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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Conservatorship of the Person and Estate of DANIEL BRODIE HOWARD.	H044250 (Santa Clara County Super. Ct. No. 1-11-PR-168560)
DAVID HOWARD, as Conservator, etc., Appellant, v. HARTFORD ACCIDENT & INDEMNITY COMPANY, Respondent.	

Appellant and conservator David Howard (Howard) appeals from an October 2016 order of the probate division of the Santa Clara County Superior Court (probate court) denying conservatee Daniel Brodie Howard's motion to assess attorney fees against respondent Hartford Accident & Indemnity Company (Hartford).

Conservatee is Howard's brother, and he moved the probate court to assess attorney fees against Hartford under Labor Code sections 3856 and 3860[1] and *Quinn v. State of California* (1975) 15 Cal.3d 162 (*Quinn*) in connection with civil litigation arising from an automobile accident that left conservatee severely injured and unable to

[1] Unspecified statutory references are to the Labor Code.

care for himself. The civil litigation had been resolved by settlement and a voluntary dismissal a year and a half earlier. Hartford was the insurer of conservatee's employer for workers' compensation at the time of the accident, had paid out workers' compensation benefits, and had joined the civil litigation by filing a complaint in intervention.

On appeal, Howard claims the probate court erred by ruling that it lacked jurisdiction to hear conservatee's motion. Howard asserts further that the settlement agreements in the civil action and subsequent approval of the compromise by the probate court do not preclude conservatee from obtaining the relief he sought. Lastly, Howard contends that he was the "active litigant" who created the settlement fund from which Hartford received recompence and, thus, he is entitled to recover from Hartford its "fair share" of the litigation expenses to recoup the attorney fees and costs he had paid to his counsel on conservatee's behalf.

For the reasons explained below, we decide the probate court lacked jurisdiction over conservatee's motion and affirm its order.

I. FACTS AND PROCEDURAL BACKGROUND

A. *Litigation and Settlements Arising from the Auto Accident*

On February 16, 2011, conservatee suffered major injuries in an automobile accident with another driver, Margaret Ruhl. At the time of the accident, conservatee was driving his Toyota Camry and acting within the scope of his employment with Agra Tech, Inc. Hartford was Agra Tech, Inc.'s workers' compensation insurance carrier.

On March 17, 2011, the probate court appointed Howard as temporary conservator of conservatee's person and estate. At that time, conservatee was hospitalized and in a coma.

On March 22, 2011, The Boccardo Law Firm, Inc. (Boccardo) filed a tort action against Ruhl on behalf of conservatee, by and through Howard (Santa Clara County case

No. 1-11-CV-197027 (civil action)).[2] Howard subsequently amended his complaint to include defendants Toyota Motor Corporation and its related entities (Toyota) and the California Department of Transportation (Caltrans).[3] Conservatee also filed a workers' compensation claim with the California Workers' Compensation Appeals Board (WCAB).

On March 15, 2012, Hartford filed a complaint in intervention against the defendants in the civil action seeking to recover the workers' compensation benefits it had paid as a result of conservatee's accident and injuries. In September 2012, a judge of the WCAB found conservatee to be totally and permanently disabled and awarded permanent disability, medical care for life, and attorney fees.[4]

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[2] Ruhl died while the civil action was pending. Thereafter, her estate participated in the case. Ruhl and her estate are referred to as Ruhl. Ruhl is not a party to this appeal.

[3] In September 2013, conservatee and Caltrans reached a settlement under which Caltrans was dismissed from the civil action. Neither Caltrans nor Toyota is a party to this appeal.

[4] Howard requests that we take judicial notice of multiple documents and pleadings filed in the civil action and his workers' compensation case (Cal. Workers' Comp. Appeal Bd. Case No.: ADJ8013899). We deferred consideration of Howard's request for consideration with the merits of this appeal. Hartford did not file an opposition to Howard's request and relied on the documents and pleadings in its briefing. Generally, a reviewing court does not take judicial notice of matters not considered by the trial court, absent exceptional circumstances. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2.) However, because the civil action and workers' compensation cases are relevant and integral to the circumstances presented by this case and the facts drawn therefrom are not in dispute, we grant Howard's unopposed request for judicial notice. (Evid. Code, §§ 452, subds. (c) & (d)(1), 459; see *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813; see also *Brooks v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1522, 1536 [taking judicial notice of an opinion and decision of the WCAB].)

In addition, Howard has filed a motion to augment the clerk's transcript with a letter he sent to Hartford in January 2016 (i.e., four months before he filed his motion to assess attorney fees), stating his position regarding the pro rata apportionment of attorney fees between conservatee and Hartford. The motion to augment also seeks to correct a citation to the letter in Howard's opening brief. Howard had initially included this letter in the materials for which he requests judicial notice, but the letter had not been filed in

On October 30, 2013, conservatee, Hartford, and Toyota signed a mediation agreement that called for Toyota to pay a specified sum to conservatee. The agreement stated that conservatee would "indemnify and hold harmless the Toyota defendants . . . from any liability whatsoever to any persons or entities arising out of the subject accident, including, but not limited to, any claims by any person or entity claiming to be entitled to any portion of this settlement." In January 2014, Howard petitioned the probate court for an order approving a compromise of the disputed claim. On January 28, 2014, the probate court signed an order approving the compromise of the disputed claim against Ruhl and Toyota and directed payments from the settlement proceeds to Boccardo (for attorney fees and expenses), Hartford (for medical and like expenses it had paid), and conservatee (for the balance of the settlement). The probate court also entered an order (pursuant to Howard's request) sealing the settlement amount and proposed payments to Boccardo, Hartford, and conservatee set forth in the order approving the compromise.

