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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

FEDERAL INSURANCE COMPANY,
Plaintiff and Appellant,

v.

GUADALUPE REYES-CANO et al.,
Defendants and Respondents.

C103530

(Super. Ct. No. 24CV000318)

Defendant Guadalupe Reyes-Cano was driving his employer's truck when he was struck and injured by a vehicle driven by an employee of Pacific Gas and Electric (PG&E). Reyes-Cano received workers' compensation benefits through his employer's insurer, plaintiff Federal Insurance Company (FIC). Reyes-Cano filed a negligence claim against PG&E and its employee/driver and FIC filed a lien for reimbursement of workers' compensation benefits paid. Reyes-Cano also alleged a claim for negligence against his employer with the Workers' Compensation Appeals Board (WCAB). When his suit against PG&E settled, Reyes-Cano agreed to set aside \$125,000 from the settlement to satisfy FIC's lien but refused to ultimately release the money to FIC because the issue of his employer's negligence had yet to be resolved in the WCAB action. FIC brought the underlying suit alleging conversion and related claims and the trial court granted summary adjudication and judgment in favor of Reyes-Cano.

On appeal, FIC argues that the grant of summary judgment should be reversed because the trial court erred in (1) failing to properly rule on FIC's evidentiary objections, (2) considering the affirmative defense of employer negligence where it was not properly raised in the third party lawsuit, (3) concluding the \$125,000 was not a "specific, identifiable sum," and (4) finding no triable issues of fact exist. We disagree with FIC on all points and therefore affirm the grant of summary judgment.

BACKGROUND

In support of its opposition to Reyes-Cano's summary judgment motion, FIC provided a separate statement of facts. The trial court found that FIC failed to create a dispute as to any of the facts put forth by Reyes-Cano when FIC either agreed to those presented or failed to present any material facts of its own in a manner that complied with California Rules of Court, rule 3.1350(f)(3).¹ On appeal, FIC does not challenge the trial court's findings as to the undisputed material facts. Our review of the record demonstrates the following material facts are undisputed.

On April 9, 2021, Reyes-Cano filed a complaint against PG&E and its employee/driver (third party defendants), alleging that they negligently caused a vehicular collision with Reyes-Cano, who was driving his employer's vehicle during the scope of his employment. On June 11, 2021, the third party defendants served their answer and alleged as an affirmative defense that the negligence of others caused the subject collision. In the meantime, Reyes-Cano also retained another law office to represent him before the WCAB concerning his claim for workers' compensation benefits.

Reyes-Cano and the third party defendants agreed to mediate his personal injury claim and notice of the third party action and the scheduled date for mediation was

¹ Undesignated rule references are to the California Rules of Court.

provided to Reyes-Cano's employer and FIC. On May 12, 2023, FIC served its notice of lien claim in the amount of \$208,778.08. Prior to the mediation, the parties exchanged mediation briefs. The third party defendants alleged that Reyes-Cano's employer was partially responsible for the collision because the tomato truck Reyes-Cano was driving was 5,000 pounds over the legal limit, preventing Reyes-Cano from stopping or avoiding the collision. The third party defendants sent their mediation brief to FIC, and FIC's attorney attended the mediation.

On August 15, 2023, Reyes-Cano and the third party defendants reached a settlement regarding his personal injury action, but the issue of FIC's lien was not resolved. At FIC's request, Reyes-Cano's attorney agreed to and did set aside and hold in a trust account \$125,000 from the settlement, noting that it would be held "pending final resolution of the worker's compensation lien issue."

On October 11, 2023, FIC and Reyes-Cano's attorney exchanged correspondence in which the parties reiterated the agreement for Reyes-Cano's attorney to hold in trust \$125,000. Reyes-Cano's attorney stated, "It looks like we need to litigate the employer negligence issue to figure out the value of the worker's compensation lien. As you know, the defense raised comparative negligence because the employer overloaded the tomato truck."

Reyes-Cano's attorney has continually held the \$125,000 at issue in its client trust account; the money has never been transferred or moved to any other account. Reyes-Cano's workers' compensation case, including the issue of employer negligence, is still being litigated. Accordingly, the \$125,000 has not been distributed to FIC.

