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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LEW WARDEN,

Plaintiff and Appellant,

v.

DUDLEY HOFFMAN MORTUARY  
et al.,

Defendants and Respondents.

2d Civil No. B229405  
(Super. Ct. No. 1198549)  
(Santa Barbara County)

THE COURT:\*

Lew Warden appeals an order of the trial court awarding attorney fees and costs incurred by respondent Dudley Hoffman Mortuary and numerous individuals in defending an action in the trial court and on appeal in which Warden asserted that respondents improperly mixed the cremated remains of his wife with the ashes of other persons and retained her gold dental fillings without authorization. We affirm.

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YEGAN, Acting P.J.

PERREN, J.

COFFEE, J.

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

### *STATEMENT OF FACTS AND PROCEDURAL HISTORY*

In a prior unpublished appellate opinion, we affirmed a jury verdict in favor of respondents Dudley Hoffman Mortuary, Janice Hoffman, Jeffrey Hoffman, Keith Grimsley, and Richard Williams and a directed verdict in favor of the Association of California Cremationists, Reginald Duran, and Dave Jones on Warden's complaint seeking damages and injunctive relief. The complaint contained numerous causes of action based on both contract and tort theories. In that opinion, we reversed the trial court's denial of respondents' motion for attorney fees and costs based on contract pursuant to Civil Code section 1717 and remanded the matter to the trial court for an award of fees in accordance with our opinion.

On remand, respondents' counsel submitted a duplicate of the motion for attorney fees the trial court had previously denied. The motion was accompanied by billing invoices respondents' counsel had submitted to respondents' insurance company for \$117,120.09 in fees. Respondents' counsel also filed a separate motion requesting \$40,632 in attorney fees for work done on appeal. That motion also was accompanied by copies of billing invoices sent to respondents' insurance company. After extensive briefing and oral argument, the trial court entered an order awarding \$107,150.09 in fees incurred in the trial court and the entire amount of attorney fees requested for work done on the appeal.

Warden appeals from the order awarding fees on the grounds that (1) there was no contractual basis for an award of fees, (2) respondents failed to file a motion for fees in the trial court on remand, (3) the Court of Appeal opinion did not authorize an award of fees claimed by respondents, (4) respondents' claims for fees for travel time and expenses was a fraud on the court, (5) respondents billed for time incurred in a different lawsuit, (6) the billing records submitted by respondents contained entries which were vague and redacted, (7) the trial court relied on the unsworn representations of

respondents' counsel in awarding fees, and (8) the trial court erred in assuming the Court of Appeal opinion deprived it of discretion in awarding fees.<sup>1</sup>

### *DISCUSSION*

#### *Respondents' Entitlement to Fees Was Adjudicated in the Prior Appeal*

A substantial portion of Warden's briefs in this appeal is devoted to rearguing respondents' entitlement to fees, an issue we adjudicated in our prior opinion, in which we stated:

"Respondents assert they are entitled to attorney fees based on language in the authorization for cremation and disposition stating: 'I . . . agree to protect and indemnify Dudley-Hoffman Crematory-Columbarium or its assigns, against any claims of damages which may result on account of this authorization or my . . . failure to properly identify or pick up said cremated remains, including legal fees and costs and expenses of litigation.' [Fn. omitted.]

"Although the complaint contains some claims that sound in contract and others in tort, each is based on the same alleged wrongdoing--commingling remains and stealing gold crowns. "[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.'" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.) For example, a provision in a contract that states 'in any "lawsuit or other legal proceeding" to which "this Agreement gives rise"' has been held broad enough to encompass recovery of attorney fees for tort claims. (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342-1343; see also *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1796-1797 [contract providing for recovery of attorney fees "'In any legal action brought by either party to enforce the terms hereof . . .'"].) The language in

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<sup>1</sup> Warden makes a passing reference in his opening brief to an asserted error by the trial court in directing payment of the award to respondents' counsel without directing how the sums should be disbursed. No argument is made concerning this contention, and we deem it waived. (*Sullivan v. Centinela Valley Union High School Dist.* (2011) 194 Cal.App.4th 69, 72, fn. 3.)

the authorization is broad enough to provide a basis for awarding attorney fees on the contract as well as the tort claims as it provides for the recovery of attorney fees for defending against 'any claims of damages which may result on account of this authorization.'

"In addition, a prevailing party is entitled to fees for work done on noncontract claims if the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units. (See, e.g., *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 [defense of contract, tort and RICO claims so intertwined that separation of time "'impracticable, if not impossible, . . .'" to achieve]; see also *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1085-1086 [time spent on non-fee shifting claims were determinative of fee-shifting claims and thus compensable]; *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1608 [successful party may recover fees for work on overlapping claims].) The attorney [fee] provision contains broad language encompassing both contract and tort claims. As respondents obtained a jury verdict in their favor, they were entitled to attorney fees and the trial court erred in denying them. (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1247; *Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1398-1399.) [Fn. omitted.]" (*Warden v. Dudley Hoffman Mortuary* (Apr. 19, 2010, B206840) [nonpub. opn.].)

Our prior opinion is a final adjudication of respondents' entitlement to fees. It is therefore unnecessary to address Warden's numerous contentions concerning this issue.

### *The Trial Court Did Not Abuse Its Discretion in Awarding Fees*

#### *Standard of Review*

The issue of the reasonableness of a fee award is reviewed for abuse of discretion. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1096.)