Shortly thereafter, Hartford moved to modify the probate court's January 29, 2014 order based on "surprise and an ongoing accounting issue between" conservatee and Hartford. The alleged surprise related to the attorney fees and costs stated in the probate court's order. Hartford asserted those amounts were not in accord with a handwritten statement regarding the division of the settlement proceeds between conservatee and Hartford that had been signed by conservatee's counsel and Hartford at the October 2013 mediation.

At a hearing on Hartford's motion held on March 27, 2014, conservatee's counsel said Hartford knew the total settlement amount agreed to at the mediation and contended the only issue in dispute involved the amount Hartford would receive as a credit against

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the civil action or with the probate court. We deferred consideration of Howard's motion to augment for consideration with the merits of this appeal. Because the letter was not filed or lodged in either the civil action or the probate case, we deny Howard's motion to augment the record. (See Cal. Rules of Court, rule 8.155(a); *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

its obligation to pay future workers' compensation benefits pursuant to the WCAB proceeding. After the probate court stated its tentative ruling was to grant Hartford's motion and authorize the defendants to pay the gross settlement amount to conservatee's counsel, conservatee's counsel argued the effect of the tentative ruling was to set aside the "Hartford settlement." The probate court then modified its tentative ruling and set aside its January 29, 2014 order under Code of Civil Procedure section 473.

On April 24 and 25, 2014, conservatee, Toyota, Ruhl, and Hartford executed a joint stipulation seeking an order approving a "Global Settlement and Compromise of Disputed Claim." On May 5, 2014, the probate court signed the proposed order approving the "global settlement of the Toyota defendants and the Ruhl defendants" as set forth in the joint stipulation and the January 2014 petition to approve the compromise of disputed claim. The order directed Toyota and Ruhl to pay the settlement proceeds to Boccardo (conservatee's and Howard's counsel) "pending a final accounting between" conservatee and Hartford. It also directed conservatee and Hartford to supply requests for dismissal to Toyota and Ruhl and "comply with the other terms of their respective settlements." Finally, the order said, "Once the final accounting is determined, [conservatee] and [Hartford] will seek Court approval only with respect to the distribution between [conservatee] and [Hartford] of the total settlement funds deposited" with Boccardo.

On May 12, 2014, conservatee filed a motion in the civil action to set a trial between Hartford, Toyota, and Ruhl. In June 2014, Toyota and Ruhl served motions in the civil action to enforce the "global settlement." Conservatee opposed the motion, asserting that he "chose to take all the [settlement] money, indemnify Toyota in the Complaint in Intervention and deal with Hartford. That is, and was, the settlement agreement with Toyota." In a ruling dated July 31, 2014, the superior court granted the motion to enforce the global settlement.

On August 29, 2014, Howard filed an "amended" petition to approve a compromise of disputed claim (amended petition). On September 4 and 8, 2014, conservatee ("as indemnitor of Toyota Motor Corporation and Margaret Ruhl") and Hartford signed a "conditional settlement agreement" titled "Settlement of Complaint-in-Intervention."[5] (Some capitalization omitted.)

On September 16, 2014, the probate court held a hearing on Howard's amended petition to approve the compromise of the disputed claim. Counsel for conservatee and Howard (Boccardo), counsel for Hartford, and counsel for Toyota appeared at the hearing. Without objection from the parties, the probate court signed an order approving the compromise of the disputed claim. As in the previously vacated order approving the compromise, the probate court's order directed payment from the settlement proceeds to Boccardo, Hartford, and conservatee. The next day, September 17, 2014, Hartford requested and obtained a dismissal in the superior court of its complaint in intervention, with prejudice.

On October 1 and 2, 2014, Howard and his counsel (Boccardo) and Hartford and its counsel signed a "Confidential Settlement Agreement and Release." Although the agreement was signed by Hartford, it states it "is made and entered into . . . by and between Toyota . . . on the one hand, and Plaintiff Daniel B. Howard, by and through his Conservator, David Brodie Howard, individually." Conservatee and Howard are identified as the releasors, and Toyota and its entities are the releasees. The agreement states that "the parties agree that Hartford Accident & Indemnity Co. is not a releasee." (Capitalization omitted.) The term "action" is defined as "[i]nvolve[ing] the legal

[5] The settlement agreement states in part, "On or about August 11, 2014, Plaintiff and Indemnitor and Hartford reached an agreement on a division of the settlement proceeds between them and based thereon hereby execute this Agreement." (Some capitalization omitted.) The agreement also states that it is "contingent upon approval of the terms of this Settlement from the Santa Clara County Probate Court which has jurisdiction over the conservatorship" of conservatee.

proceeding that was filed in the Santa Clara County Superior Court Case No.: 111CV197027" (i.e., the civil action) and "includes the Complaint in Intervention" filed by Hartford. The agreement provides that its implementation "will fully and finally resolve all claims for injuries or damages by the releasors against the releasees." (Capitalization omitted.) In consideration for the settlement payment by releasees, releasors "completely release and forever discharge releasees from any and all past, present or future claims, injuries, or damages." (Capitalization omitted.) The releases are "general releases" and releasors waive all rights under Civil Code section 1542.