FIC filed a complaint against Reyes-Cano alleging causes of action for conversion, imposition of constructive trust, money had and received, and money paid. FIC alleged Reyes-Cano has wrongfully refused to release the funds to FIC and requested punitive damages.

Reyes-Cano moved for summary judgment or adjudication, arguing that the parties agreed he would hold the disputed funds in trust until the lien issue was resolved and, because the lien issue had not been resolved by an allocation of fault by the WCAB, FIC was not entitled to “a sum certain” at the time it filed its complaint and its claims based on conversion necessarily fail.

Agreeing with Reyes-Cano, the trial court granted summary adjudication and judgment on all of FIC’s causes of action. The court reasoned that it was undisputed that the issue of whether the employer’s negligence contributed to the collision and Reyes-Cano’s injuries was still pending in the WCAB and that meant the sum of money owed is not yet a “specific, identifiable sum” as required for a claim of conversion. As FIC’s additional claims were related to the conversion claim, the trial court granted summary adjudication on those claims based on the same reasoning and ultimately granted summary judgment in favor of Reyes-Cano.

FIC timely appealed.

DISCUSSION

I

Legal Principles

The statutory scheme that governs compensation for personal injuries sustained by an employee during the course of employment is largely set out in the Labor Code. (Lab. Code, §§ 3200-6002.)² “An employee injured in the course of employment is entitled to receive compensation benefits from his or her employer without regard to negligence.” (*O’Dell v. Freightliner Corp.* (1992) 10 Cal.App.4th 645, 653 (*O’Dell*).) When a worker is entitled to workers’ compensation benefits for an injury, those benefits are generally the worker’s exclusive remedy against the worker’s employer for injuries sustained in the

² Undesignated statutory references are to the Labor Code.

course of employment. (§ 3602, subd. (a); *Phelps v. Stostad* (1997) 16 Cal.4th 23, 30.) “Despite the exclusivity of the workers’ compensation remedy against the employer, the worker may recover a judgment from a negligent third party.” (*Employers Mutual Liability Ins. Co. v. Tutor-Saliba Corp.* (1998) 17 Cal.4th 632, 637; see also § 3852.)

The employer (a term that includes the employer’s workers’ compensation insurer) is likewise entitled to recover from the negligent third party the amount of workers’ compensation benefits paid to the injured worker. (§§ 3850, 3860; *Fidelity & Casualty Co. v. McMurry* (1963) 217 Cal.App.2d 767, 769.) Specifically, “[w]hen a third party is liable for an employee’s injury, the controlling statutes grant the employer the right (1) to obtain reimbursement from the third party for workers’ compensation benefits which the employer already has paid (§§ 3852, 3853, 3856, subd. (b)), and (2) to obtain a credit toward its future liability for workers’ compensation equal to the amount of the employee’s recovery ... (§ 3861.)” (*Bonner v. Workers’ Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023, 1032-1033.)

An employer may pursue reimbursement in three ways: “[T]he employer ‘may bring an action directly against the third party (§ 3852), join as a party plaintiff or intervene in an action brought by the employee (§ 3853), or allow the employee to prosecute the action himself and subsequently apply for a first lien against the amount of the employee’s judgment, less an allowance for litigation expenses and attorney’s fees (§ 3856, subd. (b)).’ ” (*Associated Construction & Engineering Co. v. Workers’ Comp. Appeals Bd.* (1978) 22 Cal.3d 829, 833 (*Associated Construction*)). “This prevents an employee from retaining both the third party damages and workers’ compensation benefits for the same injuries and disabilities.” (*Collins v. Union Pacific Railroad Co.* (2012) 207 Cal.App.4th 867, 881, italics omitted.)

Critically, however, an employer is accountable for its own negligence in causing the employee’s injury and therefore is only reimbursed for the amount by which its compensation liability exceeds its proportional share of the injured employee’s recovery.

