Filed 6/18/20 Abarca v. Citizens of Humanity, LLC CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NOE ABARCA, Plaintiff and Respondent, v. CITIZENS OF HUMANITY, LLC, Defendant and Appellant.	B290090 (Los Angeles County Super. Ct. No. BC521900)

APPEAL from an order of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed as modified.

Browne George Ross, Peter W. Ross; Richards, Watson & Gershon, T. Peter Pierce; Robie & Matthai and Edith R. Matthai for Defendant and Appellant.

Kramer Holcomb Sheik, Daniel K. Kramer, Teresa A. Johnson; Michael Burgis & Associates, Michael Burgis, Zhenia Burgis; Esner, Chang & Boyer, Stuart B. Esner and Steffi A. Jose for Plaintiff and Respondent.

Citizens of Humanity, LLC (Citizens) appeals from an order awarding Noe Abarca his attorney fees and costs after he prevailed at trial on his disability discrimination and retaliation claims and was awarded punitive damages. We affirmed the underlying judgment. (*Abarca v. Citizens of Humanity, LLC* (July 31, 2019, B283154) [nonpub. opn.].) We modify the trial court's order awarding Abarca his attorney fees and costs and affirm it as modified.

BACKGROUND

Abarca worked for Citizens in their quality control department, inspecting boxes of jeans.[1] He suffered an injury and presented Citizens with a work restriction. After the work restriction expired, Citizens fired Abarca. Abarca sued Citizens and prevailed on his claims for retaliation, disability discrimination, failure to prevent discrimination and retaliation under the Fair Employment and Housing Act (FEHA), and wrongful termination. The jury found that, while Citizens had other nondiscriminatory reasons for terminating Abarca, its ultimate decision to fire him was based on discrimination and constituted conduct that was malicious, oppressive, or fraudulent. Citizens, however, successfully defended Abarca's claims for failure to provide reasonable accommodations and failure to engage in the interactive process.

The jury awarded Abarca $100,000 in compensatory damages: $35,000 for past lost earnings; $20,000 in other past economic loss; $45,000 in past noneconomic loss including mental

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[1] Citizens's motion to augment the record with the reporter's transcript from the underlying merits appeal filed on January 2, 2019 is granted.

suffering; and nothing for future noneconomic loss.[2] The jury also awarded Abarca $550,000 in punitive damages.

Abarca's attorneys represented him on a contingency basis, with no retainer. Abarca moved for an award of attorney fees in the amount of $1,652,255, plus a multiplier of 2.0, for a total of $3,304,510 under Government Code section 12965, subdivision (b). Citizens opposed the fee motion and filed 156 objections to Abarca's attorneys' declarations.

The trial court summarily overruled Citizens's objections and awarded Abarca attorney fees in the sum of $1,084,160 pursuant to Code of Civil Procedure sections 1032 and 1033.5 and Government Code section 12965, subdivision (b). The trial court did not reduce the number of hours billed, finding them reasonable and noting that "[t]his case was litigated to the hilt. Defendant litigated every possible issue, in this court's opinion, at times, excessively. If the number of hours here is exceptional, that is the reason why. An exceptional number of hours is required to overcome an exceptionally tenacious defense." The trial court did, however, find Abarca's attorneys' hourly rates excessive, reducing the hourly rates of three attorneys from $700 to $450, another's rate from $700 to $500, an associate's rate from $350 to $300, and the rate of two paralegals from $200 to $125. The trial court also denied Abarca's request for a multiplier.

Abarca also requested $142,299.92 in costs. This request included $21,497.49 in deposition costs; $73,861.15 in expert witness fees; $10,206.99 for models, blowups, and photocopies of

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[2] The total amount of compensatory damages was reduced to $70,000 after the trial court struck the jury's award for other past economic loss and reduced past noneconomic loss to $35,000.

exhibits; $13,976.80 in court reporter fees; and $17,423.02 for "[o]ther" expenses including $1,625 for investigations and $2,870 for special messenger services and witness consulting. The trial court granted Citizens's motion in part, taxing Abarca's costs in the amount of $26,616.80, denying recovery of expert fees , court reporter fees, investigation expenses, and costs of special messenger services and witness consulting.

DISCUSSION

Citizens argues that the trial court abused its discretion by not reducing or denying recovery of attorney fees and costs altogether. We disagree.