The September 2014 settlement of Hartford's complaint in intervention was attached to the agreement. In addition, three probate court orders were attached and incorporated into the agreement: the May 8, 2014 order approving the global settlement (along with the underlying joint stipulation of conservatee, Toyota, Ruhl, and Hartford); the September 16, 2014 order approving the compromise of disputed claim; and the January 28, 2014 order sealing the settlement records and terms.

On November 18, 2014, the superior court entered a dismissal of the civil action "as requested" by conservatee, by and through Howard. The request for dismissal was signed by conservatee's counsel and requested dismissal of the "[e]ntire action of all parties and all causes of action" "[w]ith prejudice" and provided "each side to bear their own fees and costs."

B. *Conservatee's Motion to Assess Attorney Fees*

Approximately 18 months later, on May 26, 2016, conservatee filed a motion in the probate court to assess attorney fees, asking the probate court to order Hartford to "reimburse Conservatee $150,934.76 in costs and $179,605.48 in attorney's fees as Hartford's *pro rata* share of Conservatee's costs and attorney's fees in creating the Toyota settlement." Conservatee stated the authority for the motion was sections 3856,

subdivision (b),[6] and 3860, subdivision (e),[7] and the "common fund" doctrine of *Quinn, supra*, 15 Cal.3d 162.[8]]) In addition, conservatee said his motion was "based upon [the probate court's] Order Approving the Compromise of *Howard v. Toyota, et al.*, filed under seal on September 16, 2014, the written 'Settlement of Complaint in Intervention' executed on September 4, 2014," the declarations of his counsel, information in the probate court's file, and any oral argument at the hearing on the motion. Conservatee

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[6] Section 3856, subdivision (b), provides: "If the action is prosecuted by the employee alone, the court shall first order paid from any judgment for damages recovered the reasonable litigation expenses incurred in preparation and prosecution of such action, together with a reasonable attorney's fee which shall be based solely upon the services rendered by the employee's attorney in effecting recovery both for the benefit of the employee and the employer. After the payment of such expenses and attorney's fee the court shall, on application of the employer, allow as a first lien against the amount of such judgment for damages, the amount of the employer's expenditure for compensation together with any amounts to which he may be entitled as special damages under Section 3852."

[7] Section 3860, subdivision (e), provides: "Where both the employer and the employee are represented by the same agreed attorney or by separate attorneys in effecting a settlement, with or without suit, prior to reimbursement of the employer, as provided in subdivision (b) hereof, there shall be deducted from the amount of the settlement the reasonable expenses incurred by both the employer and the employee or on behalf of either, including costs of suit, if any, together with reasonable attorneys' fees to be paid to the respective attorneys for the employer and the employee, based upon the respective services rendered in securing and effecting settlement for the benefit of the party represented. In the event both parties are represented by the same attorney, by agreement, the attorney's fee shall be based on the services rendered for the benefit of both."

[8] In *Quinn*, the California Supreme Court construed section 3856 and held that a worker who actively litigates a claim against a third party tortfeasor may require his employer, as a passive beneficiary of his efforts, to contribute toward the worker's attorney fees. (*Quinn, supra*, 15 Cal.3d at pp. 169–171.) Regarding section 3860, the California Supreme Court said that, "[b]ecause the Legislature has evinced its intention that settlement and judgment situations be treated alike [citations] and because section 3860, like section 3856, calls on the court or board to look to 'the benefit of both the employer and the employee' in apportioning fees, the considerations set forth in this opinion as to section 3856 apply equally to section 3860." (*Id*. at p. 176, fn. 20; see also *Hughes v. Argonaut Ins. Co.* (2001) 88 Cal.App.4th 517, 524, fn. 3; *Luque v. Herrera* (2000) 81 Cal.App.4th 558, 563.)

asserted that, "[w]ith the complaint in intervention dismissed, [the probate] Court must now allocate attorney's fees and costs under the authority of *Quinn* . . . between two parties (i.e.: Conservatee and Hartford) effected by [the probate] Court's September 16, 2014 order approving Conservatee's claim. (*Padilla v. McClellan* (2001) 93 Cal.App.4th 1100 [(*Padilla*)])."

