

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GABRIEL R.,

Plaintiff and Respondent,

v.

MOHAMMADREZA YAZDI,
D.D.S.,

Defendant and Appellant.

B292125

(Los Angeles County
Super. Ct. No. BC597357)

APPEAL from a judgment of the Superior Court of Los Angeles County. Marc D. Gross, Judge. Affirmed.

Robert L. Luty for Plaintiff and Respondent.

Neufeld Marks and Paul S. Marks for Defendant and Appellant.

* * * * *

An arbitrator found that an orthodontic dentist had committed malpractice against his teenage patient and awarded the patient \$132,773.29. The trial court confirmed the arbitrator's award. The dentist appeals. Because the alleged errors he cites are neither supported by the record nor cognizable grounds for overturning an arbitration award, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Gabriel R. (Gabriel) was 12 when he went to Dr. Mohammadreza Yazdi (Dr. Yazdi), an orthodontic dentist. At that time, Gabriel's two front baby teeth had yet to fall out and the corresponding adult teeth were impacted above them.

Dr. Yazdi referred Gabriel to an oral surgeon with the instruction that the surgeon (1) remove the two baby teeth (through "surgical uncovering") and (2) "Bond Chain [and] Expose #10 #11 [the two corresponding adult teeth]." Following those instructions, the oral surgeon removed the two baby teeth and attached two parallel chains—one to each adult tooth—that passed through each socket where the baby teeth had been and further down into Gabriel's mouth, where they could be used to pull each of the adult teeth down into place.

At some point thereafter, Dr. Yazdi joined the two separate chains together, into a Y-shape, in an effort to get the teeth to descend more quickly. For the next two years, Dr. Yazdi did not x-ray Gabriel's mouth to assess the movement of the adult teeth. When a different dentist took an x-ray in June 2015, the x-ray revealed that the joined chain had pulled the two adult teeth toward the crux of the Y-shape, causing them to collide and preventing them from descending into their proper places in Gabriel's mouth.

II. Procedural History

A. *Lawsuit*

Gabriel, through his mother, sued Dr. Yazdi for malpractice.

B. *Arbitration*

Pursuant to an arbitration agreement Gabriel, through his mother, signed when first consulting with Dr. Yazdi, the parties went to arbitration.

The arbitration lasted two days. Gabriel and his mother testified. Gabriel also introduced the oral surgeon's deposition testimony, and called his current orthodontist, Dr. Gary Baum (Dr. Baum), as an expert witness. Dr. Yazdi testified and called an expert witness of his own. Dr. Yazdi's office manager also testified.

In a written ruling, the arbitrator found that Dr. Yazdi had been "negligent in his care and treatment of [Gabriel]" and that his negligence had "caused harm to Gabriel." In reaching this conclusion, the arbitrator found that Dr. Yazdi's testimony was "very inconsistent" and that it "just [did] not make sense," going so far as to find that the "other evidence and testimony in this case brings into question the creditability [sic] of Dr. Yazdi." The arbitrator also found that "the testimony of Dr. Baum was more creditable [sic]" than the testimony of Dr. Yazdi's expert. The arbitrator awarded Gabriel \$102,739 in damages and, in a supplemental award, an additional \$30,034.29 in "costs of suit."

C. *Motions to confirm and vacate the arbitral award*

Gabriel and Dr. Yazdi filed competing motions to confirm and vacate the arbitrator's award. In his motion to vacate, Dr. Yazdi argued that the arbitrator exceeded his powers by blatantly ignoring California law requiring him to apportion

liability between Dr. Yazdi, the oral surgeon and Dr. Baum, the last two of whom Dr. Yazdi alleged had been negligent. In response, Gabriel's attorney filed a declaration explaining that the arbitrator had precluded Dr. Yazdi's expert from offering an opinion on whether the oral surgeon and Dr. Baum had been negligent because the expert had disclosed no such opinions during his deposition.

The trial court simultaneously denied Dr. Yazdi's motion to vacate and granted Gabriel's motion to confirm. The court ruled that the arbitrator had not erred in failing to apportion liability between Dr. Yazdi and anyone else because the arbitrator had excluded the expert testimony necessary to establish the negligence of anyone else. The court further ruled that the arbitrator had not exceeded his powers in excluding this evidence.

After the court entered judgment, Dr. Yazdi filed this timely appeal.

DISCUSSION

Dr. Yazdi argues that the trial court erred in denying his motion to vacate the arbitrator's award because the parties' arbitration agreement required the arbitrator to apply California law applicable to healthcare providers, such law requires negligence to be apportioned among multiple tortfeasors, and the arbitrator's refusal to follow this law means he "exceeded [his] powers" for purposes of Code of Civil Procedure section 1286.2, subdivision (a)(4).¹ We independently review a trial court's denial of a motion to vacate (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 918, fn.1), and conclude that the trial court's order

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

denying Dr. Yazdi's motion to vacate was correct for three independent reasons.

First, the arbitrator properly attributed all of Gabriel's damages to Dr. Yazdi because Dr. Yazdi was the only person proven to be negligent during the arbitration. The arbitrator precluded Dr. Yazdi's expert witness from testifying that the oral surgeon or Dr. Baum were also negligent. Without that testimony, Dr. Yazdi could not establish their negligence. (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542 ["As a general rule, the testimony of an expert witness is required in every professional negligence case to establish the applicable standard of care, whether that standard was met or breached by the defendant, and whether any negligence by the defendant caused the plaintiff's damage."]; see also *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.)

