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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

VIESTURS PETERSONS, Plaintiff and Respondent, v. DONALD E. COOPER, Defendant and Appellant.	B270282 (Los Angeles County Super. Ct. No. BC545349)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Donald E. Cooper, in pro. per., for Defendant and Appellant.

Dinsmore and Sandelmann, Scott D. Dinsmore, and Lewis Stevenson for Plaintiff and Respondent.

INTRODUCTION

Defendant Donald Cooper, an attorney, retained plaintiff Dr. Viesturs Petersons, a retired neurosurgeon, to serve as a medical expert in a wrongful death lawsuit. Petersons subsequently sued Cooper, alleging Cooper breached the parties' retainer agreement by failing to pay Petersons approximately $104,000 in fees. After a bench trial, the court found in favor of Petersons, and awarded him $75,150 on the claim. Cooper challenges the judgment on multiple grounds, all essentially disputing the sufficiency of the evidence to support the court's findings. We conclude the findings are supported by substantial evidence, and affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *The* Rutigliano *Action*

The action arises out of an underlying wrongful death lawsuit, for which Cooper retained Petersons to serve as a medical expert (the *Rutigliano* action). In February 2008, Alfred Rutigliano died of a pulmonary embolism caused by deep vein thrombosis. The Rutigliano family retained Cooper to bring a medical malpractice claim against the care providers (the *Rutigliano* defendants).

In May 2010, Cooper drafted a retainer agreement and fee schedule, setting forth the terms for Petersons's retention in the *Rutigliano* action. The retainer agreement states: "Attorney retains Doctor in the [*Rutigliano* action] to review records and such other documents as may be provided by Attorney, render[ ] opinions on such subjects as Attorney may request and to testify as an expert witness at trial regarding the level of care and treatment of decedent provided by the defendants and whether such care and treatment met the minimum standard of care

required of physicians in the Southern California Area." The retainer agreement continues: "Doctor shall be compensated for his services at the rates as set forth in the Schedule of Rates attached hereto." The attached schedule sets out hourly rates for "Providing testimonial evidence at trial or in depositions" ($1,000), "Deposition or trial preparation" ($850), "Travel time" ($650), "Record review" ($650), "Report preparation" ($850) and "Conferences with attorney" ($850).

In connection with Petersons's work under the retainer agreement, Cooper provided Petersons with 40 different documents to review, including medical records, an autopsy report, and several deposition transcripts, motions for summary judgment, and discovery responses from the *Rutigliano* defendants.

Petersons opined that the *Rutigliano* defendants committed malpractice by failing to consider and diagnose Rutigliano's deep vein thrombosis, failing to prescribe prophylactic deep vein thrombosis prevention, including anticoagulation and thrombolysis treatment, and prescribing contra-indicated, aggressive ambulation physical therapy that ultimately dislodged emboli, causing Rutigliano's death.

On the date scheduled for trial, the plaintiffs in the *Rutigliano* action agreed to settle their claims for $5,000 from one defendant and a waiver of costs from the remaining *Rutigliano* defendants. After learning of the settlement, Petersons sent Cooper a bill for his services. Cooper did not pay Petersons.

2. *Petersons's Breach of Contract Claim*

Petersons sued Cooper for the unpaid fees, asserting a claim for breach of contract and a common count for services rendered. The parties agreed to a bench trial, and submitted a

joint memorandum of undisputed facts, pertaining primarily to the procedural history of the underlying *Rutigliano* action, the terms of the retainer agreement, and the documents Cooper provided to Petersons in connection with the case.

At trial, Petersons testified that he prepared contemporaneous handwritten notes itemizing the time he worked on the *Rutigliano* action. He generated an invoice from those notes and submitted the whole package to Cooper after learning of the settlement. In some instances, such as for "periodic telephone conference calls," Petersons admitted he did not always have contemporaneous notes. For those items, he estimated the time spent on the task over a period of several days and sometimes months. His final invoice to Cooper requested fees totaling $104,824.50.

3. *Cooper's Defense*

Cooper advanced four theories of defense to Petersons's breach of contract claim. First, he maintained Petersons "acted negligently" in rendering his opinion, and that the unpaid fees should be "offset" by the value of the contingent attorney fees Cooper purportedly lost as a result. In support of the defense, Cooper relied exclusively upon an excerpt from Petersons's deposition testimony in the *Rutigliano* action, in which Petersons admitted, contrary to a statement in his declaration, that a medical record indicated the defendants had administered walking physical therapy to Rutigliano. This physical therapy, Petersons tacitly conceded, could constitute prophylactic treatment to prevent deep vein thrombosis. Cooper did not present expert evidence to explain how this deposition testimony undermined Petersons's other opinions regarding the alleged malpractice. Cooper also admitted he successfully used a

supplemental declaration by Petersons, after the deposition, to oppose a motion for summary judgment.