Conservatee argued that, although the September 2014 order approving the compromise of disputed claim approved payment of attorney fees and costs to Boccardo and $855,209.67 to Hartford, the settlement agreement between conservatee (as indemnitor of Toyota and Ruhl) and Hartford "did not address attorney fees and costs." Conservatee argued further that, unlike the "Toyota dismissal" which said each side would bear its own costs, the dismissal requested by Hartford for its complaint in intervention "made no such stipulation." Conservatee asserted that "[t]wo independent actions required two separate settlements."

In addition, conservatee argued that "Hartford did nothing to help create the settlement funds that paid its settlement." Conservatee's counsel declared that, at the "settlement conference" (i.e., the October 30, 2013 mediation), he made "all demands for settlement" to Toyota and "[a]ll counter offers were communicated to [him] by [the mediator] or Toyota directly. Demands and counter offers were not discussed with Hartford." Conservatee contended further that, although "Hartford did show up occasionally" during the litigation (e.g., Hartford's counsel attended 14 of approximately 65 depositions) Hartford did not otherwise pursue discovery or declare experts, "refused to share expenses" with conservatee when asked earlier in the litigation, and "forced plaintiff to go it alone."

Hartford opposed conservatee's motion. Hartford argued that the issues presented by the motion had been "raised, decided, and dismissed, with prejudice in the underlying civil action," in which the superior court determined that Hartford was "a party to the global settlement agreement entered into between all of the parties including the Toyota

defendants and also Margaret Ruhl." Hartford maintained that there was "only one civil lawsuit under one action number that incorporated all the parties together, including Hartford." In addition, Hartford argued that a "global settlement of all issues, including the total attorney's fees[,] costs and expenses [] which [Boccardo] would be paid was also submitted to and approved by [the probate court] on September 16, 2014." Hartford asserted further that the probate court did not have jurisdiction to rule on the motion or over the civil action that had "already been concluded and dismissed, with prejudice," with each side to bear their own fees and costs.

In reply to Hartford's jurisdictional argument, conservatee argued that "[j]urisdiction exists because a Conservatee under [the probate court's] jurisdiction seeks reimbursement of attorney's fees and costs set by this Probate Court." Conservatee argued further, citing *Padilla*, that "Probate Code [section] 3601 gives [the probate court] broad powers over allocation of fees and costs where the amounts are undisputed. [Citation.] [The probate court] set fees and costs and now must allocate."

C. *Probate Court Order on Conservatee's Motion*

On July 28, 2016, and September 9, 2016, the probate court heard argument on conservatee's motion to assess attorney fees. The judge who presided at the hearing was not the judge who had issued the prior orders approving the compromise of disputed claim and the global settlement.

On October 12, 2016, the probate court issued the order Howard challenges in this appeal. The probate court denied conservatee's motion on four grounds. First, the probate court concluded that it lacked jurisdiction to consider conservatee's claims because the underlying civil case had been dismissed with prejudice upon conservatee's request. The probate court reasoned that because the motion was " 'based on this Court's [September 16, 2014] Order Approving the Compromise' and the [September 8, 2014] 'Settlement of Complaint in Intervention' — both of which relate only to the civil case — any claim to recover attorneys' fees and costs in the conservatorship case was

extinguished when the civil case was dismissed with prejudice on November 18, 2014." In addition, the probate court rejected conservatee's argument that Hartford's complaint in intervention created an action separate from the underlying civil action.

Second, the probate court concluded that the settlement between conservatee and Hartford of the complaint in intervention was binding and resolved all remaining issues between them. In addition, the subsequent settlement executed by the parties on October 1 and 2, 2014, precluded the relief conservatee sought by his motion.

Third, the probate court explained that section 3856, subdivision (b), was inapplicable because that section only applies to cases in which there is a judgment for damages and no such judgment exists in this case. Further, the probate court concluded that, in accord with section 3860, subdivisions (e) and (f), the September 16, 2014 order approving compromise of disputed claim "expressly set the 'fees and expenses' that would be paid to [Boccardo]." The probate court noted that conservatee did not appeal from that order and concluded, even if the probate court had jurisdiction to hear the current motion, "which it does not, it would not have the authority to modify that earlier Order."

Fourth, the probate court concluded that, assuming it had jurisdiction, "this is not a case where imposition of a common fund award would be equitable." The probate court noted that conservatee "recovered substantial sums even after medical expenses were paid, and [his counsel] was awarded $630,194.68 in fees and costs." In addition, Hartford's lien was "worth perhaps twice as much as its reimbursement of $855,209.67" and it "did much more than file a lien" in the civil litigation.

The disposition section of the probate court's order read: "Because this Court lacks jurisdiction over this matter, the Motion must be DENIED. Even if the Court had jurisdiction, the Motion would be DENIED on the ground that Conservatee is bound by prior settlements that set forth his agreement with respect to attorneys' fees and costs and that there is no statutory or common law basis to change that result."

