements. Six months later, the Maag Trust intervened in the UD Action as a party defendant under the theory that if NHOM were evicted and the Sublease terminated, then the Maag Trust’s security interest created by the Maag Deed of Trust would be destroyed.

In August 2012, MCWE, Plaza del Sol, and the Maag Trust entered into a settlement agreement (the Settlement Agreement). The Settlement Agreement “rescind[ed] and cancel[ed] the Agreement Re: Assignment,” required the Maag Trust to pay $400,000 (split into two payments) to MCWE, and obligated Plaza del Sol to assign the Plaza del Sol Note and the Plaza del Sol Deed of Trust to the Maag Trust. The Settlement Agreement states each party would bear its own costs and attorney fees, but that “[i]n any dispute involving the enforcement of this [Settlement] AGREEMENT, the prevailing party shall be entitled to recover . . . its reasonable attorneys’ fees and all other reasonable costs and expenses incurred therein.”

The Settlement Agreement states MCWE “[w]ill, and hereby does, dismiss the UD [Action] with prejudice.” Lloyd Copenbarger wanted to end the litigation and stop paying attorney fees in the UD Action. Although the Settlement Agreement was signed in August 2012, and required a dismissal with prejudice, MCWE did not dismiss the UD Action until October 2015, and then did so without prejudice.

PROCEDURAL HISTORY

In October 2012, counsel for MCWE sent a letter to the Maag Trust purporting to rescind the Settlement Agreement. Two weeks later, the Maag Trust filed a complaint against MCWE and Plaza del Sol for declaratory relief and breach of contract.2 The complaint alleged MCWE and Plaza del Sol breached the Settlement Agreement by failing to dismiss the UD Action and by not delivering the Plaza del Sol Note and Plaza del Sol Deed of Trust to the Maag Trust. As damages for breach of contract, the Maag Trust alleged it “suffered damages in an amount in excess of the jurisdiction of this court in an amount subject to proof in that: a) its title to and security interest in the [Property] has been and continues to be damaged, clouded and disparaged, and b) it has not received the [Plaza del Sol Note], the [Plaza del Sol Deed of Trust] or the Three Hundred Thousand Dollars ($300,000.00) note for which it has already paid a sum in excess of Three Hundred Thousand Dollars ($300,000.00) as well as other goods and valuable consideration.”

MCWE and Plaza del Sol filed a cross-complaint for rescission of the Settlement Agreement. However, in 2015, MCWE and Plaza del Sol changed course and amended their cross-complaint to assert reformation and specific performance. Only then did MCWE dismiss the UD Action, without prejudice.

A bench trial was conducted over four days in May 2016. The trial court granted MCWE’s motion in limine to exclude evidence and argument that MCWE breached the Settlement Agreement by failing to turn over the Plaza del Sol Note and the Plaza del Sol Deed of Trust. The Maag Trust’s only theory of damages presented at trial was that it incurred $118,000 in attorney fees defending the UD Action between August 2012, when the Settlement Agreement was executed, and November 2015, when MCWE dismissed the UD Action. In

support of this theory of damages, Lloyd Copenbarger testified he had received invoices from his attorney in the amount of $118,000. The trial court overruled MCWE’s objections to that testimony based on hearsay and the secondary evidence rule. Lloyd Copenbarger testified he had the invoices, but did not bring them to court and had never reviewed them. Lloyd Copenbarger claims he had paid about $90,000 toward the invoices out of his own pocket.

The trial court ruled in favor of the Maag Trust and against MCWE and Plaza del Sol on the declaratory relief and breach of contract causes of action and awarded the Maag Trust $118,000 in damages. Plaza del Sol moved to correct the judgment or for a new trial on the ground there was no evidence it had done anything to breach the Settlement Agreement. The court granted the motion, vacated the previously entered judgment, and entered a new judgment and statement of decision in January 2017.

The new judgment awarded the Maag Trust $118,000 in damages against MCWE only, awarded judgment in favor of Plaza del Sol on the Maag Trust’s first amended complaint, and awarded judgment in favor of the Maag Trust and against MCWE and Plaza del Sol on the cross-complaint.

