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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CATALINA MEDIA DEVELOPMENT, LLC, et al., Cross-complainants and Appellants, v. THYSSENKRUPP ELEVATOR CORPORATION, Cross-defendants and Appellants,	B306012, B309162 (Los Angeles County Super. Ct. No. BC641595)

APPEALS from judgment and orders of the Superior Court of Los Angeles County, Curtis A. Kin, Judge. Affirmed (case Nos. B306012 and B309162).

Hayes, Scott, Bonino, Ellingson, Guslani, Simonson & Clause, Mark G. Bonino, Charles E. Tillage, Andrea S. Nguyen; Koeller, Nebeker, Carlson & Halluck, Gary L. Hoffman and Maria K. Pleše for Cross-complainants and Appellants Catalina Media Development, LLC, and The Worthe Real Estate Group, Inc.

Horvitz & Levy, Mitchell C. Tilner, Aaron Henson; Olsen & Brueggemann, Christopher T. Olsen, Mark Brueggemann and Thomas M. Gaffney for Cross-defendant and Appellant ThyssenKrupp Elevator Corporation.

ThyssenKrupp Elevator Corporation (TKE) and Catalina Media Development, LLC (Catalina) are parties to a service agreement, under which TKE is solely responsible for the maintenance of elevators in a building owned by Catalina and managed by The Worthe Real Estate Group, Inc. (Worthe). The agreement contains an indemnification clause. The instant appeals stem from a dispute regarding the scope of TKE's duty under this agreement to indemnify and/or defend Catalina and Worthe in a personal injury lawsuit brought by Bess Wiley and Ronald Gress (plaintiffs), who are not parties to this appeal. Plaintiffs sued TKE, Catalina, and Worthe when Wiley injured herself attempting to board one of the elevators covered by the service agreement. Catalina and Worthe filed a cross-complaint against TKE alleging, inter alia, that TKE had breached the service agreement by failing to fund Catalina and Worthe's defense against plaintiffs' lawsuit, something the trial court subsequently ruled, in a summary adjudication ruling not challenged on appeal, TKE had an immediate duty to do. Nevertheless, TKE ultimately obtained summary judgment in its favor on Catalina and Worthe's cross-complaint, based on TKE's showing that it could not be found negligent or liable on the personal injury claims. In case No. B306012, Catalina and Worthe challenge that ruling, arguing that the court misinterpreted the indemnification clause, incorrectly concluded

there was no triable issue of fact as to TKE's fault, should have denied TKE summary judgment under the disentitlement doctrine, and improperly reconsidered the court's earlier summary adjudication ruling. We find none of these arguments persusasive and, accordingly, affirm the judgment on Catalina and Worthe's cross-complaint.

In case No. B309162, TKE separately appeals the court's denial of TKE's request for prevailing party attorney fees. TKE argues it is entitled to these fees based on the judgment in its favor on TKE's cross-complaint. We conclude the trial court did not abuse its discretion in concluding TKE was not a "prevailing party" in the overall litigation, and in denying TKE attorney fees on this basis. Accordingly, we affirm the trial court's postjudgment order awarding TKE costs, but denying it attorney fees.

FACTS AND PROCEEDINGS BELOW

A. *The Service Agreement Between TKE and Catalina*

Catalina owns and Worthe manages a property in Burbank (the property). Under a "service agreement" between Catalina and TKE, TKE was solely responsible for maintaining and servicing the elevator system in the property and was required to "use all reasonable care to maintain the equipment in proper, lawful and safe operating condition." The service agreement includes a section entitled, "Indemnity," which is the focus of the instant appeal (the indemnity agreement). The indemnity agreement has three primary parts: First, it contains a general commitment by TKE to indemnify Catalina for settlements, judgments, and other financial costs in litigation "arising out of

or caused in any manner by the acts or omissions of [TKE] . . . or the performance or failure to perform any [s]ervices under" the service agreement (the general indemnification commitment). The general indemnification commitment does not appear to require that TKE be negligent or legally liable for the injury alleged in such a suit; only that the lawsuit "aris[e] out of" TKE's actions and/or performance of its duties under the service agreement. Second, it contains a commitment by TKE to "defend any and all actions" against those entitled to such indemnification (the general duty to defend). Third and finally, it contains an agreement that, when a "claim involv[es] more than one party," "each party is responsible and liable for its share of the damages (and defense costs associated therewith)" in an amount proportional to the parties' actions and/or negligence (the apportionment clause). The specific language of the indemnity agreement encompassing all three commitments is as follows: "[TKE] shall, to the fullest extent permitted by law, indemnify, defend and hold harmless [Catalina] and its . . . property manager . . . from and against any and all liability, claims and demands on account of damage to any property or injury to persons including death resulting therefrom, losses, damages, expenses (including, without limitation, reasonable attorneys' fees and investigation costs), payments, recoveries and judgments in connection therewith arising out of or caused in any manner by the acts or omissions of [TKE] . . . or the performance or failure to perform any [s]ervices under this [a]greement or the breach of any representation or warranty, or any provision or obligation, set forth herein by [TKE], or [TKE's] employees or agents or subcontractors. [TKE] shall, at its own expense, defend any and all actions brought against any person or entity entitled

to indemnification hereunder based upon any of the foregoing and shall pay all reasonable attorneys' fees and all other expenses, and promptly discharge any judgments, settlements or compromises arising therefrom. Notwithstanding anything to the contrary herein, (1) in no event shall [TKE] be liable for penalties or indirect, special, liquidated, incidental, exemplary or consequential damages and (2) any claim involving more than one party shall be handled so each party is responsible and liable for its share of the damages (and defense costs associated therewith) in proportion to its share of acts, actions, omissions or negligence."