Second, any error in the arbitrator's evidentiary ruling provides no basis for vacating his award. The California Arbitration Act (§ 1280 et seq.) carefully delineates the grounds on which an arbitrator's award may be vacated. (§ 1286.2.) As pertinent here, those grounds include when the arbitrator (1) "exceed[s] [his] powers" or (2) "refuse[s] . . . to hear evidence material to the controversy." (§ 1286.2, subds. (a)(4) & (a)(5).) An arbitrator does not exceed his powers by making an "error[] of fact or law," and thus does not exceed his powers by making an erroneous evidentiary ruling. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6, 11 (*Moncharsh*); *Heimlich v. Shivji* (2017) 12 Cal.App.5th 152, 176; see *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1110 [incorrect evidentiary rulings do not exceed an arbitrator's powers].) Further, the evidence the arbitrator excluded—that is, the testimony of Dr.

Yazdi's expert that the oral surgeon and Dr. Baum were also negligent—is not “material to the controversy” in light of that expert's deposition testimony that neither the oral surgeon nor Dr. Baum had committed malpractice and in light of the trial court's adverse credibility finding as to that expert.

Third, even if the arbitrator's exclusion of Dr. Yazdi's expert's testimony had been erroneous, the arbitrator still did not exceed his powers in allocating 100 percent of the liability to Dr. Yazdi. That is because the introduction of evidence of negligence by the oral surgeon and Dr. Baum would at most have obligated the arbitrator to make a factual finding as to each respective tortfeasors' contributions to Gabriel's injury. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 [comparative fault is a factual finding].) Factual findings are upheld as long as they are supported by substantial evidence (e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 327), and under the deferential review standard built into section 1286.2, “[i]t is not appropriate [for a court] to review the sufficiency of the evidence before the arbitrator” (*Rodrigues v. Keller* (1980) 113 Cal.App.3d 838, 843 (*Rodrigues*)).

Dr. Yazdi makes three arguments resisting our conclusions.

First, Dr. Yazdi disputes the trial court's finding that he had presented insufficient evidence of negligence by the oral surgeon and Dr. Baum because, according to Dr. Yazdi, the arbitrator never excluded his expert's testimony. We reject Dr. Yazdi's assertion because he has not substantiated it. (*Bui v. Nguyen* (2014) 230 Cal.App.4th 1357, 1376 [“It is the appellant's burden to produce a record that demonstrates claimed error . . .”]; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [“A judgment or order of the lower court is *presumed correct*.”].) We cannot

verify what the arbitrator actually did or said because Dr. Yazdi provides no reporter's transcript of the arbitration hearing. All we have is Gabriel's counsel's sworn declaration before the trial court reporting the arbitrator's evidentiary ruling. Because Dr. Yazdi offered no contrary evidence, the trial court's finding that the arbitrator excluded Dr. Yazdi's expert's testimony is supported by substantial evidence. Dr. Yazdi strenuously argued in a late-filed reply brief to the trial court and argues in his brief before this court that the arbitrator made no such evidentiary ruling, but these unsworn statements in his pleadings do not constitute evidence. (*San Diego Police Officers Assn. v. City of San Diego* (1994) 29 Cal.App.4th 1736, 1744; see generally Evid. Code, § 140 [defining "evidence"].) These arguments also contradict Dr. Yazdi's representation in his own closing brief to the arbitrator that the arbitrator had refused to allow his expert to testify to whether Dr. Baum had been negligent. Dr. Yazdi's failure to provide evidence in the record contradicting the trial court's findings and his own representations in filings before the arbitrator is fatal to his claim of error.

Second, Dr. Yazdi argues that the arbitrator's refusal to apportion liability "exceeded [his] powers" because the arbitration agreement required the arbitrator to follow California law, and apportionment of liability is part of California law. We reject this argument. It ignores the arbitrator's ruling excluding all evidence of negligence by others, which left no liability to allocate. Thus, this case is nothing like the cases Dr. Yazdi cites where arbitrators exceeded their powers by refusing to take steps that their factual findings required them to take under the plain language of the governing arbitration agreement. (See *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, 1811-1815 [arbitrator

found one party to be prevailing, but ignored agreement's duty to award the prevailing party attorney fees]; *Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1143-1144 [arbitrator found an employee's discharge to comply with the collective bargaining agreement, but ignored agreement's duty not to award any further relief upon such a finding].) Dr. Yazdi's argument would also convert every choice-of-law clause in an arbitration agreement into a means for reviewing an arbitrator's award for errors of law; this is inconsistent with the longstanding interpretation of the California Arbitration Act. (Accord, *Moncharsh, supra*, 3 Cal.4th at pp. 6, 11.)

Lastly, Dr. Yazdi seems to attack Gabriel's and Dr. Baum's credibility, asserting that Gabriel's theory of liability and Dr. Baum's reasons for believing Dr. Yazdi to be negligent changed over the course of the litigation. We need not entertain these attacks because, as noted above, any error in evaluating the sufficiency of the evidence is not a basis for upsetting an arbitrator's award (*Rodrigues, supra*, 113 Cal.App.3d at p. 843), and because reviewing courts are not in any event permitted to second guess credibility findings (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 254).

DISPOSITION

The judgment is affirmed. Gabriel is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