In the statement of decision, the trial court found the Settlement Agreement was “valid, binding, and of full force and effect” and rejected MCWE’s claim for its reformation. The court found MCWE materially breached the Settlement Agreement by “not promptly dismissing with prejudice the UD [Action]” and this breach excused further performance by the Maag Trust. The court concluded the Maag Trust could recover the attorney fees incurred in the UD Action as damages for breach of the Settlement Agreement: “The entire purpose of the Settlement Agreement was to halt litigation in the UD [Action]. Specifically, MCWE agreed to promptly dismiss with prejudice the UD [Action]. Accordingly, the natural consequence of breaching this particular provision of the Settlement Agreement was the Maag Trust incurring additional attorney fees and costs of litigation in the UD [Action].”

As for the amount of the Maag Trust’s damages, the court found: “The only evidence [the] Maag Trust presented as damages from MCWE’s breach of the Settlement Agreement was Lloyd Copenbarger’s testimony that the Maag Trust incurred $118,000 in attorney’s fees in the UD [Action] between August, 2012 and October, 2015 (when the UD [Action] was dismissed). Maag Trust has not shown any other damages.” The court also found that “even without corroborating attorney bills, Lloyd Copenbarger’s testimony is credible.”

In addition, the trial court, on its own initiative, took judicial notice of documents filed in the UD Action from September 2012 until the UD Action was consolidated with this litigation in April 2013. The court found: “Litigation activity, including ones before an appointed referee, occurred in the action between August 2012 and April, 2013. The jury trial on the UD [Action] was stayed on April 19, 2013. [¶] The Court also notes activity within this matter after the UD [A]ction was consolidated. . . . The stay was lifted approximately six months later on October 25, 2013. With the exception of settlement activities, the matter was also stayed from May 20, 2014 to January 20, 2015 while the parties discussed settlement of both the UD [Action] and this action as consolidated. When the matter was not stayed, some litigation activity in the UD [Action] occurred between October 25, 2013 and October 7, 2015, such as opposing a motion for relief from the court’s order dismissing the UD [Action] and continued settlement activities. The court determines that Maag Trust is entitled to $118,000 as damages from MCWE’s breach of the Settlement Agreement.”

MCWE timely filed a notice of appeal from the judgment entered in January 2017. Plaza del Sol is not a party to this appeal. The Maag Trust did not appeal from the judgment in favor of Plaza del Sol on the Maag Trust’s complaint, and Plaza del Sol did not appeal from the judgment on its cross-complaint.

**DISCUSSION**

I.

**Whether the Maag Trust Could Recover Attorney Fees Incurred in the UD Action as Damages for Breach of the Settlement Agreement.**

The Maag Trust’s theory of damages was MCWE’s refusal to dismiss the UD Action, as required by the Settlement Agreement, resulted in the Maag Trust incurring attorney fees of $118,000 in defending the UD Action from the date the Settlement Agreement was signed to the date the UD Action was dismissed. MCWE argues the Maag Trust could not, as a matter of law, recover attorney fees incurred in the UD Action as damages for breach of the Settlement Agreement. Such attorney fees, according to MCWE, are costs of suit, not damages, and may only be recovered by posttrial motion.

An element of a breach of contract cause of action is damages proximately caused by the defendant’s breach. (Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 821.) The statutory measure of damages for breach of contract is “the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.” ( Civ. Code, § 3300.) “Contract damages seek to approximate the agreed-upon performance. ‘[I]n the law of contracts the theory is that the party injured by breach should receive as nearly as possible the equivalent of the benefits of performance.’” (Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 515.)

Detriment caused by MCWE’s breach of the Settlement Agreement would include the attorney fees incurred by the Maag Trust in defending the UD Action. A benefit, and intended goal, of the Settlement Agreement was for the Maag Trust to avoid incurring more attorney fees in the UD Action—hence, the Settlement Agreement required immedi-
ate dismissal with prejudice of the UD Action. Had MCWE dismissed the UD Action with prejudice as required by the Settlement Agreement, the Maag Trust would not have incurred attorney fees defending the UD Action from the date on which the Settlement Agreement was signed to the date on which MCWE dismissed the UD Action. Thus, the Maag Trust’s attorney fees incurred in the UD Action within that time frame fall within the scope of statutory breach of contract damages.