I. Attorney fees

The underlying purpose of FEHA is to protect employees from discrimination by their employers on account of race, religious creed, color, national origin, ancestry, physical disability, medical disability, medical condition, marital status, sex, age, or sexual orientation. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 582–583.) To further this purpose, the trial court may award a successful FEHA plaintiff reasonable attorney fees and costs. (*Flannery*, at pp. 582–583; Gov. Code, § 12965, subd. (b).) To determine the fee award, the trial court first determines the lodestar, i.e., the number of hours worked multiplied by a reasonable hourly fee. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1249.) The trial court may increase the lodestar by applying a multiplier or enhancement if it finds other factors weigh in favor of a higher

fee. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1171.)

We review a trial court's attorney fees award for abuse of discretion, and we presume that the trial court considered all appropriate factors in selecting the lodestar and applying a multiplier. (*Taylor v. Nabors Drilling USA, LP*, *supra*, 222 Cal.App.4th at pp. 1249–1250.) To the extent the trial court's ruling is based on factual determinations, we review the record for substantial evidence. (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430.) The trial judge is in the best position to determine the value of professional services rendered in his or her court. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The award will not be disturbed unless we are convinced that it is clearly wrong. (*Ibid.*)

A. *Reasonableness of hours*

Although Citizens agrees the abuse of discretion standard applies, it insists we must first determine whether the trial court's factual findings are supported by substantial evidence. Citizens challenges the trial court's finding that the number of hours claimed by Abarca's attorneys was reasonable in light of Citizens's decision to litigate every possible issue, which the trial court deemed excessive.

Citizens counters that its defense strategy was nothing out of the ordinary in this type of employment case. For example, Citizens argues that it should not be punished for moving for summary judgment, especially since summary judgment is routinely sought to narrow the issues before trial. While we agree with Citizens that summary judgment is a useful tool to narrow the issues before trial, that is not what happened here. Indeed, on summary judgment, Citizens prevailed on the issue of

special medical damages which Abarca conceded. Citizens also filed seven motions in limine, and six were denied. Another example of Citizens's litigation tactics is its decision to file 156 objections to Abarca's attorneys' declarations in support of the fee motion, which the trial court summarily overruled. The trial court's finding that Citizens litigated every possible issue, requiring Abarca to respond in kind, is thus well supported by the record. It is disingenuous to engage in aggressive litigation tactics and then complain about the fees those tactics generated from the opposing side.

B. *Reliability of time records*

Citizens also contends we should reverse the fee award, arguing that Abarca's attorneys' time records are unreliable because they did not keep contemporaneous time records. Citizens alleges that Abarca's attorneys fabricated their timekeeping records after the fact, rendering the reported number of hours unreliable. However, an attorney need not submit contemporaneous time records to recover attorney fees. (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.) An attorney's testimony about the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records. (*Ibid.*) The trial court thus properly relied on Abarca's attorneys' reconstructed time.

Citizens suggests Abarca's attorneys lied about the time they spent on the case. An "attorney fee dispute is not exempt from generally applicable appellate principles: 'The judgment of the trial court is presumed correct; all intendments and presumptions are indulged to support the judgment; conflicts in the declarations must be resolved in favor of the prevailing party,

and the trial court's resolution of any factual disputes arising from the evidence is conclusive.' " (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1322.) We do not reweigh on appeal a trial court's assessment of an attorney's declaration. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622–623.) Citizens was given a full opportunity to challenge the credibility of Abarca's attorneys in the trial court, taking their depositions and questioning their time records. Even so, the trial court found Abarca's attorneys credible. We will not substitute our judgment for that of the trial court as it is the best judge of the value of the legal services rendered before it. (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095.)

C. *Apportioning fees*

Citizens next argues that, because Abarca did not prevail on all of his causes of action and abandoned his largest theories of damages, he achieved only limited success, and thus the trial court abused its discretion by not apportioning fees between work performed on the four successful causes of action and the two unsuccessful causes of action. Abarca counters that each of his causes of action was factually and legally intertwined and that he obtained substantial relief in this case by prevailing on a majority of them, so the trial court properly exercised its discretion in not apportioning fees.

"Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney[ ] fee[s] reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 440.) Thus, after calculating the

lodestar figures applying the proper standards of reasonableness, the trial court should exclude hours expended on claims that are unrelated to the claim of damages on which the prevailing party succeeded at trial and reduce the award to reflect the limited nature of relief in comparison with the scope of the litigation as a whole. (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 413.) That amount is left to the trial court's sound discretion. (*Id.* at p. 414.)

We find no abuse of discretion in the trial court's decision not to apportion attorney fees between the successful and unsuccessful claims. As an initial matter, Citizens's contention that Abarca achieved limited success is belied by the record. There is no question that Abarca is the prevailing party as the jury found in favor of Abarca on four of his six causes of action and awarded him a total of $100,000 in compensatory damages. Moreover, the jury found that Abarca proved Citizens's wrongful conduct was based on malice, oppression or fraud, which warranted $550,000 in punitive damages. The $650,000 damages award can hardly be called limited success when Abarca offered to initially settle the case for $149,999.99.

Citizens next argues that Abarca should not recover for time spent litigating his failure to accommodate and failure to engage in the interactive process causes of action. Citizens relies on *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 976, 990 to 991, a lawsuit where the plaintiff failed to prevail on nearly all his causes of action, recovered an amount less than half of what could have been awarded in a limited civil case, and requested nearly $1 million in attorney fees. In contrast, Abarca's offer to settle the case for $149,999.99 supports an inference this case did not fall within limited civil jurisdiction (see Code Civ. Proc., § 85,

subd. (a)) and he prevailed on arguably his most important claim—that Citizens fired him for discriminatory motives. In fact, Abarca succeeded on the majority of his causes of action and, beyond that, he proved that Citizens's discriminatory conduct was guided by fraud, oppression, or malice.

Citizens relies on *Muniz v. United Parcel Service, Inc.* (9th Cir. 2013) 738 F.3d 214. In *Muniz*, the plaintiff alleged alternative discriminatory motives in separate claims for retaliation, gender discrimination and age discrimination. (*Id.* at p. 219.) The jury found that the employer demoted plaintiff because of her gender, however, it also concluded that plaintiff's gender was not a motivating factor to deny her a stock bonus or to place her on a management improvement plan. (*Id.* at pp. 220–221.) The jury awarded plaintiff $27,280 in damages and her attorneys sought attorney fees of $1,297,151, enhanced by a 1.5 multiplier to $1,945,726.50. (*Id.* at p. 225.) The district court denied the multiplier and awarded $696,162.78, or approximately 36 percent of the amount requested. (*Ibid.*) On appeal, the employer argued that the plaintiff's limited success required a substantially greater downward adjustment. (*Id.* at p. 222.) The Ninth Circuit rejected this argument. "We are not convinced . . . that the district court was clearly wrong in failing to deduct further for them, particularly where it does not appear that either party could segregate hours spent exclusively on the unsuccessful claims. The district court was not clearly mistaken in declining to deduct a greater amount for unsuccessful claims." (*Id.* at p. 225.) Similarly, here Citizens offers no means to separate the hours spent on Abarca's successful causes of action versus those for failure to provide reasonable accommodations and failure to engage in the interactive process. To the extent

Citizens argues that Abarca's limited success is reflected in the fact that he abandoned his theory that his termination caused him to have a stroke, we reject that contention as well. " 'Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.' " (*Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 274.) "To reduce the attorney[ ] fees of a successful party because he did not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the cost of enforcing that public right." (*Id.* at p. 273.) Here, Abarca's attorneys presented a number of cascading consequences as a result of his termination and they rightly explored a potentially meritorious, though ultimately unsuccessful, alternative legal theory of damages after Abarca suffered a stroke. As such, the trial court did not abuse its discretion in rejecting Citizens's challenges to those hours billed on Abarca's alternative theory of damages.

D. *Duplicative work*

Citizens also argues that the trial court abused its discretion by not reducing the lodestar for duplicative work. Citizens claims that Abarca's attorneys falsely claimed to have reviewed every deposition taken, every discovery request, every response, every motion, and every email sent to them. Again, this is just another improper attack on the credibility of Abarca's attorneys. (See *Johnson v. Pratt & Whitney Canada, Inc.*, *supra*, 28 Cal.App.4th at pp. 622–623.) Moreover, we agree with the trial court that the benefits of having multiple attorneys going over the same documents are "manifest" and "the value of internal consultation can be quite high." We decline to second-

guess the trial court's findings and the decisions of Abarca's attorneys to thoroughly review the evidence and pleadings in this case.