Although Worthe is not a party to the service agreement, TKE does not dispute that, as Catalina's "property manager," Worthe is a beneficiary of the general indemnification commitment and general duty to defend to the extent the indemnification agreement otherwise applies.

B. *Plaintiffs' Personal Injury Lawsuit*

In 2016, Wiley was injured on the property when she attempted to stop the elevator door from closing by thrusting her foot in between the closing elevator doors. Upon pulling her foot back from the door, Wiley lost her balance and fell backwards, injuring her arm. Based on the incident, plaintiffs (Wiley and Gress) sued TKE in its capacities as the designer, manufacturer, installer, and servicer of the elevator and Catalina and Worthe in their respective capacities as property owner and manager. Plaintiffs alleged premises liability, negligence, products liability, breach of implied warranty, strict liability, and loss of consortium causes of action.

C. *Cross-Complaints Regarding Indemnity and Defense Costs*

On January 25, 2017, Catalina and Worthe sent a tender of defense letter to TKE, "notifying [TKE] of their defense and indemnity obligations on behalf of [Catalina] and Worthe." On February 7, 2017, Catalina and Worthe filed a cross-complaint against TKE. Through causes of action for breach of contract to indemnify, total equitable indemnity, contribution, and "comparative indemnity apportionment of fault" (capitalization omitted), Catalina and Worthe sought to recover from TKE some or all of any amount they might be required to pay plaintiffs in the personal injury action. Catalina and Worthe also alleged that TKE had "an express duty and [is] obligated to defend [Catalina and Worthe] pursuant to the conditions of" the service agreement, which TKE had refused to do. On this basis, the cross-complaint alleged a "breach of contract to defend" cause of action as well, through which Catalina and Worthe sought to require TKE to fund their defense in the personal injury action on an ongoing basis, and to recover all defense costs they had incurred in the personal injury action to date. (Capitalization omitted.)

TKE filed a defensive cross-complaint against Catalina, likewise seeking indemnity and defense costs.

D. *Catalina and Worthe's Motion for Summary Adjudication on the Issue of TKE's Duty to Defend*

Catalina and Worthe sought summary adjudication that TKE had a duty to defend Catalina and Worthe under the service agreement. The motion argued that, "since the date of tender [demanding TKE pay Catalina and Worthe's defense costs], there

has been an obligation of [TKE] to defend [Catalina] and Worthe from the allegations" in the personal injury suit, but that TKE had refused to fulfill this obligation. The motion requested that the court "issue an order that [TKE] had and continues to have, an obligation to defend [Catalina] and Worthe" in the personal injury suit.

In a June 11, 2018 written ruling, the trial court[1] granted the motion. Differing characterizations of the reasoning and significance of this ruling are the source of much of the parties' debate on appeal. We therefore summarize it in some detail.

In the written ruling ultimately attached to the order granting the motion, the court indicated it understood the motion as seeking "[s]ummary [a]djudication on the issue of whether[, under the indemnity agreement,] [TKE] owes [Catalina and Worthe] an *immediate* duty to defend" (italics added), and that the California Supreme Court in *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541 (*Crawford*) had expressly authorized such a motion—that is, a summary adjudication motion "in an ongoing litigation to establish an *immediate* duty to defend." (Italics added.) The court rejected TKE's argument that, based on the apportionment clause in the indemnity agreement, TKE has a duty to pay Catalina and

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[1] Two different judges made significant rulings in this case. Catalina and Worthe's summary adjudication motion was decided by Judge Michael S. Mink. The case was then transferred to Judge Curtis A. Kin, who issued the remaining rulings summarized in this opinion. We disagree with the arguments briefed by the parties that the change in the judicial officer presiding over the proceedings has any bearing on the issues raised on appeal.

Worthe's defense costs only after and to the extent that a trier of fact determines TKE's negligence caused such costs. The court explained that "pursuant to *Crawford*, absent an agreement to the contrary, a[n] indemnitor's duty to defend arises before a determination of liability requiring actual indemnity has been made by the trier of fact. In other words, the duty to defend arises immediately upon a proper tender and thus necessarily before the trier of facts [has] determine[d] the issues of liability and damages, and how they should be allocated among the parties." The court also more specifically rejected any interpretation of the apportionment clause as providing an agreement to the contrary that might delay any obligation to pay for defense costs until liability is resolved.

The court's ruling "grant[ed] the [m]otion for [s]ummary [a]djudication on the issue of [TKE's] duty to provide a defense to [Catalina and Worthe]," and instructed Catalina and Worthe to submit a proposed order. The court ultimately signed their proposed order, to which the court's initial written ruling was attached, on July 13, 2018. We shall refer collectively to the July 13, 2018 order, June 11, 2018 ruling, and corresponding June 11, 2018 minute order as the "duty-to-defend order." The duty-to-defend order does not expressly instruct TKE to do anything as a result of the "immediate[ ]" duty to defend it recognizes. For example, it does not expressly instruct TKE to pay Catalina and Worthe a particular sum or to begin funding their defense.

