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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AMANDA QUILES, Plaintiff and Respondent, v. ARTHUR J. PARENT, JR., Defendant and Appellant.	G056687 (Super. Ct. No. 30-2010-00425532) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Timothy J. Stafford, Judge. Affirmed in part, reversed in part, and remanded with directions. Request for judicial notice. Denied.

Rutan & Tucker, Brian C. Sinclair and Maria Z. Stearns for Defendant and Appellant.

Bryan Schwartz Law and Bryan J. Schwartz; Levene, Neale, Bender, Yoo & Brill, Daniel H. Reiss and Beth Ann R. Young for Plaintiff and Respondent.

* * *

INTRODUCTION

In April 2016, following a jury trial, judgment was entered in the amount of $383,500 against defendant Arthur J. Parent, Jr. (Parent) in plaintiff Amanda Quiles's wrongful termination action. Parent filed a motion for a new trial, which challenged as excessive the jury's punitive damages award of $350,000. The trial court conditionally granted the new trial motion, subject to Quiles consenting to a reduction of the punitive damages award to $175,000; Quiles accepted the reduction. In October 2016, an amended judgment was entered which reflected the reduced punitive damages award and added an award of $689,310.04 in attorney fees and $50,591.69 in costs in favor of Quiles.

In early 2018, Quiles filed a memorandum of costs and a motion to recover attorney fees she incurred in enforcing the judgment. After several rounds of briefing and hearings, the trial court granted the motion, awarding Quiles the requested amounts of $493,017 in attorney fees and $27,879.09 in costs.

We reverse only the portion of the postjudgment order that awards Quiles attorney fees and costs incurred to defend against the reversal or modification of the judgment on appeal which the California Supreme Court in *Conservatorship of McQueen* (2014) 59 Cal.4th 602, 605 (*McQueen*) held are not recoverable under Code of Civil Procedure section 685.080.[1] We remand to the trial court to determine how much the attorney fees and costs award should be reduced under *McQueen*.

We otherwise affirm the postjudgment order in its entirety, rejecting Parent's contentions of error. Postjudgment interest began to accrue as of the date the original judgment was entered. Parent, therefore, had not satisfied the judgment by the time Quiles filed her memorandum of costs and motion to recover attorney fees. Although Quiles only served Parent's counsel and failed to serve Parent directly with her

[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

motion for attorney fees as required by section 685.080, Parent waived the defect in service by failing to raise that issue in his opposition and instead addressing the merits of Quiles's motion. Even if the issue of defective service had not been waived, Parent failed to show he had been prejudiced. Quiles was not estopped from seeking attorney fees and costs because her counsel mistakenly reported a lesser amount was owed on the judgment; there was no evidence Quiles had agreed to accept a lesser amount than was owed in full satisfaction of the judgment. The court did not otherwise abuse its discretion by awarding certain costs.

BACKGROUND

Although the procedural history of this case has been repeated in many of the appellate opinions it has yielded, we begin our background summary by quoting our prior opinion in *Quiles v. Parent* (2018) 28 Cal.App.5th 1000 to provide the general procedural history relevant to Parent's contentions in this latest appeal:

"In November 2010, Quiles, along with other individuals, filed a proposed class action against, inter alia, Koji's Japan Incorporated (Koji's) and Parent (collectively defendants), asserting several state and federal wage and hour claims and violation of California's unfair competition law. Plaintiffs amended their complaint several times to add, among other things, Quiles's individual wrongful employment termination claim in violation of the FLSA [Fair Labor Standards Act of 1938 (FLSA; 29 U.S.C. § 201 et seq.)].

"In early 2015, the trial court presided over a bench trial to determine joint employer and alter ego theories of liability. At the beginning of the trial, defendants declared bankruptcy. Parent was fined over $50,000 for making a frivolous bankruptcy filing. At the conclusion of the bench trial, the trial court found Parent qualified as a joint employer under the FLSA. [Footnote omitted.]

"A year later, the trial court conducted a jury trial of Quiles's individual FLSA claim against defendants for wrongful employment termination. According to the parties' joint statement of the case prepared for this phase of trial, 'Quiles claimed that she was wrongfully terminated from her employment when Koji's became aware that she was named as the representative claimant in this class action.' Quiles sought damages for past loss of earnings and emotional distress. Defendants argued Quiles's employment was terminated for 'legitimate reasons, based on her disciplinary record alone.'

"The jury found in favor of Quiles on her wrongful employment termination claim, finding on the special verdict form: (1) Quiles's lawsuit was a substantial motivating reason for her discharge; (2) defendants' conduct was a substantial factor in causing harm to Quiles; and (3) defendants failed to prove that they would have made the same decision based upon a legitimate, nonretaliatory reason. The jury awarded Quiles economic damages for loss of past earnings in the amount of $3,000; noneconomic damages, including emotional distress damages, in the amount of $27,500; and punitive damages in the amount of $350,000.

"Quiles filed a request to withdraw as a class representative and requested dismissal of her individual claims other than her wrongful employment termination claim that had been tried. The trial court granted Quiles's request and Quiles disclaimed any right to future recovery as a class member.

"In April 2016, judgment was entered in Quiles's favor and against defendants for the damages awarded by the jury, plus $3,000 in liquidated damages awarded by the trial court [citation], for a total damages award of $383,500. [Foonote omitted.] Blank lines were included in the judgment for attorney fees and costs of litigation awards.

"Defendants filed a motion for a new trial solely challenging the award of punitive damages. The trial court conditionally granted the new trial motion, subject to Quiles consenting to a reduction of the punitive damages award to $175,000. [Citation.]

Quiles accepted the proposed reduction, bringing the total damages award down to $208,500.

"In May 2016, Quiles filed a memorandum of costs and a supplemental memorandum of additional costs, which, together, sought a total costs award of $70,587.81. In June 2016, Quiles filed a motion seeking an attorney fees award in the total amount of $1,057,295.59 for the prosecution of her individual FLSA claim. . . . Defendants filed a motion to strike or tax costs and an opposition to the motion for attorney fees.