As MCWE emphasizes, California follows the American rule, under which each party to a lawsuit ordinarily must pay his or her own attorney fees incurred in that lawsuit. (Trope v. Katz (1995) 11 Cal.4th 274, 278; Gray v. Don Miller & Associates, Inc. (1984) 35 Cal.3d 498, 504.) Code of Civil Procedure section 1021 codifies this rule, providing that the measure and mode of attorney compensation are left to the agreement of the parties “[e]xcept as attorney’s fees are specifically provided for by statute.”

There is a difference, however, between attorney fees sought qua damages and attorney fees sought qua costs of suit. In Brandt v. Superior Court (1985) 37 Cal.3d 813, 819, the California Supreme Court recognized, in a tort action for wrongful denial of insurance policy benefits, the insured may recover as tort damages the attorney fees incurred to obtain the policy benefits wrongly denied. Brandt fees are damages, not costs. (Essex Ins. Co. v. Five Star Dye House, Inc. (2006) 38 Cal.4th 1252, 1258.)

Although Brandt dealt with a tort cause of action, the principle that attorney fees qua damages are recoverable as damages, and not as costs of suit, applies equally to breach of contract. In this case, for example, the Maag Trust’s attorney fees incurred in defending the UD Action are damages caused by MCWE’s breach of the Settlement Agreement. Those attorney fees were not costs of suit because they were not costs incurred in the action to enforce the Settlement Agreement. In contrast, the Maag Trust’s attorney fees incurred in the lawsuit for breach of the Settlement Agreement would be, if recoverable, costs of suit because they were incurred in the litigation in which they were sought. (Code Civ. Proc., § 1033.5, subd. (a)(10).)

MCWE relies on two Court of Appeal opinions in support of the argument that attorney fees may never be recovered as damages for breach of contract. In v. Arnett (1980) 113 Cal. App.3d 59, 63, the plaintiff sued the defendants for personal injuries. Just before trial, the parties settled, but the plaintiff repudiated the settlement agreement. The defendants filed a cross-complaint to enforce the settlement agreement and sought as damages attorney fees incurred in having to continue defending the personal injury lawsuit. (Ibid.) A jury awarded the defendants damages for breach of the settlement agreement. (Id. at p. 64.) The Court of Appeal reversed because “[t]o allow [the defendants] to recover their attorney fees would be contrary to the well-established rule that in the absence of a special statute or a contractual provision for attorney’s fees, the prevailing party is not entitled to recover attorney’s fees from his opponent.” (Id. at p. 67.)

Navellier v. Sletten (2003) 106 Cal.App.4th 763 (Navellier) arose out of the breach of a release agreement. The plaintiffs sued defendant for fraud and breach of contract. (Id. at p. 766.) In the breach of contract cause of action, the plaintiffs alleged the defendant breached the release agreement by pursuing counterclaims in a federal lawsuit. (Id. at pp. 767-768.) The trial court denied the defendant’s special motion to strike under the anti-SLAPP statute. (Id. at p. 766.) The Court of Appeal reversed. The second prong of the anti-SLAPP analysis requires a plaintiff to demonstrate a probability of prevailing on its claim. (Id. at p. 768.) The Court of Appeal concluded the plaintiffs could not meet this burden on the breach of contract cause of action because the “Plaintiffs’ major item of damages, the attorney’s fees they incurred in connection with defendant’s counterclaims, is not available as a matter of law because neither a statute nor a release provides for recovery of attorney’s fees in this case.” (Id. at p. 776.)

We question whether Olson and Navellier were correctly decided because both opinions fail to recognize the difference between attorney fees sought as damages and attorney fees sought as costs of suit.3 We are not bound by those opinions. (Sarti v. Salt Creek Ltd. (2008) 167 Cal.App.4th 1187, 1193 [“there is no horizontal stare decisis in the California Court of Appeal”].)

Although it appears to us attorney fees may be recovered as damages for breach of contract, we do not need to decide the issue. Nor do we need to decide whether, as MCWE contends, the Maag Trust had to plead attorney fees as special damages in its complaint, whether the Maag Trust failed to disclose those damages in discovery, or whether the Maag Trust had to plead and prove excuse of its own failure to perform its obligations under the Settlement Agreement. Nor do we need to decide the offset issue. If attorney fees were recoverable as damages for breach of the Settlement Agreement, the Maag Trust failed to prove them.