Second, Cooper maintained Petersons overbilled for research, emphasizing that the retainer agreement authorized Petersons to render opinions only "on such subjects as Attorney may request." In response to Cooper's questions about specific research items, Petersons testified that he relied on the research to form his opinion that the *Rutigliano* defendants committed medical malpractice. Cooper did not offer expert testimony to dispute Petersons's account of why the research was relevant to his opinion, and the trial court precluded Cooper from examining Petersons as to whether Cooper had authorized specific research items. Cooper also admitted that Petersons likely believed the research was relevant because, in Cooper's words, "I think I threw out everything I possibly could on the *Rutigliano* case."

Third, Cooper asserted he was entitled to an offset for allegedly unpaid legal fees Petersons owed him from an unrelated lawsuit. At trial, Cooper sought to introduce evidence of a supposed oral agreement whereby Petersons agreed to provide services in the *Rutigliano* action as payment for the alleged debt. Petersons testified he had no such discussion with Cooper. When Cooper attempted to testify later about the purported oral agreement, the trial court refused to admit the testimony under the parol evidence rule.

Finally, Cooper maintained Petersons's request for approximately $104,000 in expert witness fees was unconscionable, given the $250,000 cap on noneconomic damages imposed by the Medical Injury Compensation Reform Act

(MICRA).[1] In that regard, Cooper claimed Petersons overbilled for time spent reviewing documents and for office conferences that regularly devolved into "idle chatter" unrelated to the *Rutigliano* action. Petersons disputed the charge, testifying he always made an appointment or came to the office at Cooper's request. He also denied that he charged Cooper for conversations unrelated to the malpractice action.

4. *The Trial Court's Statement of Decision*

The trial court issued a written statement of decision finding Cooper liable for breach of the retainer agreement and awarding Petersons $75,150 on the claim. The court rejected Cooper's contention that Petersons overbilled for office conferences and reviewing records, noting the list of documents was "extensive" and "consumed virtually 2 pages of the [parties'] Joint Memorandum [of Undisputed Facts]." The court also found that the research time Petersons billed was "within the scope of the retainer agreement." However, the court allowed recovery only for those tasks that were explicitly described in Petersons's billing records, and struck the fees for "unitemized" tasks for which Petersons had provided only general time estimates.

The court revisited Cooper's offset claim in its statement of decision, noting that Cooper had discussed "other cases" involving

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[1] "In 1975, our Legislature enacted [MICRA], substantially changing the law governing medical malpractice actions. Among other things, the Legislature imposed a $250,000 limitation on noneconomic damages in any action 'based on professional negligence,' with 'professional negligence' defined as 'a negligent act or omission to act by a health care provider in the rendering of professional services . . . .' " (*Perry v. Shaw* (2001) 88 Cal.App.4th 658, 661.)

Petersons in his closing argument brief.[2] In rejecting the offset claim, the court cited the stipulated "fact that [Cooper] drafted the retainer agreement," and reasoned that "if [Cooper] wanted other financial obligations set off from [Petersons's] billing herein, he could easily have added the appropriate terms to the contract."

Finally, the court rejected Cooper's unconscionability defense. The court found Petersons's time was "not excessive," given "the nature of the issues" presented and that it amounted to only 10 percent of the "1200 hours" that Cooper said he spent on the case.

DISCUSSION

1. *Standard of Review*

"The substantial evidence standard applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury trial." (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.) "Where [the] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358; *Estate of Young* (2008) 160 Cal.App.4th 62, 75.) We must " 'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]' [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations.

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[2] Cooper did not include the parties' closing argument briefs in his appellant's appendix.

[Citations] Moreover, findings of fact are liberally construed to support the judgment." (*Estate of Young,* at p. 76.)

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. (*Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 420 (*Ghadrdan*).)

2. *Substantial Evidence Supports the Trial Court's Finding that Petersons Was Not Negligent in Performing His Professional Services*

Cooper argues Petersons "negligently performed" the expert services set forth in the retainer agreement, thus "materially breaching [the] contract" and "excusing any further performance of the contract" by Cooper. As he did at trial, Cooper relies exclusively upon Petersons's deposition testimony, in which Petersons conceded, contrary to a statement made in his expert declaration, that Rutigliano's hospital records showed he had received walking physical therapy that could constitute prophylactic treatment for deep vein thrombosis. Cooper maintains this evidence compelled the trial court to find Petersons's alleged negligence "destroyed any settlement and trial values of the action," so as to bar Petersons from receiving payment under the retainer agreement. We disagree.