"Following a hearing on attorney fees and costs, the trial court awarded Quiles $689,310.04 in attorney fees by way of a detailed written ruling. In a separate order, the court awarded $50,591.69 in costs to Quiles. An amended judgment was entered [on October 18, 2016] which reflected the updated damage award (total of $208,500), the attorney fee award ($689,310.04),[2] and the costs award ($50,591.69)" for judgment in Quiles's favor in the total amount of $948,401.73. (*Quiles v. Parent, supra,* 28 Cal.App.5th at pp. 1005-1006.)[3]

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[2] Pursuant to the trial court's ruling on the attorney fees and costs request dated September 27, 2016, $35,573.40 of the $689,310.04 awarded in attorney fees constituted fees on fees. The parties do not dispute that postjudgment interest accrues at the rate of 10 percent per annum.

[3] Parent appealed from the amended judgment, challenging the attorney fees and costs portion of the amended judgment only. (*Quiles v. Parent, supra,* 28 Cal.App.5th at p. 1004.) We affirmed the amended judgment. (*Ibid.*)

During the pendency of that appeal, Parent filed a petition for a writ of supersedeas staying enforcement of the judgment as to the amount that remained owed on the judgment (attorney fees and costs only). (*Quiles v. Parent* (2017) 10 Cal.App.5th 130, 148.) We granted the petition without prejudice to the trial court exercising its discretion to impose a bond requirement on Parent. (*Ibid.*) The trial court thereafter exercised its discretion and required Parent to post a bond under section 917.9. Parent filed an appeal from that order. This court summarily denied Parent's petition for writ of supersedeas and request for a temporary stay challenging the court's order imposing the discretionary undertaking under section 917.9, and we affirmed that order. (*Quiles v. Parent* (Nov. 2, 2018, G054907) [nonpub. opn.].)

Quiles took steps to enforce the judgment by, inter alia, filing a writ of execution, a motion for appointment of a receiver, and an application for an order compelling appearance and examination of judgment debtor. During the same time period, it is undisputed Parent made the following payments to Quiles to pay down the judgment: (1) $50,000 on October 17, 2016; (2) $158,500 on January 10, 2017; (3) $13,916.17 on January 17, 2017; (4) $150,000 on August 10, 2017; (5) $50,000 on August 11, 2017; (6) $12,233.22 on August 28, 2017; and (7) $605,000 on January 24, 2018.

On January 29, 2018, Quiles filed a memorandum of costs after judgment, including attorney fees, that was served on Parent's counsel.[4] On February 6, 2018, she filed and served on Parent's counsel a memorandum of points and authorities and multiple declarations and exhibits in support of her motion for the recovery of postjudgment attorney fees and costs in which she sought $514,763.50 in attorney fees and $27,879.09 in associated costs.[5]

On February 8, 2018, Parent filed a motion to strike or tax the memorandum of costs on the ground Quiles's request for costs was statutorily time-barred because Parent had already fully satisfied the judgment. Parent also argued

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[4] Two months later, on April 16, 2018, Quiles served a document entitled "Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest" on Parent directly. A copy of the memorandum itself is not attached to the proof of service. In the appellate opening brief, Parent states that the cost memorandum served on him on April 16, 2018 was "identical to the one filed with the trial court on January 29, 2018."

[5] Our record does not include a notice of motion and motion for attorney fees filed on that date. As discussed *post*, on March 1, 2018, Parent filed an opposition to the motion; the opposition did not address whether the notice of motion and motion had been filed but instead addressed the merits. On March 2, 2018, Quiles filed and served on Parent's counsel another notice of motion and motion for the recovery of postjudgment attorney fees and costs. The record does not explain this sequence of events.

Quiles's requested costs, including attorney fees, should be taxed because some were not permitted by statute and were otherwise unreasonable and unnecessary.

On March 2, 2018, Quiles filed a motion for attorney fees and costs pursuant to the FLSA, seeking $493,017 in attorney fees and $27,879.09 in collection costs. Parent filed an opposition arguing Quiles's request for fees and costs was untimely under section 685.080 and was otherwise unreasonable and unnecessary.

On March 9, 2018, Parent made a $10,000 payment on the judgment.

For the first time at the March 15, 2018 hearing on the motion for postjudgment attorney fees and costs, Parent argued the motion should be denied because Quiles had not directly served Parent with her moving papers as required by statute. The court took the matter under submission. In a minute order dated March 16, 2018, the trial court continued the matter to April 19, 2018 and ordered the parties to file briefs addressing "the effect of Code of Civil Procedure section 695.220, if any, on Defendants' payments toward the Amended Judgment."

The parties filed supplemental briefs in response to the court's order. In Quiles's supplemental brief filed April 6, 2018, Quiles asserted that at the time she filed her motion for attorney fees and costs, Parent still owed over $51,000 on the judgment.[6] Parent argued in his supplemental brief that Quiles's counsel had previously represented that much less remained owing on the judgment and he had paid that amount in full before Quiles pursued postjudgment attorney fees and costs. Quiles explained that her counsel's prior assertions regarding the amount due on the judgment erroneously disregarded that the fees and costs awarded by the trial court and set forth in the amended judgment were awarded nunc pro tunc to the date of the original judgment and therefore accrued interest beginning in April 2016.

[6] Quiles served this document, as well as a subsequent motion to strike Parent's brief and objection to Parent's objection to supplemental brief, on Parent directly and also on Parent's counsel.

At the continued hearing, Quiles's counsel urged the court to continue the hearing to allow Quiles to personally serve Parent "if it is an issue" and make sure Parent had notice of "what's going on here." Parent's counsel objected to continuing the hearing, stating, "That's just an effort to bring in new evidence."