II.

The Maag Trust Failed to Prove Damages for Breach of the Settlement Agreement.

“No damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and

3. Both the Navellier and Olson opinions mention the lack of an attorney fees provision in the contracts. (Navellier, supra, 106 Cal. App.4th at p. 776 [“neither a statute nor the release provides for recovery of attorney’s fees in this case”]; Olson, supra, 113 Cal.App.3d at pp. 67-68 [“There is no contention or evidence there was any provision in the contract for attorney fees”].) Here, the Settlement Agreement does provide for prevailing party attorney fees. MCWE contends the attorney fees provision in the Settlement Agreement permits recovery only by the prevailing party in an action to enforce or for breach of the Settlement Agreement and, therefore, would not permit recovery of attorney fees in the UD Action. But that contention serves to emphasize the point that attorney fees incurred in the UD Action are not costs of this lawsuit but damages for breach of the Settlement Agreement.
Lloyd Copenbarger testified he did not know the billing statement information that he was given by his attorney. Asked if he had reviewed the invoices, he answered: “I didn’t review the bills. I pay the attorneys, and they apply them to . . . the matters that they’re working on.”

Lloyd Copenbarger’s testimony about the attorney invoices was inadmissible as hearsay and under the secondary evidence rule. An invoice itself is hearsay, and is not admissible to prove the work or services reflected in the invoice were performed, unless a foundational showing is made of an exception to the hearsay rule. (Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co. (1968) 69 Cal.2d 33, 43; Gorman v. Tassajara Development Corp. (2009) 178 Cal.App.4th 44, 87; In re Leanna W. (2004) 120 Cal.App.4th 735, 743.) If the proper foundation is laid, invoices are admissible as business records to prove the occurrence of the act, condition, or event recorded in the business record. (Evid. Code, § 1271; Jazayeri v. Mao (2009) 174 Cal.App.4th 301, 320-321.) Although a bill may evidence the rendition of the services set forth thereon [citation], in order to be competent evidence under [the business records exception to the hearsay rule], it must be supported by the testimony of a witness qualified to testify as to its identity and the mode of its preparation. (California Steel Buildings, Inc. v. Transport Indemnity Co. (1966) 242 Cal.App.2d 749, 759.)

The Maag Trust did nothing to lay the foundation for admitting the invoices into evidence; the Maag Trust did not even bring the invoices to trial. Lloyd Copenbarger’s testimony about the invoices is therefore double hearsay.

Evidence Code section 1521, known as the “Secondary Evidence Rule,” provides: “(a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following: [¶] (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. [¶] (2) Admission of the secondary evidence would be unfair. [¶] (b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing). [¶] (c) Nothing in this section excuses compliance with Section 1401 (authentication).”

Evidence Code section 1523, subdivision (a) provides: “Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.” Oral testimony is admissible to prove the content of a writing if the proponent does not have possession or control of a copy of the document and the original has been lost or destroyed, or if the proponent does not have possession or control of the original or a copy of document and neither the original nor
the copy was reasonably procurable by court process or made available by other means. (Id., subds. (b) & (c)(1).)

Here, the invoices for attorney fees were not lost or destroyed. Lloyd Copenbarger testified he had the invoices, and his attorneys would have copies of them too, but he chose not to bring the invoices with him to trial. Thus, under Evidence Code section 1523, Lloyd Copenbarger’s testimony was inadmissible to prove the content of the invoices. The trial court should have sustained MCWE’s secondary evidence rule and overruled objections to Lloyd Copenbarger’s testimony.

Lloyd Copenbarger’s testimony, even if admissible, was insufficient to prove the amount of attorney fees or the nature of the work performed. Although the trial court found Lloyd Copenbarger to be credible, the problem is not credibility: The problem is Lloyd Copenbarger provided no relevant information of the time spent, work performed, or the hourly rates of attorneys in the UD Action. A party seeking fees as a prevailing party must present evidence of the time spent and the hourly rate of each attorney. (E.g., El Escorial Owners’ Assn. v. DLC Plastering, Inc. (2007) 154 Cal.App.4th 1337, 1366 [prevailing parties “must prove the hours they sought were reasonable and necessary”]; Levy v. Toyota Motor Sales, U.S.A., Inc. (1992) 4 Cal.App.4th 807, 816 [party seeking attorney fees has the “burden of showing that the fees incurred were ‘allowable,’ were ‘reasonably necessary to the conduct of the litigation,’ and were ‘reasonable in amount’”].)