E. *Catalina and Worthe's Motion to "Enforce" the Duty-to-Defend Order*

After the court issued the duty-to-defend order, Catalina sent TKE correspondence demanding that TKE immediately pay

Catalina and Worthe's defense costs. TKE refused, citing the apportionment clause in the indemnification agreement, and proposed that Catalina instead prepare a memorandum of costs to be addressed at the end of the personal injury action in accordance with the fact finder's ultimate apportionment of fault.

Catalina and Worthe moved "to enforce the court's [duty-to-defend] order." (Boldface and capitalization omitted.) In the motion, they asked the court to "enforce the court's prior order providing that [TKE] has a duty to immediately defend [Catalina and Worthe], and to reimburse [them] for their post-tender fees and costs." TKE opposed the motion to enforce.[2]

F. *Settlement of Plaintiffs' Claims*

Before the court had heard or ruled on the motion to enforce, plaintiffs filed a notice of settlement of their claims against all defendants. The notice provided that the settlement was not to interfere with the cross-complaints and the claim for fees and costs between TKE and Catalina and Worthe. The settlement did not involve any recognition or admission of liability, fault, apportionment of fault, or determination of causation as to any party. The proposed release stated, "[T]he payment made to [plaintiffs] is not to be construed as an admission of liability on the part of any of the [s]ettling [d]efendants by whom liability is expressly denied." Under

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[2] TKE opposed the motion on the bases that (1) it was effectively a motion for a preliminary injunction to pay money, which is not permitted under California law, (2) the apportionment clause limited TKE's share of Catalina's defense costs to TKE's proportion of liability in plaintiffs' action, and there had not yet been an apportionment of liability.

the terms of the settlement, [plaintiffs] received $55,000, $44,000 of which TKE paid, and $11,000 of which Catalina and Worthe paid.

G. *Court's Ruling on the Motion to Enforce*

On September 6, 2019, the court granted in part the motion to enforce the duty-to-defend order. Specifically, the court cited *Crawford* and concluded that "TKE is obligated to comply with [the duty-to-defend] [o]rder." The court clarified, however, that it was "not order[ing], as Catalina and Worthe request[,] the immediate reimbursement by TKE of unknown fees and costs at this point." Instead, the court "order[ed] the parties to meet and confer in a good faith [to] attempt to agree on the amount due from TKE to Catalina and/or Worthe consistent with the [c]ourt's [duty-to-defend] [o]rder, particularly now that . . . TKE, Catalina, and Worthe have settled the claims in the [c]omplaint."

H. *TKE's Motion for Summary Judgment on Catalina and Worthe's Cross-Complaint*

The record does not indicate whether the parties met and conferred as required by the court's order. Two months after the court issued that order, however, TKE moved for summary judgment on Catalina and Worthe's cross-complaint. TKE argued it was entitled to summary judgment in its favor because, under the indemnity agreement's apportionment clause, TKE's liability for Catalina's defense costs was limited to its proportion of liability for plaintiffs' accident, and undisputed facts showed that TKE was not liable for the accident. In support, TKE presented (1) evidence that plaintiffs' settlement made no finding or apportionment of liability against TKE, (2) the admission of plaintiffs' expert that he could not say to any degree of scientific

certainty that TKE was negligent with respect to the accident, (3) Catalina's admission that it had no evidence suggesting TKE was negligent, and (4) Wiley's testimony suggesting her own negligence may have been at least a partial cause of the accident.

In its opposition, Catalina did not attempt to raise a triable issue of material fact as to TKE's liability. Rather, Catalina argued that, consistent with the court's interpretation of the indemnity agreement set forth in the duty-to-defend order, the apportionment clause did not require a finding of TKE's liability in order for TKE to be obligated to defend Catalina and Worthe. Catalina and Worthe argued that the duty-to-defend order thus had fully adjudicated Catalina's breach of duty to defend cause of action, and that the only remaining issue in the case was the extent of TKE's obligation to reimburse Catalina and Worthe for their post-tender fees and costs.

To support its request for defense costs, Catalina submitted to the court copies of "all invoices generated by [defense counsel's] office," along with a spreadsheet from Catalina's insurer, Travelers Insurance, showing "its payment of [Catalina's] [defense] costs to date." Upon receiving these, TKE argued for the first time in its reply that Catalina's breach of duty to defend claim failed for the additional reason that Catalina lacked standing under *Bramalea California, Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468 (*Bramalea*), because their defense costs had been fully paid by a collateral source (Travelers Insurance). Following the filing of this reply, Travelers Insurance moved to intervene, but its motion was denied as untimely and procedurally defective.

The court granted TKE's summary judgment motion on Catalina and Worthe's cross-complaint. As to the causes of action

seeking indemnification for any amount paid to plaintiffs as a result of the action, the court concluded these required a finding that TKE was liable or otherwise at fault, and that because TKE had offered evidence establishing no such finding was possible, the burden shifted to Catalina and Worthe to demonstrate a triable issue on this point. Because Catalina and Worthe did not offer any such evidence, the court concluded TKE was entitled to summary judgment on the causes of action seeking indemnification.