In a minute order dated April 20, 2018, the trial court stated: "[T]he Court still has conflicting statements concerning whether the judgment was fully satisfied. Plaintiff and Defendant have taken contradictory positions on this factual issue. The conflict is not legal, but apparently factual. [¶] Therefore, the court requests the parties submit a Joint Statement within fifteen (15) days regarding the extent that the judgment has been satisfied. If the parties have a conflict of the issue, the Joint Statement should explain how the parties came to different positions."

Quiles's portion of the parties' joint statement[7] included the following table showing the progression of the balance of the judgment in light of Parent's payments and the accrual of interest beginning the date the original judgment was entered in April 2016:

[7] The joint statement was served on Parent directly and on Parent's attorney.

Date	Payment by Parent	Fees & Costs[8]	Days[9]	Newly-accrued interest	Unpaid Interest	Interest Reduction	Principal Reduction	Principal Balance Remaining on Judgment
4/19/2016								912,828.33
10/17/2016	50,000.00	0.00	181	45,266.29	0.00	45,266.29	4,733.71	908,094.62
10/18/2016	0.00	35,573.40	1	248.79	248.79	0.00	0.00	943,668.02
1/10/2017	158,500.00	0.00	84	21,717.29	0.00	21,966.08	136,533.92	807,134.10
1/17/2017	13,916.17	0.00	7	1,547.93	0.00	1,547.93	12,368.24	794,765.86
8/10/2017	150,000.00	0.00	205	44,637.54	0.00	44,637.54	105,362.46	689,403.40
8/11/2017	50,000.00	0.00	1	188.88	0.00	188.88	49,811.12	639,592.28
8/28/2017	12,233.22	0.00	17	2,978.92	0.00	2,978.92	9,254.30	630,337.98
1/24/2018	605,000.00	0.00	149	25,731.60	0.00	25,731.60	579,268.40	51,069.58
3/9/2018	10,000.00	0.00	44	615.63	0.00	615.63	9,384.37	41,685.21
4/30/2018				593.87				42,279.08

[8] The single entry in this column for $35,573.40 represents the "fees on fees" determined by the trial court to have been incurred in connection with the attorney fees and costs award that was incorporated into the judgment.

[9] The column entitled "Days" is explained in the joint statement: "To correctly calculate interest on a daily basis, this column reflects the number [of] days from the date the amount owed on Plaintiff's judgment was changed by an order of the trial court or a payment by Defendant until the next such change or payment."

In Parent's portion of the joint statement, Parent did not challenge the accuracy of any of the calculations; his primary challenge was that postjudgment interest did not begin to accrue until the date the amended judgment was entered on October 18, 2016.

On June 29, 2018, the trial court ruled on the motion for attorney fees and motion to tax costs: "The Court finds that on April 30, 2018, Defendants still owed the outstanding balance of $42,279.08. When a judgment debtor makes a payment, the payment is first credited toward accrued post-judgment interest and then to principal. (See Code Civ. Proc. § 695.220; *Howard v. American* [*National*] *Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 518.)

"Plaintiff Amanda Quiles' Motion for Collections Attorney Fees and Costs is GRANTED. Under the Federal Fair Labor Standards Act, 29 U.S.C. 216(b) and Code Civ. Proc., § 685.040, the Court awards Plaintiff $493,017.00 against Defendants and collection costs in the sum of $27,879.09.

"The Court finds that the hourly rates charged and the number of hours billed were reasonable and necessary. 'A trial court "assessing attorney fees begins with a touchstone or lodestar figure, based on the "careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." . . . The court tabulates the attorney fee touchstone, or lodestar, by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work.' [Citation.] 'A defendant "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response."' [Citation.] Defendant Arthur J. Parent's Motion to Strike or Tax Plaintiff's Memorandum of Costs is DENIED. Defendants have not completely satisfied the Judgment."

Parent appealed from the June 29, 2018 order.[10]

DISCUSSION

We review issues of statutory interpretation and entitlement to attorney fees de novo. (*Wertheim LLC v. Currency Corp.* (2019) 35 Cal.App.5th 1124, 1131.)

I.

RECOVERY OF POSTJUDGMENT ATTORNEY FEES AND COSTS GENERALLY

"Title 9 of part 2 of the Code of Civil Procedure (§§ 680.010-724.260) is known as the Enforcement of Judgments Law." (*McQueen, supra,* 59 Cal.4th at p. 607.) Section 685.040 provides: "The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5."

Eligibility to recover such costs, however, is contingent on satisfying the temporal and other procedural requirements of sections 685.070 and 685.080.

Section 685.070 provides a judgment creditor may claim enumerated postjudgment enforcement costs specified in subdivision (a) by filing a memorandum of costs pursuant to subdivision (b), which provides: "*Before the judgment is fully satisfied*

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[10] After the trial court granted Quiles's motion requiring Parent to post an undertaking in order to stay enforcement of the court's June 29, 2018 order awarding Quiles postjudgment fees and costs pending resolution of Parent's appeal of that order, Parent filed an appeal from the order requiring him to post the undertaking and also filed a petition for writ of supersedeas and request for immediate stay. This court denied the petition for writ of supersedeas and request for immediate stay. Parent's appeal from the court's order imposing an undertaking is still pending.

but not later than two years after the costs have been incurred, the judgment creditor claiming costs under this section shall file a memorandum of costs with the court clerk *and serve a copy on the judgment debtor*. Service shall be made personally or by mail. The memorandum of costs shall be executed under oath by a person who has knowledge of the facts and shall state that to the person's best knowledge and belief the costs are correct, are reasonable and necessary, and have not been satisfied." (Italics added.)