Lloyd Copenbarger testified (1) he did not review the invoices, (2) did not recall participating in or supervising counsel in the UD Action, (3) did not know what his attorneys did or what legal services were performed in the UD Action, and (4) did not know which part of the fees were incurred in, and what services were performed for, the UD Action and which were for the lawsuit for breach of the Settlement Agreement. This is a wholesale failure of proof. No admissible evidence was presented of the nature of the legal work performed on behalf of the Maag Trust in the UD Action, the attorney billing rates, or of the amount of attorney fees incurred.

The trial court took judicial notice of documents filed in the UD Action from September 2012 until the UD Action was consolidated with this litigation in April 2013. MCWE argues the trial court, by doing so, committed misconduct. We do not address that argument. The documents filed in the UD Action have little materiality. “While judicial notice may be taken of court records (Evid. Code, § 452, subd. (d)), the truth of matters asserted in such documents is not subject to judicial notice.” (Board of Pilot Commissioners v. Superior Court (2013) 218 Cal.App.4th 577, 597; see Ragland v. U.S. Bank National Assn. (2012) 209 Cal.App.4th 182, 193 [“When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable”].) The judicially noticed, court-filed documents are not relevant evidence of who prepared the documents, the amount incurred in attorney fees to prepare them, and whether that amount was reasonable.

The Maag Trust’s presentation of evidence did not afford MCWE the ability to meaningfully cross-examine and challenge the reasonableness of the fees incurred. “The evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended.” (Christian Research Institute v. Alnor (2008) 165 Cal.App.4th 1315, 1320 [vague billing entries and block billing insufficient].) An award of attorney fees may be based on declarations of counsel without production of detailed time records; however, the hours spent must be substantiated. (Raining Data Corp. v. Barrenechea (2009) 175 Cal.App.4th 1363, 1375.)

The Maag Trust did not present any evidence to substantiate the amount of attorney fees incurred in the UD Action. The Maag Trust easily could have done so. Lloyd Copenbarger had possession of the invoices and they could have been made admissible quite easily as business records. In addition, or in the alternative, the attorneys who represented the Maag Trust in the UD Action could have testified about their hourly rates, the work performed, and the amount of time spent on various tasks. Such evidence is required when a prevailing party requests attorney fees by motion. No less is required when attorney fees are sought as damages.

The Maag Trust argues MCWE could have called as witnesses the attorneys who represented the Maag Trust in the UD Action, but chose not to do so. But the Maag Trust, not MCWE, bore the burden of proving damages. (Richman v. Hartley, supra, 224 Cal.App.4th at p. 1186.)

Absent actual damages, a plaintiff might recover nominal damages for breach of contract. (Midland Pacific Building Corp. v. King (2007) 157 Cal.App.4th 251, 275.) In any event, the Maag Trust did not plead and does not argue it was entitled to nominal damages.

Proof of damages resulting from breach are an element of a breach of contract cause of action. The Maag Trust had a full and fair opportunity to present its evidence, but that evidence was insufficient to prove the Maag Trust incurred damages. As a result, we reverse the judgment with directions to enter judgment in favor of MCWE. (Frank v. County of Los Angeles (2007) 149 Cal.App.4th 805, 823-824 [if evidence is insufficient to support a judgment for plaintiff, a proper remedy is to reverse with directions to enter judgment for defendant].)

III.

The Trial Court Should HaveResolved All Claims Presented in the Breach of Contract Cause of Action.

MCWE also contends the trial court failed to completely dispose of all the claims asserted in the Maag Trust’s breach of contract cause of action in that the court did not rule on the claim that MCWE failed to deliver the Plaza del Sol Note and the Plaza del Sol Deed of Trust to the Maag Trust. MCWE
argues the Maag Trust conceded that claim, and, therefore, MCWE is entitled to a ruling in its favor on it.