II. DISCUSSION

On appeal, Howard asserts the probate court erred by ruling that it lacked jurisdiction to consider conservatee's motion to assess attorney fees where the underlying civil action had been dismissed with prejudice. Howard contends the probate court had continuing jurisdiction over the conservatorship and statutory authority to consider a request to assess attorney fees. He asserts further that the probate court misconstrued the settlement agreements and subsequent approval of the compromise by the probate court, and he was not required to raise the common fund issue before he did so. Lastly, Howard argues that, as the "active litigant" who created the settlement fund, he is entitled to recover from Hartford its "fair share" of the litigation expenses to recoup the attorney fees and costs he had paid to Boccardo on conservatee's behalf.

In considering these arguments, we review de novo rulings regarding jurisdiction and claim and issue preclusion. (See *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907 [jurisdiction following voluntary dismissal]; *Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1774 [subject matter jurisdiction]; *In re Marriage of Garcia* (2017) 13 Cal.App.5th 1334, 1341 [res judicata/claim preclusion]; *Roos v. Red* (2005) 130 Cal.App.4th 870, 878 [collateral estoppel/issue preclusion].) In addition, we independently review issues of statutory interpretation. (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1183.)

For the reasons set out below, we conclude that the probate court lacked jurisdiction over conservatee's motion to assess attorney fees. As this issue is dispositive, we do not reach Howard's remaining arguments.

A. *Relevant Principles of Probate and Workers' Compensation Law*

Although we affirm the probate court's denial of conservatee's motion to assess attorney fees on jurisdictional grounds, we briefly set out principles of probate and workers' compensation law relevant to the motion.

1. Probate Law

When a conservatee brings an action through his or her conservator, the conservator has the power to settle the action subject to court approval. (Code Civ. Proc., § 372, subd. (a)(1); see also Prob. Code, § 2504, subd. (c) [requiring court approval of compromise or settlement of a "claim of the . . . conservatee for physical or nonphysical harm to the person"]; *Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi* (1996) 51 Cal.App.4th 1302, 1309 (*Sisco*).) "Money or other property to be paid or delivered pursuant to the order or judgment for the benefit of a . . . person for whom a conservator has been appointed shall be paid and delivered as provided in Chapter 4 (commencing with Section 3600) of Part 8 of Division 4 of the Probate Code." (Code Civ. Proc., § 372, subd. (a)(1).)

"Probate Code Division 4, Part [8], Chapter 4 applies whenever [a] court approves a compromise of an action to which a [person with a disability] is a party and the compromise provides for the payment of money for the [person with a disability's] benefit. (Prob. Code, § 3600.)[9] Probate Code section 3601 provides that the court approving the compromise shall direct that an amount for reasonable expenses and attorney's fees be paid from the settlement."[10] (*Sisco*, *supra*, 51 Cal.App.4th at p. 1309;

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[9] Probate Code section 3600 provides: "This chapter applies whenever both of the following conditions exist: [¶] (a) A court (1) approves a compromise of, or the execution of a covenant not to sue on or a covenant not to enforce judgment on, a minor's disputed claim, (2) approves a compromise of a pending action or proceeding to which a minor or person with a disability is a party, or (3) gives judgment for a minor or person with a disability. [¶] (b) The compromise, covenant, or judgment provides for the payment or delivery of money or other property for the benefit of the minor or person with a disability."

[10] Probate Code section 3601 states: "(a) The court making the order or giving the judgment referred to in Section 3600, as a part thereof, shall make a further order authorizing and directing that reasonable expenses, medical or otherwise and including reimbursement to a parent, guardian, or conservator, costs, and attorney's fees, as the court shall approve and allow therein, shall be paid from the money or other property to be paid or delivered for the benefit of the minor or person with a disability. [¶] (b) The

see also *Curtis v. Fagan* (2000) 82 Cal.App.4th 270, 279–280 [holding attorney fees could be divided by the court hearing the compromise under Prob. Code, § 3601, eliminating the need for a separate action]; *Padilla, supra*, 93 Cal.App.4th at pp. 1104–1106.) "[W]hen reviewing the court's jurisdiction to consider a claim for attorney fees, the nature of the action dictates the result." (*Id.* at p. 1105.)

2. Workers' Compensation Law

"When an employee suffers a work-related injury through the fault of someone other than the employer, the employee is entitled to workers' compensation benefits from the employer and personal injury damages from the responsible third party." (*Manriquez v. Adams* (2003) 108 Cal.App.4th 340, 345 (*Manriquez*); *O'Dell v. Freightliner Corp.* (1992) 10 Cal.App.4th 645, 653 (*O'Dell*); § 3852.) To prevent double recovery by the employee, an employer may recoup the benefits it has paid to the employee by, among other mechanisms, intervening in an action by the employee against the third party. (§ 3853; *O'Dell*, at p. 653.) The "employer" includes the employer's workers' compensation insurance carrier (§ 3850, subd. (b)), which, in this case, was Hartford.

The order of distribution of the proceeds from any recovery, as well as the rights to attorney fees paid from those proceeds, are governed by statute. (*Manriquez, supra*, 108 Cal.App.4th at p. 345.) Section 3860 addresses recovery by settlement. (*Ibid*.; see also *Draper v. Aceto* (2001) 26 Cal.4th 1086, 1088.)