(*Employers Mutual Liability Ins. Co. v. Tutor-Saliba Corp.*, *supra*, 17 Cal.4th at p. 638.) This is because our “comparative fault” system seeks to distribute tort damages proportionately among all who caused the harm. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 595.) Calculating this amount requires a determination of “(1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled.” (*Associated Construction*, *supra*, 22 Cal.3d at p. 843.) Thus, an “employer may be allowed credit or reimbursement under the Labor Code, based on an employee’s recovery from a third party, but only to the extent the employer’s liability in workers’ compensation exceeds its share of responsibility for the employee’s full tort damages.” (*Id.* at p. 847.) A contrary result would permit the employer’s workers’ compensation carrier to “recover the full amount of benefits paid regardless of the employer’s negligence.” (*Aetna Casualty & Surety Co. v. Superior Court* (1993) 20 Cal.App.4th 1502, 1508.)

As we discuss below, depending on the circumstances, the issue of employer negligence may be adjudicated in court or in the workers’ compensation arena. (See, e.g., *Short v. State Compensation Ins. Fund* (1975) 52 Cal.App.3d 104, 107.)

II

Evidentiary Objections

In granting Reyes-Cano’s motion for summary judgment, the trial court overruled FIC’s evidentiary objections based on FIC’s failure to file objections in the proper format as required by rule 3.1354(b).³ The trial court noted that FIC attempted to raise

³ Contrary to FIC’s contention, *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 is inapplicable. In *Reid*, the California Supreme Court held that “if the trial court fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal.” (*Id.* at p. 534.) Here, in contrast, the trial court expressly overruled FIC’s objections for failure to properly present them.

objections within the statement of facts, rather than the required separate document, but they ultimately went to facts and not evidence. FIC contends that the trial court erred in overruling all of FIC's objections without addressing their substance; that its objections went to facts rather than evidence was a distinction without a difference because the objections targeted the inadmissible hearsay, speculation, and lack of foundation of Reyes-Cano's supporting evidence.

We generally review the trial court's rulings on evidentiary objections in summary judgment proceedings for abuse of discretion. (*Santos v. Crenshaw Manufacturing, Inc.* (2020) 55 Cal.App.5th 39, 53.) The party challenging a court's evidentiary ruling has the burden to establish abuse of discretion, which can only be found if the court's order exceeds the bounds of reason. (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1118.) A court does not abuse its discretion in overruling evidentiary objections that fail to comply with the requirements of rule 3.1354. (*Schmidt*, at p. 1118.) Pursuant to that rule, objections "must be served and filed separately from the other papers in ... opposition to the motion" (rule 3.1354(b)), and each objection is required to "[s]tate the exhibit, title, page, and line number of the material objected to" (rule 3.1354(b)(2)), and to "[q]uote or set forth the objectionable statement or material" (rule 3.1354(b)(3)).

On appeal, FIC does not disagree with the trial court's finding that it failed to comply with rule 3.1354. Our review of the record supports the trial court's conclusion. FIC's objections were not filed separately in the proper format, nor did they identify the page and line number of the material objected to or quote the objectionable statements or material. The trial court acted well within its discretion in overruling the objections for failing to meet these standards. (*Santos v. Crenshaw Manufacturing, Inc.*, *supra*, 55 Cal.App.5th at p. 53; *Schmidt v. Citibank, N.A.*, *supra*, 28 Cal.App.5th at p. 1118.)

Even if we were inclined to examine the substance of FIC's objections, FIC fails to specifically identify the evidentiary objections at issue, cite the record to indicate where those objections may be found, or discuss the relevant law concerning them.

Instead, FIC generally argues it was prejudiced by the court’s failure to give its objections “due consideration.” An appellant must make a showing on appeal as to why the trial court abused its discretion. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.) And, in an appeal from summary judgment, “[t]he party making the evidentiary objection at the trial level forfeits it by not renewing it on appeal.” (*Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932, 969, fn. 22; see also *Reid v. Google, Inc., supra*, 50 Cal.4th at p. 534 [“the burden [is] on the objector to renew the objections in the appellate court”].) By failing to present a substantive argument as to why the objections should have been substantively reviewed, we deem the argument forfeited.