The trial court issued a tentative statement of decision on September 14, 2016. The Maag Trust’s counsel submitted a proposed statement of decision which was the same as the tentative statement of decision. In the tentative and proposed statements of decision the court found: “The Settlement Agreement did not specifically require MCWE to turn over the [Plaza del Sol] Note and Trust Deed. Rather, the Settlement Agreement required [Plaza del Sol] Real Estate Trust to ‘assign the [Plaza del Sol Note] and [Plaza del Sol Deed of Trust]’ to the Maag Trust. . . . However, such a requirement could be reasonably read as an implicit requirement of the Settlement Agreement. Accordingly, MCWE further breached the Settlement Agreement by failing to turn over possession of the [Plaza del Sol] Note and Trust Deed.”

MCWE filed an ex parte application to clarify, add to, and/ or delete from the tentative statement of decision. Among other things, MCWE asserted: “These findings were made, however, despite a Motion in Limine that was unopposed by Plaintiff and granted by this Court specifically excluding ‘evidence, argument, or reference to a ‘breach’ of the Settlement Agreement by MCWE for its failure to turn over the original [Plaza del Sol Note] and [Deed of Trust].’ Thus, MCWE asserts that any reference to a ‘breach’ by MCWE for failing to turn over the [Plaza del Sol] Note and [Plaza del Sol] Deed of Trust should be deleted from the Statement of Decision since it should not have been and could not have been raised in the first place due to the Court’s earlier ruling.”

In response, the Maag Trust conceded: “The Maag Trust’s pleadings in this action alleged multiple breaches of the Settlement Agreement. Prior to trial, Defendants filed a Motion in Limine No. 7 seeking an order to preclude evidence or argument that they breached the Settlement Agreement by failing to give the Maag Trust possession of the promissory note originally provided by [NHOM] to . . . Plaza Del Sol . . . and the related Deed of Trust. In their Motion in Limine No. 7, Defendants acknowledges assigning the Note and Deed of Trust to the Maag Trust, and argued that any failure to turn over possession was not a breach of the Settlement Agreement. The Maag Trust chose not to oppose Defendants’ Motion in Limine No. 7, and the Court granted the motion. Accordingly, the Maag Trust did not present evidence or argument at trial that MCWE breached the Settlement Agreement by failing to turn over possession of the Note and Deed of Trust.”

In response to MCWE’s objections and the Maag Trust’s response, the trial court changed the tentative statement of decision. The final statement of decision includes this finding: “Because the Settlement Agreement was materially breached by MCWE’s failure to promptly dismiss with prejudice the UD [Action], the Court need not decide whether [the] Maag Trust suffered damages as a direct and proximate result of MCWE’s alleged failure of not turning over possession of the [Plaza del Sol] Note and Trust Deed.”

The trial court’s decision not to decide the issue of delivery of the Plaza del Sol Note and the Plaza del Sol Deed of Trust was expressly based on the court’s decision that MCWE breached the Settlement Agreement by failing to timely dismiss the UD Action. However, both claims (failure to deliver the note and failure to dismiss the UD Action) were pleaded in the complaint and they appear to be independent of each other. The Maag Trust conceded it presented no evidence or argument at trial that MCWE breached the Settlement Agreement by failing to turn over possession of the Plaza del Sol Note and the Plaza del Sol Deed of Trust. MCWE therefore was entitled to a ruling in its favor on that claim.

It is unnecessary to remand for the trial court to make new findings or revise the statement of decision for two reasons. First, we are reversing the judgment with directions to enter judgment in MCWE’s favor, and that judgment is a final resolution in MCWE’s favor of all claims presented in the breach of contract cause of action. Second, this opinion becomes law of the case in further proceedings in this matter.

DISPOSITION

The judgment in favor of the Maag Trust and against MCWE on the Maag Trust’s complaint is reversed. The matter is remanded with directions to enter judgment in favor of MCWE and against the Maag Trust on the Maag Trust’s complaint. MCWE shall recover its costs on appeal.

FYBEL, J.