Section 3860 "provides in separate subdivisions for (1) settlements achieved 'solely through the efforts of the employee's attorney' (subd. (c)); (2) settlements achieved 'solely through the efforts of the employer's attorney' (subd (d)); and (3) when the employee and the employer are both represented, either by the same attorney or by

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order required by subdivision (a) may be directed to the following: [¶] (1) A parent of the minor, the guardian ad litem, or the guardian of the estate of the minor or the conservator of the estate of the person with a disability. [¶] (2) The payer of any money to be paid pursuant to the compromise, covenant, or judgment for the benefit of the minor or person with a disability."

different attorneys, settlements achieved through a combined effort (subd. (e)).” (*Manriquez, supra*, 108 Cal.App.4th at p. 345.) Further, subdivision (f) provides, “The amount of expenses and attorneys’ fees referred to in this section shall, on settlement of suit, or on any settlement requiring court approval, be set by the court. In all other cases these amounts shall be set by the [workers’ compensation] appeals board. Where the employer and the employee are represented by separate attorneys they may propose to the court or the appeals board, for consideration and determination, the amount and division of such expenses and fees.” (§ 3860, subd. (f).)

“ ‘Where settlement is effected solely through the efforts of the employee’s attorney, the employer is a passive beneficiary and its reimbursement rights are subject to reasonable fees and expenses for “services in securing and effecting settlement for the benefit of both the employer and the employee.” [Citation.] “[I]f the employer receives his fair share of the recovery, he must bear his fair share of the cost of the recovery.” [Citation.]’ [Citation.] By requiring the calculation of the attorney fees to take into account not only the benefit the employee’s attorney confers on his or her own client but also the benefit to the employer lienholder, section 3860, subdivision (c), incorporates the equitable ‘common fund’ doctrine.”[11] (*Manriquez, supra*, 108 Cal.App.4th at pp. 345–346.)

B. *Probate Court Jurisdiction over Conservatee’s Motion*

There is no dispute that the probate court had continuing jurisdiction over the conservatorship of the person and estate of conservatee. Nevertheless, the probate court

[11] Section 3860, subdivision (c), provides: “Where settlement is effected, with or without suit, solely through the efforts of the employee’s attorney, then prior to the reimbursement of the employer, as provided in subdivision (b) hereof, there shall be deducted from the amount of the settlement the reasonable expenses incurred in effecting such settlement, including costs of suit, if any, together with a reasonable attorney’s fee to be paid to the employee’s attorney, for his services in securing and effecting settlement for the benefit of both the employer and the employee.”

concluded it lacked jurisdiction over conservatee's motion to assess attorney fees filed in May 2016 because the civil action had been dismissed with prejudice in November 2014.

Howard disagrees with this conclusion. He contends that conservatee's voluntary dismissal of the civil action in November 2014 did not divest the court of jurisdiction over conservatee's 2016 motion to assess attorney fees.

Howard frames his argument in terms of res judicata.[12] He acknowledges that " 'a dismissal with prejudice bars a later lawsuit on the same claim [and a] judgment of dismissal entered thereon is a final judgment on the merits, entitled to res judicata effect.' "[13] He then asserts that res judicata principles do not bar conservatee's motion. He argues that conservatee's motion is a "distinctly different" cause of action from the civil action because the motion seeks payment from Hartford under common fund principles. He asserts further that, in the civil action, "the parties were plaintiff Conservator and the Toyota defendants" and, for the motion, the parties "are plaintiff and defendant Hartford." He maintains, therefore, that the probate court erred when it concluded in its October 2016 order that it did not have jurisdiction over the motion.

There is no dispute that the conservatee (by and through Howard) voluntarily dismissed the entire civil action that involved Toyota, Ruhl, and Hartford with prejudice in November 2014. Such voluntary dismissals are governed by Code of Civil Procedure section 581. That provision "allows a plaintiff to voluntarily dismiss, with or without prejudice, all or any part of an action before the 'actual commencement of trial.' [Citation.] The California Supreme Court stated: 'Apart from certain . . . statutory

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[12] Res judicata is now usually described as claim preclusion, and direct or collateral estoppel as issue preclusion. (*Samara v. Matar* (2018) 5 Cal.5th 322, 326.)

[13] "[F]or purposes of applying the doctrine of res judicata [ ] a dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action. [Citations.] . . . 'The statutory term "with prejudice" clearly means the plaintiff's right of action is terminated and may not be revived. . . . [A] dismissal with prejudice . . . bars any future action on the same subject matter.' " (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793.)

exceptions, a plaintiff's right to a voluntary dismissal [before commencement of trial pursuant to section 581] appears to be absolute. [Citation.] Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action.' [Citation.] Alternatively stated, voluntary dismissal of an entire action deprives the court of both subject matter and personal jurisdiction in that case, except for the limited purpose of awarding costs and statutory attorney fees. [Citations.] 'An order by a court lacking subject matter jurisdiction is void.' " (*Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 261, fns. omitted (*Gogri*); see also *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal.App.3d 116, 120; *Paniagua v. Orange County Fire Authority* (2007) 149 Cal.App.4th 83, 89 (*Paniagua*).)