As to the breach of duty to defend cause of action, the court acknowledged that it "had previously found in Catalina and Worthe's favor as to the issue of having a contractual duty to defend," but concluded that this did not determine the separate issue of "whether Catalina and Worthe could ultimately prevail on the [duty-to-defend] cause of action." (Capitalization omitted.) The court determined that the lack of evidence supporting TKE's liability was fatal to the duty-to-defend cause of action in light of the apportionment clause. Specifically, the court explained that although TKE had an immediate duty to fund Catalina and Worthe's defense in the litigation *before* liability was determined, under the apportionment clause, "once liability for plaintiffs' injuries was determined, the costs of defense would be apportioned between the multiple parties based on their respective fault. . . . [I]f TKE is not liable to plaintiffs, then TKE is not liable for defense costs to Catalina or Worthe, even though TKE has a duty to defend under the [s]ervice [a]greement." The court illustrated the point by noting that "to the extent TKE had paid defense costs pursuant to its duty under the [s]ervice [a]greement, if TKE had been found not negligent or liable to plaintiffs at trial, then TKE would have

been entitled to reimbursement." Under this interpretation of the apportionment clause, the lack of a triable issue as to TKE's negligence or fault for plaintiffs' injuries defeated Catalina and Worthe's breach of duty to defend claim.

In its tentative ruling, the court indicated that it would afford Catalina and Worthe the opportunity to present argument regarding the *Bramalea* issue first raised in TKE's reply brief, but further indicated its tentative view that *Bramalea* provided a separate and additional basis for summarily adjudicating the duty to defend cause of action in TKE's favor. Given the court's stated view that TKE was entitled to summary judgment on the grounds already fully briefed by the parties, however, TKE withdrew its *Bramalea* contention at the hearing on its summary judgment motion, "[s]o no further brief[ing] [would be] needed." As a result, the parties submitted nothing further on this point.

I. *Catalina and Worthe's Postjudgment Motion and Appeal*

After obtaining summary judgment on Catalina's cross-complaint, TKE dismissed its own cross-complaint against Catalina without prejudice, and the court entered judgment for TKE on Catalina and Worthe's cross-complaint.

Catalina and Worthe moved for postjudgment relief, filing a joint motion for a new trial and to vacate summary judgment for TKE. Catalina and Worthe based the motion on both the arguments they had already raised in opposition to TKE's motion for summary judgment and on a new argument that TKE was "disentitled" from seeking summary judgment because it had failed to comply with the duty-to-defend order and subsequent order enforcing it, both of which, according to Catalina and Worthe, obligated TKE to immediately fund their defense. (See

Stoltenberg v. Ampton Investments, Inc. (2013) 215 Cal.App.4th 1225, 1230 [under equitable doctrine of disentitlement, a party that is not in compliance with court orders may be refused " 'aid and assistance of a court . . . [because] he stands in an attitude of contempt to legal orders and processes of the courts of this state' "].)

The court denied the motion. The court concluded Catalina and Worthe had waived any disentitlement argument by failing to raise it in opposition to summary judgment. The court went on to note that any disentitlement doctrine argument was meritless in any event, because TKE had not violated any court order. The court explained that "the [c]ourt never ordered immediate reimbursement of defense costs" in the orders Catalina and Worthe claimed TKE had disobeyed, but rather "only found that TKE had the immediate contractual duty to defend Catalina and Worthe," so TKE's failure to pay these costs was not in contempt of any court directive. The court also rejected Catalina and Worthe's other arguments by reiterating its interpretation of the indemnity agreement and apportionment clause as consistent both with the initial orders finding an immediate duty to defend and a subsequent allocation (or, potentially, reallocation) of defense costs based on negligence and fault in the personal injury action, once such negligence and fault had been determined.

Catalina and Worthe appealed from the judgment and the denial of their postjudgment motion.

J. *TKE's Motion for Attorney Fees and Costs*

TKE moved for prevailing party attorney fees and costs under Civil Code section 1717, subdivision (a),[3] and a prevailing party fee clause in the service agreement.[4] In the operative motion, TKE requested the approximately $140,000 in fees and $14,000 in costs it claimed it incurred defending Catalina's cross-complaint in the 10-month period after plaintiffs settled the underlying personal injury action. The court granted the motion in part, awarding TKE its claimed costs, but not its claimed attorney fees. For the purposes of TKE's fees request, the court concluded TKE was not the prevailing party under section 1717, because "[t]he objective of TKE, Catalina, and Worthe in bringing their respective cross-complaints was to have the other party held liable for any damages awarded to plaintiffs," an objective "none of these cross-complaining parties fully achieved." The court further noted that although TKE had won a summary judgment motion, it had also lost a summary adjudication motion on the issue of duty to defend, and that the summary judgment win had not afforded TKE the relief it was seeking via its cross-complaint.

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[3] Unless otherwise indicated, all further statutory references and citations are to the Civil Code.

[4] Specifically, the service agreement contained the following provision: "In the event any party to this [a]greement shall institute any action or proceeding against the other party relating to this [a]greement, the unsuccessful party in such action or proceeding shall reimburse the successful party for its disbursements incurred in connection therewith and for its reasonable attorneys' fees and costs as fixed by the court."

The court concluded TKE was entitled to costs under Code of Civil Procedure section 1032, subdivisions (a)(4) and (b), because TKE obtained a dismissal in its favor as to Catalina and Worthe's cross-complaint. (See *id*., subd. (b) ["a prevailing party is entitled as a matter of right to recover costs in any action or proceeding"]; *id*., subd. (a)(4) [defining " '[p]revailing party' " for the purposes of the section as "includ[ing] . . . a defendant in whose favor a dismissal is entered, [and] a defendant where neither plaintiff nor defendant obtains any relief"]; *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1335, fn. 3 ["we reject their contention that we must construe section 1032[, subdivision] (a)(4) in light of . . . section 1717"].)