Section 685.080 provides that a judgment creditor may claim costs authorized by section 685.040, which include but are not limited to costs that may be claimed by section 685.070, by filing a noticed motion. The motion "*shall be made before the judgment is satisfied in full*, but not later than two years after the costs have been incurred" (§ 685.080, subd. (a), italics added) and "shall be served on the judgment debtor" (*id.*, subd. (b)).[11]

In *McQueen, supra,* 59 Cal.4th at page 615, the California Supreme Court explained: "'[T]he statutory purpose of requiring that the motion for enforcement costs be brought "before the judgment is satisfied in full" [citation] is to avoid a situation

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[11] Section 684.020 provides: "(a) Except as provided in subdivision (b), when a writ, notice, order, or other paper is required to be served under this title on the judgment debtor, *it shall be served on the judgment debtor instead of the attorney for the judgment debtor*. [¶] (b) The writ, notice, order, or other paper shall be served on the attorney specified by the judgment debtor rather than on the judgment debtor if all of the following requirements are satisfied: [¶] (1) The judgment debtor has filed with the court and served on the judgment creditor a request that service on the judgment debtor under this title be made by serving the attorney specified in the request. Service on the judgment creditor of the request shall be made personally or by mail. The request shall include a consent, signed by the attorney, to receive service under this title on behalf of the judgment debtor. [¶] (2) The request has not been revoked by the judgment debtor. [¶] (3) The consent to receive service has not been revoked by the attorney. [¶] (c) A request or consent under subdivision (b) may be revoked by filing with the court a notice revoking the request or consent. A copy of the notice revoking the request or consent shall be served on the judgment creditor. Service shall be made personally or by mail. The judgment creditor is not bound by the revocation until the judgment creditor has received a copy of the notice revoking the request or consent." The exception in subdivision (b) of section 684.020 was not invoked here.

where a judgment debtor has paid off the entirety of what he [justifiably] believes to be his obligation in the entire case, only to be confronted later with a motion for yet more fees.'"

II.

WHETHER PARENT HAD SATISFIED THE JUDGMENT BY THE TIME QUILES SOUGHT POSTJUDGMENT ATTORNEY FEES AND COSTS DEPENDS ON THE DATE POSTJUDGMENT INTEREST BEGAN TO ACCRUE.

Parent argues that as of the time Quiles filed her motion to recover postjudgment attorney fees and costs, he had fully satisfied the judgment. Parent's calculations are dependent on his assumption that postjudgment interest did not begin to accrue in this case until the amended judgment was filed in October 2016. Quiles's calculations, summarized in the chart set forth in the Background section *ante*, assume postjudgment interest began to accrue in April 2016. As we explain, we agree postjudgment interest began to accrue on the original judgment beginning April 2016, there is no dispute about the accuracy of Quiles's numbers and calculations based on that assumption, and, therefore, her memorandum of costs and motion for attorney fees were not barred because Parent had not satisfied the judgment.

"The principal amount of a judgment is the amount of any damages awarded, plus any costs (including attorney fees) to which the prevailing party may be entitled, less any amounts paid by the judgment debtor. (§ 680.300.) Postjudgment interest accrues on the principal amount of the judgment at the rate of 10 percent per annum. (§ 685.010.) How the costs are added to the judgment, and how interest is

calculated, turns on the manner in which those costs were imposed or the purpose for which the costs were incurred. [¶] . . . As a general rule, the prevailing party may recover certain statutory costs incurred in the litigation up to and including entry of judgment. (§§ 1032, 1033.5.) These costs may include attorney fees, if authorized by contract, statute . . . or law. (§ 1033.5, subd. (a)(10).) Most costs are obtained by filing a cost memorandum, although attorney fees require a separate noticed motion. (§ 1033.5, subd. (c); Cal. Rules of Court, rule 3.1702.) Where costs are established by the judgment, but the amount of the award is ascertained at a later time, the court clerk enters the costs on the judgment after the amount is determined. (Cal. Rules of Court, rule 3.1700(b)(4); *Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 369.) In other words, the amount of the cost award is incorporated into the judgment." (*Lucky v. United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, 137.)

Therefore, "[g]enerally, when a judgment includes an award of costs and fees, the amount of the award is left blank for future determination. [Citations.] After the parties file their motions for costs and any motions to tax costs, the trial court holds a postjudgment hearing to determine the merits of the competing contentions. When the court's subsequent order setting the final amount is filed, the clerk enters the amounts on the judgment nunc pro tunc." (*Bankes v. Lucas*, *supra*, 9 Cal.App.4th at p. 369.)

"Interest at the rate of 10 percent per annum accrues on the unpaid principal amount of the judgment (§ 685.010), including the amount of the cost award and attorney fees award (§ 680.300), as of the date of judgment entry (§ 685.020, subd. (a))." (*Lucky*

United Properties Investment, Inc. v. Lee, supra, 185 Cal.App.4th at pp. 137-138.)[12] "Postjudgment interest generally runs from the date judgment is originally entered, and its purpose 'is to compensate the judgment creditor for the time value of the money until the judgment is paid.'" (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1023; see § 685.020, subd. (a) ["interest commences to accrue on a money judgment on the date of entry of the judgment"]; *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 350 [noting postjudgment interest "reduces the incentive to delay payment" and "serves to adequately compensate plaintiffs"].)

Section 695.220 provides that "[m]oney received in satisfaction of a money judgment . . . is to be credited as follows: [¶] (a) The money is first to be credited against the amounts described in subdivision (b) of Section 685.050 that are collected by the levying officer. [¶] (b) Any remaining money is next to be credited against any fee due the court pursuant to Section 6103.5 or 68511.3 of the Government Code, which are to be remitted to the court by the levying officer. [¶] (c) *Any remaining money is next to be credited against the accrued interest that remains unsatisfied*. [¶] (d) Any remaining money is to be credited against the principal amount of the judgment remaining unsatisfied. If the judgment is payable in installments, the remaining money is to be credited against the matured installments in the order in which they matured." (Italics added.)