Although dismissal ordinarily deprives the court of subject matter jurisdiction over the lawsuit, it is well established that a dismissed defendant may still invoke the jurisdiction of the court to enforce collateral statutory rights, such as to seek attorney fees. (See, e.g., *Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.* (1989) 215 Cal.App.3d 353, 357; *Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1024; *Gogri*, *supra*, 166 Cal.App.4th at p. 274; *Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 876–877, 878–880.) Under settled principles, conservatee's voluntary dismissal of his entire civil action deprived the superior court of both subject matter and personal jurisdiction in that case. (*Gogri*, at p. 261.)

Howard appears to concede this established point of law generally when he states in his reply brief that Hartford's dismissal of "its complaint in intervention against Toyota with prejudice, thereby depriv[ed] the civil court of further jurisdiction to consider, for example, any further motions, such as appellant's motion to assess." Further, nothing in the record indicates that conservatee asked the superior court to retain jurisdiction to enforce the settlement in this case (see Code Civ. Proc., § 664.6) or otherwise moved to set aside the dismissal of his civil action (see Code Civ. Proc.,

§ 473). Given this procedural history, the question before us is whether conservatee's motion to assess attorney fees—filed in the probate court pursuant to that court's authority to approve and disburse the settlement proceeds under Probate Code section 3601—fell outside the probate court's subject matter jurisdiction because the civil action had been voluntarily dismissed in its entirety.[14]

Conservatee's motion was based on the probate court's September 2014 order approving and disbursing the settlement proceeds and the settlement of Hartford's complaint in intervention in the civil action. Further, conservatee's motion relied on the probate court's power to set attorney fees and costs under Probate Code section 3601. Thus, as framed by conservatee's own motion, any action by the probate court on the motion was linked to the civil action, which had been settled and entirely dismissed long before he filed his motion in May 2016.

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[14] In his briefing to this court and at oral argument, Howard raised Probate Code sections 850, subdivision (a)(1)(D), 2451, and 2462, subdivision (a), as a source of the probate court's jurisdiction and statutory authority over the requested assessment set forth in conservatee's motion. Howard's briefing, however, does not provide a record citation specifying where these statutory provisions were invoked to the probate court. Based on our review of the record, conservatee did not invoke Probate Code section 850 in the probate court but instead first mentioned this provision in his notice of appeal when "describ[ing] and specifiy[ing] [the] code section that authorizes this appeal." (Italics omitted.)

" '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court. [Citation.]' [Citations.] We will therefore 'ignore arguments, authority, and facts not presented and litigated in the trial court.' [Citation.] Such arguments raised for the first time on appeal are generally deemed forfeited." (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591–592.) Here, we conclude the probate court should have been given the opportunity, in the first instance, to address Howard's novel contention about that court's authority to consider conservatee's request to assess attorney fees. Accordingly, we will not address Howard's argument that the probate court has jurisdiction and authority to make an order allocating attorney fees in this case under Probate Code sections 850, 2451, or 2462.

As it did in the probate court, Hartford relies on *Paniagua, supra*, 149 Cal.App.4th at p. 89, to argue that the probate court properly concluded it lacked jurisdiction to consider conservatee's motion. In *Paniagua*, the plaintiff moved for leave to file an amended complaint that restored the original defendant and added two additional defendants to an action he had previously dismissed without prejudice. (*Id*. at pp. 85, 87.) The Court of Appeal, after discussing the effect of a voluntary dismissal on a court's jurisdiction to act, concluded that "[p]laintiff could not overcome the effect of his voluntary dismissal by merely filing a motion for leave to amend the complaint." (*Id*. at p. 89.) The Court of Appeal explained, "A motion is '[a]n application for an order' [citation] that, with certain exceptions not relevant here, 'must be made in the court in which the action is pending' [citation]. 'As courts have explained, "[a] motion is not an independent right or remedy; it is confined to incidental matters in the progress of a cause. A motion relates to some question that is collateral to the main object of the action and is connected with and dependent upon the principal remedy." [Citations.] A "motion" therefore implies the "pendency of [a] suit[ ] between the parties," [citation] and is ancillary to an ongoing action or proceeding.' " (*Ibid*.) In addition, the Court of Appeal concluded that "[p]laintiff's unsuccessful attempt to amend the complaint in a non-existing suit, without trying to restore the action by moving to set aside his prior dismissal, was a non-event that did not toll the statute [of limitations]." (*Ibid*.)

As relevant here, conservatee's motion to assess attorney fees did not revive the civil action or overcome the effect of the voluntary dismissal of that action. (*Paniagua, supra,* 149 Cal.App.4th at p. 89.) Further, the probate court's authority to approve and distribute the settlement in this case arose initially in the context of a "compromise of a pending action or proceeding." (Prob. Code, § 3600, subd. (a)(2).) When the probate court approved the compromise and directed payment of attorney fees and expenses from the settlement in September 2014, it acted on the pending action as it was required under Code of Civil Procedure section 372, subdivision (a)(1), and Probate Code sections 3600

and 3601. After the probate court completely exercised its authority under those statutes, the civil action transmuted from being a pending action to an entirely dismissed action as a result of the dismissals of the complaint in intervention and conservatee's complaint.