TKE timely appealed the order to the extent it denied TKE attorney fees. Catalina and Worthe did not appeal the costs award. We consolidated TKE's and Catalina and Worthe's appeals.

DISCUSSION

CATALINA AND WORTHE'S APPEAL (CASE NO. B306012)

On appeal, Catalina and Worthe argue the trial court reversibly erred in granting summary judgment for TKE on their cross-complaint and in denying Catalina and Worthe's motion to vacate the judgment against them on their cross-complaint. They argue the trial court misinterpreted the plain meaning of the indemnity agreement—more specifically, the apportionment clause therein—as relieving TKE of any duty to fund Catalina and Worthe's defense against plaintiffs' personal injury action if TKE showed it could not be found liable for plaintiffs' injuries. They further argue that TKE did not sufficiently make such a

showing, that the court abused its discretion in declining to apply the disentitlement doctrine, and that the court incorrectly reconsidered and "reversed" the existing duty-to-defend order by absolving TKE of any duty to reimburse Catalina and Worthe's defense costs. We disagree on all points for the reasons we set forth below.

A. *Catalina and Worthe's Arguments Regarding Interpretation of the Indemnification Agreement*

Catalina and Worthe argue that the trial court misinterpreted the indemnity agreement as absolving TKE of any duty to defend or indemnify if TKE is found to be not at fault in the personal injury action. This presents a purely legal issue, which we review de novo. (*Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 390 [when there is no conflict in competent extrinsic evidence, the interpretation of a contract is subject to independent review on appeal].)

1. *Crawford v. Weather Shield Mfg., Inc.*

Catalina and Worthe's contractual misinterpretation argument relies heavily on *Crawford*, *supra*, 44 Cal.4th 541. That case involved an indemnification agreement between a contractor (JMP) and subcontractor (Weather Shield) that included both a commitment to indemnify and a separate commitment to defend. (*Id.* at pp. 547–548.) Specifically, the agreement provided that Weather Shield would (1) " 'indemnify and save [JMP] harmless against all claims for damages . . . loss, . . . and/or theft . . . growing out of the execution of [Weather Shield's] work,' " and (2) " 'at [its] own expense . . . defend any suit or action brought against [JMP] founded upon the claim

of such damage[,] . . . loss, . . . or theft.' " (*Ibid.*) The issue on appeal was whether the agreement obligated Weather Shield to immediately "provide a defense to a suit against [JMP] even if [Weather Shield] was not negligent." (*Id.* at p. 551.) In considering this issue, the court summarized the general principles governing indemnification agreements and the interpretation thereof. (*Id.* at pp. 551–553.) That summary provides an apt starting point for our analysis as well:

"Parties to a contract, . . . may define therein their duties toward one another in the event of a third party claim against one or both arising out of their relationship. Terms of this kind may require one party to indemnify the other, under specified circumstances, for moneys paid or expenses incurred by the latter as a result of such claims. [Citation.] They may also assign one party, pursuant to the contract's language, responsibility for the other's legal defense when a third party claim is made against the latter. [Citation.] [¶] As befits the contractual nature of such arrangements, but subject to public policy and established rules of contract interpretation, the parties have great freedom to allocate such responsibilities as they see fit. [Citations.] . . . [Citations.] Hence, they may agree that the promisor's indemnity and/or defense obligations will apply only if the promisor was negligent, or, conversely, even if the promisor was not negligent. [Citations.] [¶] In general, such an agreement is construed under the same rules as govern the interpretation of other contracts. Effect is to be given to the parties' mutual intent [citation], as ascertained from the contract's language if it is clear and explicit [citation]." (*Crawford, supra*, 44 Cal.4th at pp. 551–552, italics omitted.)

Applying these principles to the Weather Shield-JMP agreement, the California Supreme Court first concluded that the unambiguous language of that agreement—which did not reference Weather Shield's negligence or liability to plaintiffs in the underlying action—signaled a duty to defend and indemnify in any suit " 'founded upon' claims *alleging* damage or loss arising from Weather Shield's negligen[ce] . . . even if it was later determined . . . that Weather Shield was not negligent." (*Crawford, supra*, 44 Cal.4th at p. 553.)

The court further held that Weather Shield's "separate and specific promise '. . . to defend . . .' . . . [¶] . . . clearly connotes an obligation of active responsibility . . . from the outset" of litigation. (*Crawford, supra*, 44 Cal.4th at p. 553, italics omitted.) In so concluding, the court relied both on a common sense meaning of a "contractual promise to 'defend' another against specified claims," which "necessarily arises as soon as such claims are made against the promisee" (*id.* at pp. 553–554), as well as on section 2778, which includes in the duty to indemnify a duty to defend upon request by the indemnitee. (§ 2778, subd. 4.) The court concluded that, in the absence of express contractual language to the contrary, Weather Shield had a duty to defend JMP immediately at the outset of litigation, and regardless of whether Weather Shield was ultimately found to have been negligent.