The above-cited authorities establish that prejudgment interest begins to run at the time judgment is entered and a subsequent modification to the judgment to add an

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[12] "A money judgment automatically accrues interest by force of law, regardless of whether it explicitly declares as much. [Citations.] Postjudgment interest also automatically accrues on any unpaid costs and attorney fee awards. (§§ 680.300 ['"Principal amount of the judgment" means the total amount of the judgment as entered . . . together with the costs thereafter added to the judgment pursuant to Section 685.090 . . .'], 685.090, 1033.5, subd. (a)(10) [costs include attorney fees if authorized by contract, statute, or law]; *Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 599.)" (*Hernandez v. Siegel* (2014) 230 Cal.App.4th 165, 172.)

award of prevailing party attorney fees and costs is entered nunc pro tunc so as to preserve the right to postjudgment interest that accrues after the judgment was originally entered until the attorney fees and cost award is determined.

Parent argues the entry of the *amended* judgment in October 2016 had the effect of superseding and thereby nullifying the original judgment. Citing *O'Connor v. Skelton* (1961) 195 Cal.App.2d 612 and *George v. Bekins Van & Storage Co.* (1948) 83 Cal.App.2d 478, Parent argues that because the amended judgment not only included the award of attorney fees and costs, but also incorporated the trial court's ruling on the motion for new trial reducing the amount of punitive damages, the amended judgment constituted a material and substantial modification of the original judgment, rendering the original judgment ineffective. Therefore postjudgment interest, his argument continues, did not began to accrue in this case any earlier than October 16, 2016 because the amended judgment entered that day was the only judgment from which interest might accrue.

Both cases cited by Parent address whether a party forfeits an appeal for failure to file a timely notice of appeal from an originally entered judgment as opposed to an amended judgment. Neither of the cases cited by Parent addresses the accrual of postjudgment interest. Parent has presented no authority that supports his position that Quiles forfeited six months of postjudgment interest on the judgment simply because in postjudgment motions, the trial court reduced the amount of the punitive damages award and ordered entry of an amended judgment accordingly. As of the time the amended judgment was entered in October 2016, postjudgment interest had already accrued on the judgment by operation of law. No legal authority suggests the amount of that interest is wiped out instead of adjusted in light of the amendments to the original judgment as occurred here.

Other than Quiles's assumption that prejudgment interest began to accrue when the original judgment was entered in April 2016, Parent does not challenge Quiles's

calculations which, pursuant to section 695.220, applied Parent's payments to accrued interest before the principal judgment and showed that as of February 2018, Parent still owed $51,069.59 on the principal judgment. After Parent made a $10,000 payment in March 2018, he owed $42,279.08 as of April 30, 2018. As the judgment had not yet been satisfied within the meaning of section 685.080, Quiles's motion to recover postjudgment attorney fees and costs was not statutorily barred as untimely.

III.

ALTHOUGH QUILES FAILED TO SERVE PARENT DIRECTLY WITH THE MOTION TO RECOVER ATTORNEY FEES INCURRED TO ENFORCE THE JUDGMENT, PARENT WAIVED THAT ARGUMENT AND OTHERWISE FAILED TO SHOW PREJUDICE.

Parent contends that Quiles never served him directly (as opposed to service through his counsel) with a noticed motion for postjudgment attorney fees and costs as required by section 685.080. Quiles served only Parent's counsel on February 6, 2018 with her memorandum of points and authorities and declarations in support of her motion to recover enforcement costs, including attorney fees, and later on March 2, 2018, served only Parent's counsel with the notice of motion and motion. Quiles only served the memorandum of costs on Parent's counsel on January 26, 2018; on April 16, 2018, she directly served Parent, as well as his counsel, with the same memorandum of costs as required by section 685.070.

Parent argues that because he was not directly served with the noticed motion for enforcement costs, including attorney fees, "Quiles is limited to those specific costs listed in section 685.070" and the "trial court committed legal error by awarding costs well beyond those allowed by section 685.070" pursuant to section 685.080.[13]

[13] Parent identifies the awarded costs that were not allowed by section 685.070 as (1) costs associated with the order for appearance of the judgment debtor for examination; (2) transportation costs including BART fares, parking fares, and airfare; (3) legal research fees; (4) copying costs; (5) postage; (6) court costs for obtaining a certified copy of the judgment; (7) fees for downloading court documents; and (8) outside counsel costs.

Parent's argument that an attorney fees motion under section 685.080 is automatically defeated if it was improperly served is inconsistent with the statute's language and with case law addressing the effect of defective notice and service in the context of statutory motions.

Although section 685.080, subdivision (b) requires direct service on a judgment debtor unless the judgment debtor has taken certain steps to authorize his or her attorney to accept service on his or her behalf, nothing in section 685.080 provides that a trial court is prohibited in all cases from awarding postjudgment enforcement attorney fees and costs when the judgment debtor was not directly served. In contrast, section 683.160, which also falls within the Enforcement of Judgments Law, expressly conditions the renewal of a judgment on completion of direct service of the notice of renewal on the judgment debtor. Subdivision (b) of section 683.160 provides: "Until proof of service is filed . . . no writ may be issued, nor may any enforcement proceedings be commenced to enforce the judgment, except to the extent that the judgment would be enforceable had it not been renewed." Section 685.080 does not contain a similar condition.

"It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion. [Citations.] This rule applies even when no notice was given at all. [Citations.] Accordingly, a party who appears and contests a motion in the court below cannot object on appeal or by seeking extraordinary relief in the appellate court that he had no notice of the motion or that the notice was insufficient or defective.'" (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697 (*Carlton*); see *De Luca v. Board of Supervisors* (1955) 134 Cal.App.2d 606, 609 ["The general rule is that one who has been notified to attend a certain proceeding and does do so, cannot be heard to complain of the alleged insufficiency of the notice; it has in such instance served its purpose"].)