*The Billing Records Submitted by Respondents' Counsel Were Sufficient  
To Enable the Trial Court to Determine a Reasonable Fee*

The rule regarding awarding attorney fees to successful litigants is that "parties who qualify for a fee should recover for all hours reasonably spent . . . ." (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 632-633, fn. omitted.) The amount of fees awarded by a trial court is subject to a very deferential standard of review. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49; see also *In re Lugo* (2008) 164 Cal.App.4th 1522, 1544-1545 [" . . . The only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination . . . ."].) In the award of attorney fees, it is well recognized that the trial court is in the best position to evaluate the work of the attorneys. (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 997.)

A party seeking recovery of attorney fees and costs should submit sufficiently detailed records to enable a court to determine the nature of the litigation, its difficulty, the amount of time required to address the issues, the skill involved, the attention given, success or failure, and other circumstances of the case. (*PLCM Group v. Drexler, supra*, 22 Cal.4th at p. 1096.)

The billing records submitted by respondents' counsel meet these criteria. In most instances, the billing entries identify the nature of the task performed, e.g., drafting or reviewing pleadings, attending depositions, telephone conferences, court appearances and the like; the date of the task, and the time involved. The time was billed in 10-minute increments and the billing records show that, for the most part, a single attorney was involved in any individual task, thus avoiding overbilling for duplicative effort. Although Warden did not challenge the reasonableness of the hourly rate, we note that counsel's billing rate--a constant \$165 per hour for both partner and attorney time, with no premium charged for trial time—was reasonable.

Respondents prevailed on every issue in the lawsuit, including defeating a class action claim, and successfully defeated most, if not all, of Warden's numerous pre- and post-trial motions. On this record, we cannot say the fee award was unreasonable.

#### *Other Contentions*

Warden's assertion that respondents are not entitled to an award of fees because the pleadings filed on remand did not comply with the rules of court is without merit. A noticed motion is generally required to claim attorney fees. (Code Civ. Proc., § 1033.5, subd. (a)(10)(B); Cal. Rules of Court, rule 3.1702; Civ. Code, § 1717 ["The court, upon notice and motion by a party, shall determine who is the prevailing party on the contract [for purposes of awarding fees]"].) A judgment that includes a judicial determination of entitlement to contractual fees under Civil Code section 1717 satisfies the noticed motion requirement. (*Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1710.) Respondents filed a noticed motion for attorney fees incurred on appeal and a separate motion for fees incurred in the trial court. With respect to the latter document, respondents submitted a copy of the attorney fee motion they had submitted when first requesting fees and which the trial court initially denied. Each motion was accompanied by detailed billing records and an attorney declaration that the records were copies of the firm's billing invoices for legal services provided. Respondents' motions substantially complied with the relevant statute and court rule.

Warden's contention that the trial court awarded fees because it believed our prior opinion deprived it of discretion is also without merit. As the portion of our prior opinion above-quoted demonstrates, this court only determined that respondents were entitled to fees--this court did not in any way circumscribe the trial court's discretion in determining the amount of fees to be awarded.

Warden's assertion that respondents' claims for fees for travel time and expenses was a fraud on the court is without merit. The record clearly reflects that counsel withdrew \$9,700 in claimed fees for travel time and expenses, and the court reduced the amount of fees requested by that amount.

Warden's contention that respondents claimed fees incurred in a different lawsuit also is without merit. Counsel submitted a declaration accompanied by appropriately notated billing records explaining that the billing records were duplicates of monthly billing invoices submitted to respondents' insurance company and included time for fees incurred for counsels' representation of respondents in a related lawsuit (brought by Warden's nephew on behalf of plaintiffs asserting claims of wrongdoing substantially similar to that claimed by Warden in this lawsuit). The declaration explained that the attorney fees requested in this case did not include any fees incurred in the other lawsuit. Warden's briefs do not contain any numerical calculations supporting his assertion that fees for the other lawsuit were included in the request for fees in this case. In the absence of any such evidence, we must affirm the trial court's determination that the fees awarded were incurred in the present lawsuit. (See, e.g., *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564 [party challenging hours must present evidence that hours claimed are not appropriate].)

The record also belies Warden's assertion that the trial court relied on the unsworn representations of respondents' counsel in awarding fees. At the outset of the hearing, the trial court stated: "[T]here's voluminous paperwork on this. I've had a chance to review it all. I also reviewed the paperwork back when the paperwork was brought back in March of 2008. I reviewed the appellate court decision on the attorney fee issue." At the conclusion of argument, the court reiterated: "[T]his was a heavily litigated case that took a lot of work, and the court has reviewed the billing statements. It did so back in March 26th, 2008, when the matter first came before the court on the attorney fee trial costs, and has reviewed them again . . . ." The trial court's minute order states: "The Court finds the attorney's fees to be a reasonable amount charged in the community." The only representation of respondents' counsel relied on by the trial court

was the statement by counsel that it would reduce its request by the amount claimed for travel time and expenses, which, of course, redounded to Warden's benefit.

The order is affirmed. Respondents shall recover fees and costs on appeal.



Timothy J. Staffel, Judge

Superior Court County of Santa Barbara

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Lew Warden, in pro. per., for Appellant.

Hardin & Coffin, LLP and Naomi R. Dewey for Respondents.