2. TKE breached the indemnity agreement, which required TKE to defend Catalina and Worthe unless and until TKE was found to be not at fault

Catalina and Worthe rely on *Crawford*'s characterization of a "duty to defend another" as indicating an immediate

obligation to start paying Catalina's defense expenses after Catalina's initial tender at the outset of the personal injury litigation, regardless of liability or negligence. (*Crawford, supra*, 44 Cal.4th at p. 554.) We agree that, at the time Catalina made its initial tender and for a significant period thereafter, TKE had an immediately enforceable obligation to pay Catalina and Worthe's defense costs. The allegations in plaintiffs' lawsuit met the requirements of the general duty to defend, and the apportionment clause—which we discuss in more detail in the next section—did not absolve TKE of its duty to defend at that point, as there had not yet been a determination of TKE's liability or fault. Therefore, at the time of Catalina's tenders to TKE, no provision of the agreement applied that "expressly provide[d]" for something other than *Crawford*'s default definition of "duty to defend" as immediately enforceable and untethered to fault. (*Crawford, supra*, 44 Cal.4th at pp. 555.)

That TKE breached its duty to defend by taking no action in response to any of Catalina's multiple tenders or the trial court's finding that TKE had an immediate duty to defend is not dispositive of the issue raised on appeal, however. The question remains whether, based on the state of the undisputed material facts at the summary judgment hearing, TKE's breach could have caused Catalina and Worthe any damages. The answer to that question depends on the meaning of the apportionment clause, which we address below.

3. The apportionment clause requires affirming summary judgment in TKE's favor because Catalina and Worthe have not suffered any damages

Although TKE breached its duty to defend, the application of the apportionment clause to the undisputed material facts presented on summary judgment shows that Catalina and Worthe suffered no damages as a result of that breach. This is because, even if TKE had advanced Catalina and Worthe's defense costs, the apportionment clause ultimately would have required Catalina and Worthe to return those defense costs to TKE after TKE established, as it did here, that it was not at fault.

Crawford recognized that parties are free to condition the duty to defend or indemnify on a finding of liability or fault (see *Crawford, supra*, 44 Cal.4th at pp. 551–552), but required that the parties "expressly [so] provide[ ]." (*Id.* at p. 555.) *Crawford* did not involve any language similar to the apportionment clause. The *Crawford* agreement included broad duties to indemnify and defend, much like the first two portions of the indemnification agreement here, but made no mention of liability or fault. Here, by contrast, the apportionment clause does just that.[5] Exactly

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[5] Catalina and Worthe also rely on *Centex Homes v. R-Help Construction Co., Inc.* (2019) 32 Cal.App.5th 1230 (*Centex*), in arguing that TKE's duty to defend was immediate and unaffected by subsequent liability determinations. But the indemnification agreement at issue in *Centex*—like the one at issue in *Crawford* and unlike the one at issue here—did not include any reference to liability or negligence findings, nor did it otherwise caveat the duty to defend. Thus, that the duty to defend under the

what role those concepts play in defining the scope of TKE's duty to defend obligation is the subject of heated debate between the parties. The salient question is thus whether the apportionment clause reflects the type of express provision contemplated by *Crawford*—that is, whether it reflects a decision by TKE and Catalina to abrogate the general indemnification and duty to defend commitments and, if so, under what circumstances.

Catalina and Worthe urge us to interpret the apportionment clause as limiting the general duty to defend obligation only if the court finds a party other than TKE is at fault. According to Catalina and Worthe's interpretation, the apportionment clause would "allow[ ] TKE to share the costs [of Catalina's defense and indemnify] if another entity"—i.e., not TKE—"is found at fault."

In assessing this proposed interpretation, we must look to the language of the parties' agreement, which "is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (§ 1638.) Nothing in the language of the apportionment clause requires an entity *other than TKE* be found at fault in order for the clause to relieve TKE of a complete duty to defend. Rather, it requires that more than one "party" be involved in a claim and, where that is the case, that *all* such "part[ies]" bear a share of the liability and defense costs in amounts proportionate to their levels of fault. No language in the apportionment clause suggests one such party (i.e., TKE) should be treated any differently than any other such "party." Nor is there any basis for interpreting the term "party" as referring to

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agreement in *Centex* could be " ' "extinguished only prospectively and not retroactively" ' " is of no assistance in interpreting the indemnity agreement here. (*Id.* at p. 1238.)

only parties other than TKE. To the contrary, the term "party" in the service agreement is elsewhere employed to refer to the parties *to that agreement*, which of course includes TKE.[6] (See § 1641 ["[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"].) Thus, the language of the agreement does not permit us to accept the interpretation Catalina and Worthe suggest.

The apportionment clause language instead requires that whenever more than one party to the indemnification agreement is named in a claim—as is the case here—each such party must bear responsibility for a portion of Catalina and Worth's defense costs (and any judgment or settlement) in an amount proportional to that party's fault, "notwithstanding" the broad indemnification and duty to defend obligations the indemnification agreement also contains. In this way, the apportionment clause expressly ties TKE's ultimate responsibility for Catalina and/or Worthe's defense expenses to the extent of TKE's liability, at least in a lawsuit where, as here, both TKE and Catalina are parties.