III ***Affirmative Defense***

FIC contends that the trial court erred when it considered the possibility of employer negligence in granting summary judgment because the third party defendants never alleged that affirmative defense in their answer. Thus, according to FIC, it cannot impede FIC’s ability to recover its lien. Reyes-Cano responds that the WCAB’s ultimate determination of his employer’s negligence will inform the parties as to FIC’s right to reimbursement and credit against any obligation to pay further benefits. We conclude the trial court did not err in considering the unresolved issue of employer negligence when ruling on the motion for summary judgment or adjudication.

As previously noted, in the event a third party is liable in whole or in part for the employee’s injuries, the injured employee may sue that third party and his employer may seek reimbursement from the third party (either directly or through application for a lien against the employee’s recovery) for workers’ compensation benefits the employer has paid or become obligated to pay to the injured employee. (*C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 383-384; *Engle v. Endlich* (1992) 9 Cal.App.4th 1152, 1160-1161.) However, where an employer is also responsible for

causing the plaintiff's injury, courts use comparative fault principles to apportion responsibility for the injury against the concurrent tortfeasors. (See, e.g., *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 ["[I]n all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering"].)

Under such circumstances, an employee may not bring a civil action against a negligent employer (§ 3602), but it may bring his or her action against a third party defendant who is then permitted to “ ‘shift part of the responsibility for the judgment rendered against it to the employer’s carrier’ ” by alleging and proving the employer’s negligence. (*Associated Construction, supra*, 22 Cal.3d at p. 841; see also *Nelsen v. Workmen's Comp. App. Bd.* (1970) 11 Cal.App.3d 472, 476 [“the third party, upon establishing such concurrent negligence, is entitled to have the judgment against him reduced by the amount of compensation paid to the injured employee”].)

“[I]f the issue of an employer’s negligence is to be raised as a defense to any claim by a plaintiff-employee for injuries sustained as a result of alleged negligence on the part of third party tortfeasors, then such defense must be asserted in a pleading filed and served upon the employer (or the lien claimant representing him) in a timely manner so as to afford him a reasonable opportunity to be heard. Anything less constitutes a denial of due process in that it would deprive the employer of a substantial right to protect his interest in defending against a charge of negligence and thus effectively prevent him (or his lien claimant) from successfully asserting his claim for reimbursement as to those monies already expended on behalf of plaintiff-employee.” (*Brandon v. Santa Rita Technology, Inc.* (1972) 25 Cal.App.3d 838, 846, fn. omitted.) “On the other hand, if the employer’s negligence has not been raised as an issue in the third party action, the employer may rely on its lien rights.” (*O’Dell, supra*, 10 Cal.App.4th at p. 654.)

Here, the third party defendants alleged in their answer that Reyes-Cano's injuries were concurrently caused by the negligence of others. FIC contends this was insufficient to properly raise *employer* negligence as an affirmative defense and thus it was entitled to rely on its lien rights, which, by statute, are given priority for reimbursement. FIC further contends that it is entitled to the full amount of its lien and whatever determination regarding employer negligence is made by the WCAB will only affect the employer's credit toward future compensation benefits. We see it differently.

We agree that the third party defendants did not specifically allege employer negligence in their answer. (See *Difko Admin. (US) Inc. v. Superior Court* (1994) 24 Cal.App.4th 126, 134 [concluding that a third party defendant who wishes to establish his or her right to an offset based on the employer's concurrent negligence may only do so by raising the issue as defensive matter in his or her answer]; Code Civ. Proc., § 431.30, subd. (g) [requiring an answer to include defenses "separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished"].) On the other hand, we also agree that FIC had actual knowledge of the issue as FIC was served with the mediation brief and FIC's attorney attended the mediation where the issue was discussed. We need not decide the implications of actual knowledge versus improper pleading, however, as the issue of employer negligence was not resolved in the third party suit.⁴ Under these

⁴ Nor do we need to discuss Reyes-Cano's assertion that had FIC intervened in the third party lawsuit, the issue of employer negligence would have been decided in that forum and FIC forfeited its claim to the lien by failing to do so. It is not Reyes-Cano's appeal, and we see no indication that this argument was raised below. Reyes-Cano has not provided any argument as to why we should consider it in the first instance here. (Cf. *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 704 [declining to consider the appellant's argument not raised or factually developed in the trial court prior to the grant of summary judgment].)

circumstances, FIC could rely on its lien rights rather than intervene. (See *O'Dell, supra*, 10 Cal.App.4th at p. 654.)