In *Carlton, supra,* 77 Cal.App.4th at page 696, the plaintiff argued the trial court erroneously granted the defendant's motion for summary judgment because it had not been served 28 days before the hearing as required by section 437c, subdivision (a) and because the proof of service was inadequate. The appellate court concluded the plaintiff had waived the argument that he had not been properly served because he had filed an opposition to the motion for summary judgment and appeared at the hearing on the motion at which he presented argument. The appellate court noted: "At no time did [the plaintiff] request a continuance of the summary judgment hearing or contend he was prejudiced by inadequate notice or service. He simply stated that service had not been made in compliance with Code of Civil Procedure section 1011." (*Carlton, supra,* 77 Cal.App.4th at p. 697.)

The *Carlton* court explained: "This court understands the dilemma faced by an attorney who claims his client was not properly served with motion papers and/or that inadequate notice of the hearing was received. If counsel is convinced his or her legal position is correct, he or she may appear at the hearing without filing a response to the motion and request a continuance for the purpose of preparing a proper response. If counsel makes a complete record relating to both the defective service and/or inadequate notice and the inability to prepare a proper response, and the court denies the continuance, the record will be well preserved for any future writ proceeding or appeal. [¶] If counsel is unwilling to take the chance that a continuance will be granted, he or she should file the best opposition possible under the circumstances. The opposition should include counsel's position on the defective-service/inadequate-notice issue, as well as the merits. The opposition should contain a complete discussion of counsel's position as to why a more complete opposition was not able to be filed (e.g., because the defective notice did not give counsel adequate time to prepare a response). Counsel should then appear at the hearing, object to the hearing taking place because the service was defective and/or inadequate notice of the hearing was received; again explain to the court the

prejudice that has been suffered by reason of the defective service and/or inadequate notice; and request a continuance of the hearing so that a proper response to the motion may be filed. Obviously, if the court denies a continuance, counsel should be prepared to argue the motion on the merits. If, however, the steps described in this paragraph are taken, the record will be well preserved for any future writ proceeding or appeal. [¶] None of these steps [was] taken by [the plaintiff] in this case. Although he did raise the issue of inadequate service in his opposition at the summary judgment hearing, he nevertheless filed a response to the motion for summary judgment, never claimed he did not have adequate time to prepare a response, appeared at the hearing, argued the merits, never requested a continuance, and never claimed he was prejudiced by the defective service or inadequate notice of hearing. As stated, under these circumstances, we conclude [the plaintiff] waived any alleged defective service or inadequate notice." (*Carlton, supra,* 77 Cal.App.4th at pp. 697-698.)

In *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1288 (*Reedy*), the defendants contended the plaintiff's motions for terminating sanctions were defective because, inter alia, they were made without the statutorily required notice period. A panel of this court held "[t]he contention regarding proper notice fails for at least two reasons. First, the issue was clearly waived. Although [the defendants'] oppositions to [the plaintiff's] motions in limine for terminating sanctions were—to put it mildly—cursory, they did file written opposition. And in doing so, they never so much as suggested notice was defective. [The defendants] also appeared at the commencement of trial when the court considered the motions and took them under submission—again without asserting any defect in the notice." (*Id.* at p. 1288; see *In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 13, fn. omitted [addressing party's claim he did not receive statutorily prescribed notice of the continued order to show cause hearing, appellate court stated "[t]o preserve a claim to defective notice of motion or other hearing, the objection

must be raised at the earliest opportunity and accompanied by some indication of prejudice"].)

Even if a party timely asserts an objection to a motion based on defective notice, the party must also show prejudice resulting from the defective notice. The *Reedy* court stated: "And this brings us to the second major flaw in [the defendants'] inadequate notice argument. In order to obtain a reversal based upon such a procedural flaw, the appellant must demonstrate not only that the notice was defective but that he or she was *prejudiced*." (*Reedy, supra,* 148 Cal.App.4th at p. 1289; see *Lever v. Garrogian* (1974) 41 Cal.App.3d 37, 40 [citing section 475, appellate court stated, "[p]rocedural defects which do not affect the substantial rights of the parties do not constitute reversible error"].) The appellate court in *Reedy* concluded "not only have [the defendants] failed to make any showing of prejudice, but an objective review of the facts conclusively negates the idea." (*Reedy, supra,* 148 Cal.App.4th at p. 1289.) The court noted the defendants had received notice that terminating sanctions were to be considered at trial, and while a decision on such sanctions was pending, defendants never attempted to offer additional opposition on the merits of the sanctions motions. (*Id.* at pp. 1289-1290.)

The record here shows Parent waived his objection that he was not directly served with the motion for attorney fees. In neither Parent's motion to strike or tax Quiles's memorandum of costs filed on February 8, 2018, nor his opposition to Quiles's motion for postjudgment attorney fees filed on March 1, 2018, did he argue that service of the memorandum of costs and the motion for attorney fees was defective because he was not directly served with either document. Instead, in both instances, his attorneys filed opposition to Quiles's requests for postjudgment enforcement costs on the merits; Parent does not contend they were unauthorized to do so on his behalf. Not until the March 15, 2018 hearing on Parent's motion to tax costs and Quiles's motion to recover enforcement costs did Parent first raise the issue that Quiles had failed to directly serve him with her submissions as required by statute. At a subsequent hearing, Quiles's

counsel specifically requested that the court continue the matter to enable Quiles to ensure the proper notice had been given. Parent's counsel balked at the continuance request, arguing that Quiles was simply seeking a way to introduce more evidence. Parent thereafter continued to participate in multiple hearings and rounds of briefing addressing the merits of the motion.