Catalina and Worthe argue that such an interpretation of the apportionment clause is inconsistent with and improperly reconsiders the duty-to-defend order. Not so. As noted, at the time of the court's duty-to-defend order, there had been no determination of any party's fault that would trigger reallocation of defense costs under the apportionment clause. Thus, the trial court correctly concluded that, at the time of its duty-to-defend

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[6] For example, in a separate section addressing indemnification in the context of patent claims, the service agreement refers to a "proprietary right of any third party."

order and subsequent order on the motion to enforce, TKE was obligated to fund Catalina and Worthe's defense.[7] But this does not preclude the apportionment clause's applicability once TKE's level of liability to plaintiff has been determined.

Catalina and Worth further argue that this interpretation of the apportionment clause yields absurd results. We disagree. There is nothing absurd about parties tying an indemnification obligation to a finding of negligence or liability by the indemnitor. Nor is it absurd for an agreement to include both an immediate defense obligation at the outset of litigation, and the possibility that, depending on the outcome of that litigation, the indemnitor ultimately may be entitled to retrieve those funds from the indemnitor. It is still a valuable right for an indemnitee to have its defense costs paid as they are incurred in litigation, even if, under some circumstances, the indemnitee may have to repay those costs. Nor is it unreasonable or absurd that TKE's ultimate duty to pay depends on whether TKE is named as a defendant alongside Catalina. In cases where, as here, plaintiffs believe or discover that TKE is at fault, plaintiffs will name TKE as a party, and the apportionment clause will function to assure Catalina bears responsibility for defense costs and liability to the extent it is also found to be at fault. In cases where TKE is at fault but not named as a party, the apportionment clause would not require such apportionment based on fault, but this difference in approach can be understood as seeking to avoid either (1) requiring a court to assess TKE's level of fault in an underlying action to which TKE is not named as a defendant,

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[7] To the extent the motion to enforce order implies otherwise, it was in error.

or (2) requiring Catalina to initiate separate proceedings to adjudicate TKE's level of fault in order to determine the scope of TKE's indemnification duties.

We acknowledge that the indemnity agreement initially speaks in terms of broad indemnification and duty to defend commitments, but ultimately offers a paltry level of protection for Catalina and Worthe when TKE is named alongside them in the underlying suit, but is not at fault. Nevertheless, this is the result of the language the parties chose. Because this outcome is not wholly absurd or unreasonable, ours is not to assess the wisdom of the parties' bargain or the efficiency of the contract's structure. Moreover, neither party has presented this court with an interpretation of the apportionment clause that reaches a different result without ignoring and/or inserting language therein. Nor can we conceive of an alternative interpretation that reaches a different result while still remaining true to any reasonable interpretation of the language in the contract.

Applying this interpretation of the indemnity agreement, the court correctly granted TKE's summary judgment motion. The trial court determined that there was no evidence from which a jury could conclude TKE had been negligent with respect to, or was otherwise liable for, plaintiffs' injury. On such a record, a finding of TKE's nonliability was inevitable. Under the plain meaning of the apportionment clause, TKE can only be ultimately responsible for Catalina's defense costs in an amount proportional to that level of fault—that is, under the undisputed facts presented at the summary judgment hearing, TKE can be held responsible for none of those defense costs. This would be the case under the apportionment clause whether or not Catalina is at fault, because the clause permits defense cost allocation to

any "party" only if that party has some level of fault. Therefore, once TKE established on summary judgment that it could not be found at fault, TKE was absolved of responsibility to pay any of Catalina and Worthe's defense costs.

Based on TKE's showing on summary judgment, Catalina and Worthe have suffered no damages as a result of TKE's breach of its duty to defend earlier in the personal injury action. We therefore conclude that the court correctly granted summary judgment in TKE's favor on Catalina and Worthe's cross-complaint.

B. *Disentitlement Doctrine*

Catalina and Worthe next argue that, under the disentitlement doctrine, because TKE refused to fund Catalina and Worthe's defense in contravention of the duty-to-defend order and the court's order on the motion to enforce, the trial court should have barred TKE from seeking summary judgment. (See *In re E.E.* (2020) 49 Cal.App.5th 195, 206–207 (*E.E.*).) Because disentitlement is an equitable doctrine based on the inherent power of the court, it is discretionary with the trial court and the standard of review is abuse of discretion. (See *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1272.) Although reasonable minds may differ regarding TKE's brazen refusal to take any action in response to the court's duty-to-defend order, the court did not abuse its discretion in failing to apply the disentitlement doctrine.

Even assuming Catalina and Worth have not forfeited this argument by failing to timely raise it in opposition to TKE's motion for summary judgment, we find no abuse of discretion in either the court's decision not to apply the disentitlement sanction *sua sponte* or its rejection of Catalina and Worthe's

disentitlement request in their motion for a new trial. Where reasonable minds can differ regarding whether such conduct merits application of the doctrine, we cannot reverse the court's discretionary decision, even assuming we may have reached a different result. Given the lack of a specific directive in the orders at issue, the court reasonably could conclude that equity did not warrant the imposition of "the 'ultimate sanction' for violating court orders." (*E.E., supra*, 49 Cal.App.5th at p. 207 [so describing the disentitlement doctrine].) We thus cannot say the court acted outside the scope of its broad discretion.

C. *Sufficiency of the Evidence to Preclude a Triable Issue of Material Fact as to TKE's Fault*

Catalina and Worthe next argue that, even if TKE's duty to defend does depend on whether TKE is found to be at fault, TKE did not establish that there was no triable issue as to TKE's fault. To support their argument, they cite the settlement and the fact that TKE paid the majority of the settlement amount. But in opposing summary judgment and in their subsequent motion to vacate, Catalina and Worthe did not argue that there was a triable issue of fact as to TKE's fault, and they have thus forfeited the argument. (See *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 [rejecting argument first raised on appeal from summary judgment ruling because "[i]t is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal"].)