But contrary to FIC's contention, the third party defendants' failure to properly allege the affirmative defense does not insulate its lien against possible reduction if the employer was negligent; it only means the third party defendants settled their obligation to Reyes-Cano without attempting to secure an offset of their own liability through apportioning blame to Reyes-Cano's employer. (See *Roe v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 884, 889 (*Roe*) [the policy against allowing a negligent employer to take advantage of his own wrongdoing "is designed to allow the third party a *pro tanto* reduction of a liability which he shares with a concurrently negligent employer"].)

Where the employer's negligence has not been adjudicated in a third party action, an employee is still entitled to have the employer's negligence adjudicated before the WCAB. (*Gregory v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 899, 902; *Roe, supra*, 12 Cal.3d at p. 892.) And contrary to FIC's contention, the WCAB's ultimate determination of employer negligence not only impacts FIC's claim of credit against *future* compensation benefits, but the WCAB is also empowered to determine an employer's compensation liability, which includes both reimbursement and future credit. (See *Gilford v. State Compensation Ins. Fund* (1974) 41 Cal.App.3d 828, 834 ["[w]here an employer is subrogated to the recovery of an employee from a third-party tortfeasor to the extent of compensation paid or payable, proof of the employer's concurrent negligence in order to defeat his lien clearly does 'concern' the question of recovery of compensation"].)

Specifically, section 3861, subdivision (a) provides that "the appeals board is empowered to and shall allow, as a credit to the employer to be applied against their liability for compensation, such amount of any recovery by the employee for their injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, ... or has not been applied to reimburse the employer."

“[T]he term ‘compensation’ in the context of an employer’s credit under Labor Code section 3681 is given a broad meaning. ... ‘Every payment conferred by Division 4 of the Labor Code is to be considered compensation liability and may be offset by credit or included in the employer’s judgment or lien.’ ” (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd.* (1997) 53 Cal.App.4th 579, 585.) Thus, an employer’s claim for reimbursement *or* credit is subject to the determination of its own negligence. (See *DaFonte v. Up-Right, Inc., supra*, 2 Cal.4th at p. 599 [discussing precedent that holds where the benefits paid or owed exceeded the employer’s share of fault, the employer should recoup the excess only].)

Indeed, the “jurisdiction of the WCAB to determine the validity of the employer’s lien, where it is not the third party tortfeasor but the injured employee who seeks to prove employer negligence is exclusive.” (*Hone v. Climatrol Industries, Inc.* (1976) 59 Cal.App.3d 513, 527.) Our Supreme Court has recognized that “ ‘where particular workmen’s compensation benefits have not been awarded by the [workmen’s compensation appeals] board by the time a third party tortfeasor satisfies the injured employee’s judgment against him, but an award of such benefits is later sought, sections 3858 and 3861 permit the employer to achieve the same results (in terms of net compensation outlay) as would have been possible by the employer’s joinder, intervention or lien if the payment of such benefits had been made before the third party suit.’ ” (*Roe, supra*, 12 Cal.3d at pp. 890-891.) In short, if an employer is adjudicated concurrently negligent, he or she is entitled to application of comparative negligence principles to any credit or reimbursement claims. (*Associated Construction, supra*, 22 Cal.3d at pp. 842-843.)