We conclude that, upon dismissal of the civil action, the probate court no longer had jurisdiction to enter any further order distributing the settlement proceeds from the civil action. (See *Paniagua*, *supra*, 149 Cal.App.4th at p. 89; see also *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 206 [concluding that a motion to enforce a settlement under Code of Civil Procedure section 664.6 was not available because the original action was no longer pending; "in the absence of a motion under Code of Civil Procedure section 473 to vacate the dismissal, the court was without subject matter jurisdiction of the old action."].) Conservatee's motion to assess attorney fees is not like a standard postdismissal motion for attorney fees that seeks to enforce collateral statutory rights. Instead, the motion sought to reallocate the settlement proceeds that the probate court had already allocated when it directed payments to Boccardo, Hartford, and conservatee in its September 2014 approval order.

Further, we are unpersuaded by Howard's argument that the probate court's conclusion regarding its lack of jurisdiction is erroneous because the order misapplies principles of res judicata and the doctrine of retraxit. Howard contends that conservatee's motion to assess attorney fees amounts to a second, separate lawsuit from the civil litigation involving compensation for conservatee's injuries. As we explain further below, the motion at issue in this appeal did not arise from an independent action and therefore principles of retraxit, res judicata, and claim preclusion are inapplicable.

Under the doctrine of retraxit, a dismissal with prejudice is a judgment on the merits " 'invoking the principles of res judicata.' " (*Rice v. Crow* (2000) 81 Cal.App.4th 725, 734.) " ' " 'Where the parties to an action settle their dispute and agree to a dismissal, it is a retraxit and amounts to a decision on the merits and as such is a bar to further litigation on the same subject matter between the parties.' " ' " (*Moradi–Shalal v.*

Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287, 312.) Res judicata and retraxit apply "only when the former judgment was in a different action; an earlier ruling in the same action cannot be res judicata." (9 Witkin, Cal. Procedure (5th ed. 2020) Judgment, § 334; see also *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 702.) "[T]he doctrine of res adjudicata does not apply to motions, the matter of their renewal being in the discretion of the trial court." (*Johnson v. Nelson* (1919) 43 Cal.App. 113, 115.) A motion does not create an independent right, remedy, or cause. (*Donald J. v. Evna M.* (1978) 81 Cal.App.3d 929, 934.)

Here, conservatee's motion was brought in the probate court upon its power to approve and disburse settlement proceeds under Probate Code sections 3600 and 3601. The probate court's ruling on the motion indicates that it considered the motion as a request for it to "modify" the September 2014 approval order.

The probate court's characterization of conservatee's motion is appropriate. In essence, the motion amounted to an effort to revise the amended petition to approve the compromise and distribute the settlement proceeds of the civil action. Accordingly, the probate court's ruling that it lacked jurisdiction to consider the motion did not arise in a successive lawsuit. Rather, it resulted from a motion to modify a prior order in the same case. While "[c]laim preclusion 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them' " (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824, italics omitted, (*DKN Holdings*)), conservatee's motion is not a second, separate lawsuit brought by conservatee against Hartford. Thus, principles premised on the existence of a second action, such as res judicata, claim preclusion,[15] and retraxit, are inapplicable.

[15] "Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.)

Howard asserts further that "Conservatee never litigated against Hartford in its individual capacity. Rather, Conservatee litigated against Hartford only as *indemnitor* of Toyota, which is obviously a representative capacity in which its sole object was to defend Toyota and to advance its interests." He claims that "neither res judicata nor collateral estoppel limitations apply whenever a party litigates in a so-called 'representative capacity,' " and he should not now be precluded from litigating "his own, very different interests" regarding the assessment of attorney fees.

As we have already explained, the principles of res judicata and collateral estoppel are inapplicable. Further, that conservatee indemnified Toyota as to Hartford's complaint in intervention is irrelevant to the issue raised by conservatee's motion. When Howard (on behalf of conservatee) asked the probate court to distribute the settlement proceeds in September 2014, conservatee's own interests were at stake. Howard's amended petition is the relevant proceeding for comparison here. By that point, Hartford's complaint in intervention in the civil action had been conditionally settled and conservatee (through Howard) sought an order from the probate court directing payment from the total settlement proceeds for himself, his attorney, and Hartford. Conservatee did not litigate the amended petition in a representative capacity as indemnitor of Toyota. Instead, he litigated the amended petition in his personal capacity but failed to assert any rights against Hartford regarding the distribution of the settlement proceeds under section 3860 or the common fund doctrine. Accordingly, we conclude that conservatee acted in the same capacity when he sought distribution of the settlement proceeds in 2014 and subsequently moved the probate court to assess attorney fees in 2016. Therefore, the probate court did not have jurisdiction over the 2016 motion in light of the 2014 dismissal with prejudice of the action.

III. DISPOSITION

The probate court's order, filed October 12, 2016, is affirmed. Respondent is awarded costs on appeal.

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Danner, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Grover, J.

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