Even if they had not forfeited the argument, however, and even assuming the authority they cite allows us to consider the settlement and settlement payment as evidence of liability (see *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115), Catalina and Worthe's arguments still would

not merit relief. First, the amounts paid by TKE and Catalina and Worthe under the settlement agreement were not before the court at the summary judgment phase; Catalina and Worthe first presented this to the court in a declaration Catalina and Worthe submitted in opposition to TKE's postjudgment attorney fees request. The settlement was before the court on summary judgment, but it expressly provides that it does not reflect any admission of fault or responsibility by any settling party. Thus, the court correctly concluded that Catalina "adduce[d] no evidence to raise any [triable] issue as to TKE's liability for plaintiffs' injuries." This makes sense, given that, as the court also noted, "[Catalina] [and Worthe] [did] not effectively dispute TKE's contention that it does not have any liability for the incident."

TKE'S APPEAL (CASE NO. B309162)

TKE seeks reversal of the trial court's order denying it prevailing party attorney fees under the attorney fees provision of the service agreement and section 1717. Under section 1717, "[i]n any action on a contract, where[, as here,] the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees in addition to other costs." (§ 1717, subd. (a).) "When a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action and the contract contains a provision for attorney fees, section 1717 entitles the successful party to recover reasonable attorney fees incurred in prosecution or defense of those claims." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103,

1109 (*Scott*).) Here, TKE did not "completely prevail[ ] on or defeat[ ] all contract claims" in either cross-complaint. (*Ibid.*) Although TKE ultimately achieved summary judgment on Catalina and Worthe's cross-complaint, TKE also lost a summary adjudication motion with respect to one of the causes of action therein. TKE appears to argue that because it successfully failed to comply with the court's order granting summary adjudication on the duty-to-defend issue, this partial win for Catalina and Worthe should not factor into the analysis. We disagree. And as to TKE's cross-complaint, TKE dismissed it before it could be adjudicated, so this reflects neither a win nor a loss for TKE.[8] TKE was not the total victor on either cross-complaint, and it is thus not entitled to attorney fees "as a matter of law." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 (*Hsu*).)

But this does not end the inquiry. "If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees. '[I]n deciding whether there is a "party prevailing on the contract,"

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[8] Because we do not rely on TKE's voluntarily dismissing its cross-complaint as a basis for determining TKE did not obtain a clear win, TKE's reliance on *Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254 is unavailing. That case concluded a cross-defendant who obtains summary judgment on a cross-complaint for indemnity can still be a prevailing party, even if that cross-defendant voluntarily dismissed its own cross-complaint for indemnity. (See *id.* at pp. 1270 & 1272–1273.) The case did not involve a situation in which both parties prevailed on summary judgment/adjudication motions, a key fact in the instant matter.

the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.' [Citation.]" (*Scott, supra*, 20 Cal.4th at p. 1109, quoting *Hsu, supra,* 9 Cal.4th at p. 876; see also *Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 439–44 ["[w]here neither party achieves a complete victory, the trial court has discretion to determine 'which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees' "].) In determining whether this is the case, courts must employ a "pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise." (*Jackson v. Homeowners Assn. Monte Vista Estates-East* (2001) 93 Cal.App.4th 773, 784.)

Here, TKE's litigation objectives with respect to the cross-complaints were (1) not funding Catalina and Worthe's legal expenses or any portion of a settlement or judgment on Catalina and Worthe's behalf, (2) securing payment from Catalina and Worthe to cover TKE's legal expenses in the action. TKE achieved neither objective; it received nothing from Catalina and Worthe to fund its defense, and paid a portion of the settlement to the plaintiffs without any determination as to what portion thereof, if any, was attributable to Catalina and Worthe's actions. On this basis, the trial court concluded that there was no prevailing party on the cross-complaints, and denied TKE's motion for attorney fees.

"When a court rules there is no prevailing party, we review the order for an abuse of discretion." (*Harris v. Rojas* (2021) 66 Cal.App.5th 817, 823; see *DisputeSuite.com v. Scoreinc.com*

(2017) 2 Cal.5th 968, 971.) The trial court has broad discretion in this regard, because it "gains familiarity with the parties and the attorneys during the case" and is thus in the best position to determine "what counts as a win." (*Harris, supra*, 66 Cal.App.5th at p. 825; see *Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1541 ["a trial court has broad discretion to determine the prevailing party in a mixed result case"].) TKE argues that the trial court exceeded the bounds of this broad discretion because it was the comparative " 'clear winner' " and there was a " 'lopsided' " result with one side obtaining comparatively " 'greater relief' " than the other. We disagree with this characterization of the litigation's outcome. As previously noted, neither party obtained any practical relief via its cross-complaint. In light of this, we cannot say the court abused its discretion in declining to find the parties' disparate levels of success on summary judgment and adjudication motions sufficient to render TKE the prevailing party. (See *Hsu, supra*, 9 Cal.4th at p. 877 [a court's prevailing party analysis should "respect substance rather than form"].)

DISPOSITION

The judgment and orders are affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

BENDIX, J.

MORI, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.