As exemplified by the *Associated Construction* court’s hypothetical recounted below, the credit procedure requires the WCAB to determine the degree of fault of the employer and the total damages to which the employee is entitled. “The board must then deny the employer credit until the ratio of his contribution to the employee’s damages

corresponds to his proportional share of fault. Once the employer's workers' compensation contribution reaches this level, he should be granted a credit for the full amount available under section 3861. Only when such level of contribution has been reached, however, will grant of the statutory credit adequately accommodate the principle that a negligent employer should not profit from his own wrong." (*Associated Construction, supra*, 22 Cal.3d at p. 843.)⁵

"Public policy consistently followed in the area of workers' compensation, and damages in general, requires that we attempt to avoid a double recovery for a plaintiff or employee, while still ensuring that a defendant employer wrongdoer does not profit from its wrong." (*Southern Cal. Edison Co. v. Workers' Comp. Appeals Bd.* (1997) 58 Cal.App.4th 766, 771.) It appears obvious that to permit full recovery of FIC's lien, under these circumstances with no questions asked, would enable FIC to recover the full amount of benefits paid regardless of whether the employer was negligent. This would obviate existing policy preventing the employer from receiving a double recovery. (*Ellis*

⁵ In *Associated Construction*, the California Supreme Court provided an explanation of the credit procedure through the following hypothetical: "Assume an employee receives \$20,000 in workers' compensation benefits. He later sues a third party to recover for the same injury, which suit is settled without the consent of the employer. Out of the settlement, the employee actually receives, after the payment of 'expenses or attorneys' fees' within the meaning of section 3861, the sum of \$25,000. The employee then seeks further benefits from the board and his employer claims a credit in the amount of the \$25,000 settlement recovery. Under the principles announced herein, the board would then determine the employer's degree of fault and the employee's total damages. Should the board find the employer free of negligence, of course, the employer would receive the benefit of the entire \$25,000 settlement as a credit against future payments. Were the board, however, to determine that the employer was 50 percent negligent, and that the employee is entitled to \$100,000 in damages, then the employer could not claim a credit until he contributed an additional \$30,000 in benefits. The employer would then have contributed a total of \$50,000 to the employee's recovery, or 50 percent of the employee's total damages of \$100,000, and the ratio of his contribution to the employee's damages would correspond to his degree of fault." (*Associated Construction, supra*, 22 Cal.3d at p. 843, fn. 10.)

v. Wells Manufacturing, Inc. (1989) 216 Cal.App.3d 312, 315-318.) This result is also the equitable one. If FIC is determined not to be negligent, it can recoup the amount of benefits paid and obtain a determination of any credits against future benefits. If found to be negligent, its recovery will be reduced accordingly. This result is preferable to permitting a lien to be imposed upon the settlement without determining the issue of FIC's negligence. (*Ibid.*; see also *Roe, supra*, 12 Cal.3d at p. 890 ["From a procedural standpoint, any rule precluding the appeals board from adjudicating the employer's concurrent negligence is bound to engender undesirable gamesmanship"].)

IV *Summary Judgment*

FIC contends that it produced substantial evidence that: it was entitled to the \$125,000 set aside from the settlement for reimbursement purposes, the parties agreed to set aside that amount, and that Reyes-Cano wrongfully withheld the money. Accordingly, FIC contends, triable issues of fact exist as to whether there is merit to its claims of conversion, constructive trust, and money had and received as well as its claimed entitlement to punitive damages. Thus, according to FIC, the trial court erred in granting summary judgment. We disagree.

A party is entitled to summary judgment only if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

Here, FIC alleged four causes of action: conversion; imposition of a constructive trust; money had and received (common count); and money paid (common count). The

trial court found that because FIC's entitlement to the full lien amount was unresolved by the WCAB, it could not establish its right to a "specific, identifiable sum" of money. And, because each of FIC's claims require it to do so, summary judgment was appropriate in all claims. We agree.

Specifically, the tort of conversion requires three elements: "(a) *plaintiff's ownership or right to possession of personal property*, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting damages." (5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 810, p. 1115; see also *Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.) " '[M]oney cannot be the subject of an action for conversion unless *a specific sum capable of identification* is involved.' " (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1151, italics added; see *id.* at pp. 1150-1152; *Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235 [trial court properly granted summary judgment rejecting conversion claim where the plaintiff could not identify specific sum but only approximate monetary losses].)

Similarly, to create a constructive trust, "three conditions must be satisfied: the existence of a res (property or some interest in the property); *the plaintiff's right to that res*; and the defendant's acquisition of the res by some wrongful act. [Citations.]" (*Calistoga Civic Club v. City of Calistoga* (1983) 143 Cal.App.3d 111, 116, italics added.)