Citizens also takes issue with some of Abarca's attorneys' time entries that reference Abarca's separate workers' compensation case. While the number of entries related to the workers' compensation case is small, Citizens contends that the trial court's failure to deduct any of these hours or to address Citizens's argument below establishes that it abused its discretion. We disagree. Citizens argued in its motion in limine, motion for summary judgment, and prior appeal that Abarca's representations in his workers' compensation case judicially estopped Abarca from seeking damages here. Thus, matters related to the workers' compensation case were highly relevant to the resolution of this case. Further Abarca's attorneys maintain that the time entries encompass time to review the workers' compensation case in order to ascertain Abarca's job duties while working for Citizens. The trial court's decision to not reduce the number hours based on these limited entries that refer to the workers' compensation claim was well within its discretion.

E. *Clerical tasks*

Lastly, Citizens's argument that Abarca should not have recovered for hours his attorneys and support staff spent on clerical tasks also fails. The necessary support services that secretaries and paralegals provide to attorneys may be included in an attorney fees award. (*City of Oakland v. McCullough* (1996) 46 Cal.App.4th 1, 7.) An attorney's overhead expenses may be compensable. (*Ibid.*) The trial court did not abuse its discretion in not reducing the number of hours for these tasks.

II. Costs

Citizens argues the trial court abused its discretion by awarding Abarca costs for (1) expert fees, (2) models, blowups, and photocopies of exhibits, and (3) "[o]ther" costs, particularly for special messenger services and witness consulting. Citizens also notes a number of arithmetical errors in the trial court's cost award.

"The right to recover any of [the] costs is determined entirely by statute." (*Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439.) A prevailing party is entitled "as a matter of right" to recover costs in any action or proceeding. (Code Civ. Proc., § 1032, subd. (b).) However, fees of experts not ordered by the court are generally not allowable as costs, "except when expressly authorized by law." (Code Civ. Proc., § 1033.5, subd. (b)(1).) Pursuant to Government Code section 12965, subdivision (b), in "civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney[ ] fee[s] and costs, including expert witness fees." Whether recovery of a particular type of cost is authorized by law is reviewed de novo. (*Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043, 1050–1051.) Whether a claimed cost was reasonably necessary and reasonable in amount is reviewed for abuse of discretion. (*Ibid.*)

A. *Expert fees*

The trial court awarded Abarca expert fees under Government Code section 12965, subdivision (b), which permits a discretionary award for expert costs. Citizens argues that such an award cannot be obtained by filing a memorandum of costs

under rule 3.1700 of the California Rules of Court. Rather, Citizens argues that Abarca was required to request expert fees through a noticed motion within the 60-day deadline for seeking attorney fees. Abarca did neither. (See Cal. Rules of Court, rules 8.104(a) and 3.1702(b)(1).)

Defendant relies on *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011 to argue that a motion is required to seek otherwise nonrecoverable expert costs. In *Anthony*, the prevailing plaintiff in a FEHA action filed a noticed motion to recover her expert witness fees. On appeal, the defendant argued that the motion was untimely because it was not filed within the 15-day limit for filing a memorandum of costs as set forth in California Rules of Court, rule 3.1700. (*Anthony,* at p. 1015.) Our colleagues in Division Eight rejected this argument, reasoning that the time constraints of California Rules of Court, rule 3.1700 applied only to "those cost items to which a party is entitled 'as a matter of right' " and not to "those cost items which are awarded in the discretion of the court and thus cannot be entered by the clerk of the court under rule 3.1700." (*Id.* at pp. 1015–1016, italics omitted.) Our colleagues concluded that in the absence of a specific rule applicable to the discretionary award of expert witness fees, the plaintiff was not required to claim her expert witness fees under FEHA by filing a memorandum of costs, and could instead seek to recover those fees by way of a noticed motion. (*Id.* at p. 1016.) *Anthony* did not, however, address whether a prevailing party in a FEHA action must seek expert witness fees in a separate motion rather than in a memorandum of costs.