Even if Parent's defective service argument had been preserved, Parent has not demonstrated he was prejudiced. Parent argues that he does not need to show prejudice because section 685.080 does not expressly contain a prejudice requirement. But neither did the statutes authorizing the motions at issue in *Carlton* and *Reedy*, discussed *ante*. In his appellate reply brief, Parent argues "it is possible—in fact, probable—that Parent would have retained different counsel to defend against the motion for enforcement costs had he been served with the motion, but he did not have that opportunity. Hence, even though Parent need not show prejudice, Parent has been prejudiced." Parent's assertion that he might have retained different counsel to defend against Quiles's efforts to recover postjudgment attorney fees and enforcement costs is unsupported by any declaration; no such assertion was ever presented in the trial court.

Parent did not contend in the trial court and does not contend on appeal that he was unaware of Quiles's memorandum of costs and motion for postjudgment attorney fees when they were served on his counsel or that he required more time to oppose Quiles's motion to his satisfaction. He opposed Quiles's requests on the merits. Again, not only did Parent fail to request a continuance on the hearing in order to provide him time to oppose Quiles's requests, he opposed her request for a continuance sought by her to ensure he directly received sufficient notice.

In sum, Parent did not preserve his objection that he was not directly served with Quiles's motion for attorney fees as required by section 685.080 but, even if he had, his argument fails because he has not demonstrated prejudice.

IV.

QUILES WAS NOT ESTOPPED FROM ASSERTING THAT THE JUDGMENT REMAINED UNSATISFIED AS OF FEBRUARY 2018.

Parent argues Quiles was equitably and/or judicially estopped from asserting that her motion for postjudgment attorney fees and costs was timely because her counsel, on prior occasions, had inaccurately represented a lesser outstanding balance on the principal judgment. Parent argues he justifiably relied on Quiles's counsel's representations in making payments on the judgment and therefore Parent's right to postjudgment attorney fees and costs should be forfeited.

In the parties' joint statement filed in the trial court, Parent stated that Quiles's counsel "committed not once, but twice in writing to accept a lesser, specific amount, basing the interest on the October 18, 2016 amended judgment date which the Defendant relied upon and based its payment of judgment on." In his appellate opening brief, Parent argues that Quiles reiterated her miscalculation in the memorandum of costs itself.

Quiles's counsel explained that he had previously miscalculated the amount remaining due on the judgment by failing to take into account the accrual of postjudgment interest beginning the date the original judgment was entered (as opposed to the date the amended judgment was entered) and the order of application of payments received from Parent to the judgment debt under section 695.220, discussed *ante*. In the parties' joint statement, Quiles's counsel stated Quiles "never 'committed' to accept less than the full, due fees-costs, including fees-costs for enforcement of the judgment–which are what Defendant Parent seeks to avoid with his misleading current position." Parent does not contend Quiles had agreed to receive less than the full amount due under the judgment in full satisfaction of Parent's debt to her. (See *McQueen, supra*, 59 Cal.4th at p. 616 ["Under sections 685.070 and 685.080, the judgment creditor cannot accept a payment as full satisfaction of the judgment, then file a memorandum or motion for additional enforcement costs and fees"].) He asserts Quiles's miscalculations regarding

the balance of the judgment estop her from collecting enforcement costs and attorney fees.

"To prove equitable estoppel, one must show (1) a representation or concealment of material facts; (2) made with knowledge, actual or virtual, of the facts; (3) to a party ignorant, actually and permissibly, of the truth; (4) with the intention, actual or virtual, that the ignorant party act on it; and (5) the ignorant party relied on it." (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 571.) Here, none of the factors necessary to the determination of whether Parent had satisfied the judgment as of February 2018 was unknown to Parent. Parent knew how much was owed on the judgment, the rate of postjudgment interest, and the amount of his payments on the judgment. He therefore cannot claim ignorant party status in the context of Quiles's counsel's mistake of law in calculating how much remained due on the judgment. Furthermore, Parent's obligation to pay the judgment is a matter of law. He cannot be said to have detrimentally relied on Quiles's counsel's calculation errors by paying down a judgment he was required by law to pay. Furthermore, there is no evidence whatsoever in our record that Quiles agreed to settle for payment of a lesser amount than the full judgment principal in exchange for immediate payment.

The doctrine of judicial estoppel applies "when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.)

"'[J]udicial estoppel is an equitable doctrine, and its application, even where all necessary elements are present, is discretionary.' [Citations.] Moreover, because judicial estoppel is an extraordinary and equitable remedy that can impinge on

the truth-seeking function of the court and produce harsh consequences, it must be 'applied with caution and limited to egregious circumstances' [citations], that is, '"'when a party's inconsistent behavior will otherwise result in a miscarriage of justice.'"'" (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449, italics omitted.)

Parent's judicial estoppel argument gets no further than the second element. Quiles's counsel's miscalculations were never accepted by the trial court or otherwise incorporated into any order of the court. Judicial estoppel does not apply.

V.

ATTORNEY FEES AND COSTS INCURRED IN APPELLATE WORK

Parent contends that the trial court erred by awarding attorney fees and costs associated with Quiles's appellate work that were not recoverable as fees and costs incurred to enforce the judgment within the meaning of sections 685.070 and 685.080.

In *McQueen, supra,* 59 Cal.4th at page 608, the California Supreme Court explained: "[W]here attorney fees are authorized by statute . . . , fees awarded for expenses incurred on appeal from the trial court judgment are not governed by the procedures of the Enforcement of Judgments Law. Rather, they are recovered under the procedures set forth in court rules promulgated pursuant to Code of Civil Procedure section 1034, subdivision (b). [¶] Nothing in our statutes or court rules suggests appellate fees come within the Enforcement of Judgments Law. The statutes and rules distinctly address three different types of costs and fees: *prejudgment* costs, including attorney fees where authorized by contract, statute or law (§ 1033.5, subd. (a)(10)), are recovered through procedures established under section 1034, subdivision (a) and rules 3.1700 and 3.1702(b); *appellate* costs and fees are recovered under section 1034, subdivision (b) and rules 3.1702(c) and 8.278; and postjudgment *enforcement* costs and fees are recovered under the Enforcement of Judgments Law, specifically sections 685.040 to 685.095." (Fns. omitted.)