Finally, common counts such as money had and received and money paid are "simplified form[s] of pleading normally used to aver the existence of various forms of monetary indebtedness." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394.) As relevant here, "[a] cause of action for money had and received is stated if it is alleged [that] the *defendant 'is indebted to the plaintiff in a certain sum* "for money had and received by the defendant for the use of the plaintiff." ' " (*Farmers Ins. Exchange v. Zerlin* (1997) 53 Cal.App.4th 445, 460, italics added.) And, "[w]here one pays out money

for the benefit of another, at the latter's request, the count for money paid, laid out, and expended will lie, and the law raises an implied promise and a legal liability on the part of the defendant to pay immediately on demand.” (Rains v. Arnett (1961) 189 Cal.App.2d 337, 344, italics added.)

As is evident from the above, central to each of FIC's claims is its ownership or possession rights to the \$125,000 at issue. Although Reyes-Cano agreed to set that amount aside for the purpose of reimbursing FIC for benefits paid, FIC cannot yet establish the amount of money to which it is entitled; the comparative negligence of Reyes-Cano's employer must be adjudicated first.

In an attempt to persuade us otherwise, FIC makes two points. First, FIC contends that section 3860, subdivision (b) unequivocally provides that the settlement is subject to the employer's full claim for reimbursement for compensation benefits paid. FIC also contends that because the parties agreed that the amount to be set aside was \$125,000, the trial court erred in labelling this amount “not ‘identifiable.’ ”

FIC fails to account for our comparative fault system. Section 3860 allows an employer to seek reimbursement for compensation benefits paid from the employee's settlement, but it does not guarantee the amount paid will be reimbursed. Together with section 3856, the statutory scheme provides for prioritizing the reimbursement of compensation benefits paid. “ ‘[U]nless the employer's recovery is barred by his contributory negligence, he will be entitled to a first lien on the entire amount the employee recovers after litigation expenses, regardless of what elements of damage the employee proves.’ ” (*Duncan v. Wal-Mart Stores, Inc.* (2017) 18 Cal.App.5th 460, 471.)

We have already explained that the issue of employer negligence may be and has been raised in the WCAB by Reyes-Cano but has not yet been adjudicated. The calculation of any credit due to FIC must include a determination of the employer's negligence and past compensation benefits. (See *Southern Cal. Edison Co. v. Workers' Comp. Appeals Bd.*, *supra*, 58 Cal.App.4th at p. 768 [finding that previous unreimbursed

payments should be included in calculating a concurrently negligent employer's credit threshold].) Because a finding that the employer was negligent will necessarily impact its liability and obligation to pay for Reyes-Cano's injuries, the \$125,000 does not represent "a specific sum" to which FIC has an ownership or possession right. Thus, there is no specific identifiable amount that Reyes-Cano is obligated to repay to FIC and all of FIC's claims premised on a right to reclaim a specific amount of money cannot be proven at this time.

FIC also claims that a triable issue of material fact exists for assessing punitive damages. Although conversion is a "strict liability tort" (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 144), punitive damages are recoverable upon a showing of malice, fraud, or oppression. (Civ. Code, § 3294, subd. (a); *Voris v. Lampert*, *supra*, 7 Cal.5th at pp. 1150-1152.) FIC contends that Reyes-Cano knows FIC is entitled to the \$125,000 and is demonstrating malice by illegally withholding it. First, "the simple failure to pay money owed does not constitute conversion." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 284.) And, as we have just concluded, FIC cannot yet show it is entitled to that sum of money. Because this question is outstanding, FIC cannot show that Reyes-Cano is exhibiting malice in asserting that it can only release the funds to FIC upon determination of the issue of employer negligence.

DISPOSITION

The trial court's ruling on the motion for summary judgment is affirmed. Reyes-Cano is awarded costs on appeal pursuant to rule 8.278(a)(1) and (a)(2).

/s/

EARL, P. J.

We concur:

/s/

RENNER, J.

/s/

WISEMAN, J.*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.