Citizens nonetheless asks us to hold that *Anthony* requires Abarca to obtain expert fees via separate motion, not through a

memorandum of costs. This argument was rejected in *Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20. There, our colleagues in Division Six upheld a discretionary cost award of expert witness fees under Code of Civil Procedure section 998 after the prevailing defendant claimed those fees in a memorandum of costs instead of a separate motion. (*Jonkey*, at pp. 26–27.) "Code of Civil Procedure section 998 grants the trial court discretion to award expert witness fees to a qualifying prevailing party. The fees may be claimed in a cost bill; there is no rule requiring a noticed motion." (*Jonkey*, at p. 27.)

Here, the trial court awarded Abarca his expert fees pursuant to Government Code section 12965, subdivision (b), which governs cost awards in FEHA actions and does not contain any provision requiring the filing of a noticed motion to recover expert witness fees or other costs. The statute authorizes the trial court to award such costs to the prevailing party "in its discretion." (Gov. Code, § 12965, subd. (b).) However, even assuming Abarca was required to file a separate motion to recover his expert fees under FEHA, Citizens cannot show prejudice. After Abarca filed his memorandum of costs, Citizens filed its motion to tax costs, challenging the expert witness fees, which the trial court considered in its order granting Citizens's motion in part.

Next, Citizens contends that Abarca should not have recovered the costs of his economist, as he never testified at trial and was not designated as an expert. The trial court rejected this argument, explaining that Abarca hired the economist for the punitive damages phase of the trial to review Citizens's net worth. However, the economist's testimony became unnecessary when Citizens agreed to the net worth amount. The trial court

was not clearly wrong when it found that cost reasonably necessary to the litigation.

Citizens argues that the amounts awarded for expert witnesses, Drs. Daniel Silver, Mark Nehorayan, and Sookyung Chang, were unreasonable because they were treating physicians, not retained experts. Abarca was awarded: $3,300 for Silver, $10,600 for Nehorayan, and $15,700 for Chang. Citizens contends these amounts are unreasonable because they only provided percipient witness testimony and were already compensated for treating and evaluating Abarca through the workers' compensation system. The trial court concluded that because the doctors were on the expert list, which required them to be at trial pursuant to statute, they were experts and entitled to compensation as such. We find no abuse of discretion.

B. *Models, blowups, and photocopies of exhibits*

Abarca was awarded $10,206.99 for models, blowups, and photocopies of exhibits. This award included the costs of editing deposition videos and compiling them for trial, creation of PowerPoint presentations, management of a database for trial, and preparation of exhibit binders. Citizens contends these costs are not recoverable because they were not reasonably necessary, but merely convenient.

In support, Citizens relies on *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095. There, the Fourth Appellate District found that the trial court erred in allowing the recovery of costs for document control and a database, laser disks, a graphics communication system, and edited videotaped depositions. (*Id.* at pp. 1104–1106.) Notably, the cost of the technology used in *Science Applications*, which included $200,000 for a document database (*id.* at p. 1104), was

significantly higher than the amount claimed by Abarca here. It observed that the "party incurred over $2 million in expenses to engage in high-tech litigation resulting in recovery of only $1 million in damages." (*Id.* at p. 1105.)

Since *Science Applications* was decided, technology in the courtroom has become commonplace and less expensive. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 991.) The costs at issue here total just over $10,000 and the trial court found they were reasonably necessary. We therefore find no abuse of discretion.

C. *"Other" costs*

Citizens also challenges the $2,870 for special messenger services and witness consulting. However, the trial court granted Citizens's motion to tax costs with respect to those specific costs.

Finally, the trial court's order contains several errors in arithmetic. First, Abarca withdrew $23,327.86 in costs and the trial court taxed an additional $12,245. However, the trial court failed to deduct these amounts totaling $35,572.86. Instead, the order taxes costs "in the total sum of $26,616.80," not $35,572.86. Second, the trial court then failed to actually subtract even the $26,616.80 it said it was taxing, instead subtracting only $15,616.80. The order makes clear that the trial court intended to tax the costs that Abarca withdrew but missed some of those costs. When the withdrawn costs are added to those items on which Citizens prevailed, the total reduction should have been $35,572.86.

DISPOSITION

The order is modified to reflect that the total amount of costs awarded is $106,727.06. The order is affirmed as modified. Noe Abarca is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.