The Supreme Court in *McQueen* continued: "Speaking more broadly, our procedural statutes and rules do not treat civil appeals as a part of the enforcement of judgment process. As stated above, the Enforcement of Judgments Law constitutes title 9 of part 2 of the Code of Civil Procedure, while civil appeals are governed by title 13 of that part (§§ 901-923) and by court rules prescribed pursuant to section 901. Under section 916, subdivision (a), the perfecting of an appeal generally stays, inter alia, 'enforcement of the judgment or order' appealed from. Similarly, section 708.010, subdivision (b), part of the Enforcement of Judgments Law, provides for a stay of certain discovery procedures in aid of enforcement '[i]f enforcement of the judgment is stayed on appeal by the giving of a sufficient undertaking.' (See § 697.040, subd. (a) [effect on liens when 'enforcement of the judgment is stayed on appeal'].) In all these statutes, 'enforcement' clearly refers to proceedings other than the appeal.

"While the Enforcement of Judgments Law does not define 'enforcement,' it nowhere suggests the term encompasses appeals. The law addresses in detail several means of enforcing a judgment, including liens on real and personal property (§§ 697.010-697.920), writs of execution (§§ 699.010-701.830), garnishment of wages (§§ 706.010-706.154) and writs of possession or sale (§§ 712.010-716.030). It also addresses in detail the effect and adjudication of third party claims (§§ 720.010-720.660) and the procedures governing satisfaction of the judgment (§§ 724.010-724.260). It does not, however, address procedures for appeal from the judgment; as already noted, those procedures are set out elsewhere in the Code of Civil Procedure and in the California Rules of Court.

"Regarding costs and fees, section 685.040, which generally authorizes a judgment creditor's recovery of enforcement costs, makes no reference or allusion to the creditor's defense of a judgment debtor's appeal. Section 685.070, subdivision (a) specifies the 'costs of enforcing a judgment' that may be claimed through a memorandum of costs; the subdivision lists statutory fees relating to the abstract of judgment, a notice

of judgment lien or a writ of enforcement, statutory costs and fees of a levying officer, and costs in connection with discovery of assets, but it makes no reference or allusion to costs incurred defending an appeal." (*McQueen, supra,* 59 Cal.4th at pp. 608-609.)

On the other hand "[r]ecovery of costs incurred on appeal is statutorily authorized by section 1034, subdivision (b): 'The Judicial Council shall establish by rule allowable costs on appeal and the procedure for claiming those costs.' The California Rules of Court address the procedure for recovery of attorney fees on appeal in rule 3.1702(c), which provides: 'A notice of motion to claim attorney's fees on appeal . . . under a statute or contract requiring the court to determine entitlement to the fees, the amount of the fees, or both, must be served and filed within the time for serving and filing the memorandum of costs under rule 8.278(c)(1) in an unlimited civil case or under rule 8.891(c)(1) in a limited civil case.' Rule 8.278(c)(1), in turn, specifies that a memorandum of costs on appeal is to be filed in the superior court '[w]ithin 40 days after the clerk sends notice of issuance of the remittitur.'" (*McQueen, supra,* 59 Cal.4th at p. 609, fn. omitted.)

Our record shows Quiles sought attorney fees and costs for appellate work and was awarded her requested attorney fees and costs. It is unclear how much of the attorney fees and costs award was attributable to appellate work the *McQueen* court held to be unrecoverable as enforcement attorney fees and costs. We therefore remand to the trial court to determine how much the attorney fees and costs award should be reduced under *McQueen*. Our opinion is without prejudice to Quiles attempting to pursue attorney fees and costs for her appellate work through the procedures set forth by the California Rules of Court, discussed *ante*.

VI.

UNNECESSARY OR UNREASONABLE ATTORNEY FEES AND COSTS

Parent argues that "[e]ven if this Court concluded that Quiles could recover costs beyond those permitted by section 685.070 [notwithstanding defects in service and

notice], the trial court abused its discretion by awarding certain costs." Parent cites legal research fees, costs related to the filing of a status conference statement in a companion action, and travel costs. He also argues the trial court abused its discretion by granting Quiles's request for attorney fees that were "excessive, duplicative, and not reasonably necessary to enforce the judgment." Parent also argues Quiles's billing records show excessive billing for intra- and inter-office communications, a motion for receivership, and for outside counsel.

"'The standard of review on issues of attorney's fees and costs is abuse of discretion. The trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice. If the trial court has made no findings, the reviewing court will infer all findings necessary to support the judgment and then examine the record to see if the findings are based on substantial evidence.'" (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512.)

We have reviewed the record and find nothing to suggest the trial court's attorney fees and cost awards constituted an abuse of discretion.

REQUEST FOR JUDICIAL NOTICE

Parent filed a request that this court take judicial notice of "Interest calculations performed on January 17-19, 2019, using the judgment calculator available on the San Diego County Superior Court's website." Parent contends the matter is subject to judicial notice under Evidence Code section 452, subdivision (h) which permits that judicial notice be taken of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Parent states: "Although the judgment calculations included in Exhibit 1 were prepared on January 17 and 18, 2019, the judgment calculations all predate the Order that is the subject of the appeal—the latest calculation running through March 9, 2018."

As we explained in detail *ante*, we conclude interest started accruing when judgment was entered in April 2016. Parent's calculations, which were based on interest calculations beginning in October 2016, are therefore irrelevant. We deny the request for judicial notice.

DISPOSITION

The postjudgment order is reversed to the extent it awards postjudgment appellate attorney fees and costs. We remand to the trial court to determine how much of the attorney fees and costs award includes fees and costs for appellate work prohibited by *McQueen, supra,* 59 Cal.4th 602 and reduce the award accordingly. The order is otherwise affirmed. In the interest of justice, the parties shall bear their own costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.