WE CONCUR: O’LEARY, P. J., BEDSWORTH, J.
ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]
THE COURT:

It is ordered that the opinion filed October 22, 2018, be modified as follows:
1. The entire paragraph commencing at the bottom of page 22 with “We follow the approach” and ending at the top of page 23 is deleted and the following paragraph is inserted in its place:

We follow the approach of the Court of Appeal in Dynamex on our record. It is logical to apply the “suffer or permit to work” standard (and the ABC test that explicates it) to wage order claims. First, the wage order explicitly defines “employ” in this language, and the case law emphasizes “the primacy of statutory purpose in resolving the employee or independent contractor question.” (Dynamex, supra, 4 Cal.5th at p. 948.) Second, wage orders regulate very basic working conditions for covered California employees, thus warranting “the broadest definition” of employment to extend protections to “the widest class of workers.” (See id. at pp. 913, 951; Cal. Code Regs., tit. 8, § 11090, subd. 1.) There is no reason to apply the ABC test categorically to every working relationship, particularly when Borello appears to remain the standard for worker’s compensation. Although both parties agree Dynamex applies to Garcia’s case, neither identifies a basis to use the ABC test in evaluating the non-wage-order claims. In the absence of an argument that the statutory purposes underlying those claims compel application of a different standard, we conclude Borello furnishes the proper standard as to Garcia’s non-wage-order claims.

2. At the end of the top paragraph of page 23, after the sentence “as to Garcia’s non-wage-order claims” add the following as footnote 11, which will require renumbering of all subsequent footnotes:

Appreciating “the primacy of statutory purpose in resolving the employee or independent contractor question” (Dynamex, supra, 4 Cal.5th at p. 948), we express no opinion on the appropriate test on different records in other situations.

3. On page 27, in the fourth sentence of the second full paragraph, the word “it” is changed to “Kirby” so the sentence reads:

As Kirby explained:

4. On the top of page 28, in the first sentence beginning “Because Dynamex favorably cites,” the words “footnote 30 in” are to be inserted between “Because” and “Dynamex” so that the sentence reads:

Because footnote 30 in Dynamex favorably cites JSF Promotions to define part C, we follow the Kirby approach and reject Sebago’s alternative construction.

5. The entire paragraph commencing at the bottom of page 28 with “Under the more stringent part C” and ending at the top of page 29 is deleted and the following paragraph is inserted in its place:

Under the more stringent part C framework adopted by the California Supreme Court in Dynamex, the result is obvious. Dynamex requires more than mere capability to engage in an independent business. Defendants presented no evidence in their moving papers that Garcia in fact provided services for other entities or otherwise established a business “independent” of his relationship with BTG. (See Kirby, supra, 176 A.3d at pp. 1187-1188 [certain factors besides performing similar work for third parties may also be relevant to part C].) Rather, they rely on the Sebago formulation and suggest Garcia was “free to offer his services as an entrepreneur to anyone he chose.”

6. At the end of the top paragraph of page 29, after the sentence “’free to offer his services as an entrepreneur to anyone he chose’” add the following as footnote 13:

For the first time in their petition for rehearing defendants attempt to argue that under a “totality of the circumstances” test (see Kirby, supra, 176 A.3d at p. 1188), factors other than the actual performance of similar work for other parties show that Garcia was an independent contractor rather than an employee. Most of this argument merely rehashes the “control” evidence defendants previously submitted to support the inappli-
cable Borello test, such as BTG’s lack of training or supervision or Garcia’s retention of fares. Defendants’ suggestion that Garcia’s taxicab amounts to an independent place of business akin to a “home office” is patently unpersuasive—Garcia made lease payments at BTG’s office and had no separate business address. As to their reference to business cards, Garcia testified that BTG provided him with business cards; he could not advertise his services as “Garcia Taxicab” or the like; he opted to list his cell phone number on the cards alongside two numbers for the company; and he did not advertise his business in the Yellow Pages, newspaper, or any other source. Although Garcia had a city-issued permit, it was specific as to BTG. (Calexico Mun. Code, ch. 5.80, § 5.80.140.) BTG admits it provided third party liability insurance, and Garcia’s ability to procure additional coverage does not show he is customarily engaged in an independently established business. Although Garcia did operate his own vehicle for a time, he purchased that vehicle from Martha Ortega, the former sole proprietor of Calexico Taxi, and operated it as a Calexico Taxi with BTG’s vehicle permit. He then leased a vehicle from BTG starting in August 2013 when his own vehicle became inoperable.

There is no change in the judgment.
The petition for rehearing is denied.

HALLER, Acting P. J.

Copies to: All parties