Where, as here, an offset claim is predicated on the assertion that "professional negligence caused the loss of a lawsuit," the party asserting the claim must prove that " 'the proper handling of the prior lawsuit by the professional would have resulted in a collectible judgment in [the party's] favor.' " (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 834, 844 (*Mattco*).) As the *Mattco* court explained, this "trial-within-a-trial burden" is "the most effective safeguard yet devised against speculative and conjectural claims," and it is "a

standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance." (*Ibid.*)[3]

The evidence supports the trial court's implicit rejection of Cooper's professional negligence claim. Even if the court accepted, as Cooper maintains, that Petersons's deposition testimony showed he negligently overlooked a hospital record that contradicted part of his opinion, there was other evidence that showed this oversight was not so damaging to the case that it *actually caused* Cooper to lose the contingent attorney fee he hoped to collect in the *Rutigliano* action. Most notably, Cooper admitted he used a supplemental declaration by Petersons, which addressed the allegedly damaging deposition testimony, to successfully oppose a motion for summary judgment. And, as the trial court noted, Cooper failed to offer expert evidence to prove the deposition testimony completely undermined Petersons's central opinion that the *Rutigliano* defendants committed

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[3] In extending this rule beyond claims for " 'lawyer negligence' " to negligence claims against other professionals, the *Mattco* court explained: "In today's technologically driven litigation, engineers, pathologists, serologists, physicians, appraisers, real estate brokers, and many other professionals . . . frequently are hired to assist a party in preparing and presenting a legal case. 'Often they play as great a role in the organization and shaping and evaluation of their client's case, as do the lawyers. . . . As experts, they are subject to liability if they perform the services negligently. [Citation.] [¶] [But,] [l]ike other defendants in negligence lawsuits, litigation support professionals are only responsible for the losses *they cause*. [Citations.] Thus, in situations where alleged negligent conduct *is analogous* to an attorney's mishandling litigation, a plaintiff should be held to the same burden." (*Mattco, supra,* 52 Cal.App.4th at pp. 834-835, first italics added.)

malpractice by failing to prescribe anticoagulation and thrombolysis treatment to prevent the deep vein thrombosis. On this record, the trial court was more than justified in concluding Petersons should be compensated for his work on the case, notwithstanding the purported negligent oversight.

3. *The Trial Court Did Not Abuse Its Discretion by Limiting Examination Regarding Research*

Cooper contends the trial court erred by limiting his examination regarding Petersons's research. Because the retainer agreement provided that Petersons was to render "opinions on such subjects *as Attorney may request*" (italics added), Cooper argues he should have been permitted to examine Petersons as to whether he authorized Petersons to perform specific research tasks. The trial court concluded the examination would result in undue consumption of time, but allowed Cooper to ask whether Petersons used the research in forming his opinion. We conclude the court acted within its discretion and that its decision to award Petersons fees for the research was supported by substantial evidence.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) A trial court's exercise of its discretion under section 352 must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*Id.* at pp. 1124-1125; *Ghadrdan, supra,* 182 Cal.App.4th at p. 420.)

The trial court reasonably determined that the critical question was not whether Cooper authorized a particular item of research, but rather whether Petersons relied on the research in forming his opinion. The retainer agreement provided that Petersons was to render "opinions on such subjects as Attorney may request *and* to testify as an expert witness at trial regarding the level of care and treatment of decedent provided by the defendants and whether such care and treatment met the minimum standard of care required of physicians in the Southern California Area." (Italics added.) Petersons testified that he relied upon each disputed item of research in forming his opinion that the *Rutigliano* defendants failed to meet the applicable standard of care. For his part, Cooper failed to offer expert testimony to show that Petersons should not have undertaken or relied upon the research in question. Indeed, Cooper admitted that Petersons had reason to believe the research would be relevant, since in litigating the case, Cooper said he "threw out everything [he] possibly could." On this record, the trial court reasonably concluded Petersons was entitled to payment for the time spent on research, regardless of whether Cooper pre-authorized any particular task.

4. *The Trial Court Properly Rejected Cooper's Claim for an Offset Under the Parol Evidence Rule*

Cooper contends the trial court erred by precluding him from introducing evidence regarding a purported oral agreement to offset Petersons's expert witness fees with allegedly unpaid attorney fees owed to Cooper from an unrelated lawsuit. In excluding the evidence, the trial court observed that the written retainer agreement "specifies the matter and amount of payment" that Petersons would receive as compensation for his services

and, therefore, evidence of a collateral oral agreement regarding the terms of payment was barred by the parol evidence rule. The law and evidence support the court's ruling.

"The parol evidence rule is a fundamental rule of contract law which operates to bar extrinsic evidence contradicting the terms of a written contract. [Citation.] It is not merely a rule of evidence but is substantive in scope." (*BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 990.) "When the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms." (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.) "[E]xtrinsic evidence is admissible only to supplement or explain the terms of the agreement—and even then, only where such evidence is consistent with the terms of the integrated document, and only where the writing is not also intended as an exclusive statement regarding its subject matter." (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 176-177.)

"[T]he issue of a contract's integration 'must be resolved preliminarily by the court, . . . and only after the court finds the agreement not integrated may parol evidence be admitted to amplify its terms.' " (*Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1381-1382 (*Heller*).) The court may consider the terms of the collateral agreement to determine whether it is "an agreement which, in the normal course of events, might be made as a separate contract." (*Software Design & Application, Ltd. v. Price Waterhouse* (1996) 49 Cal.App.4th 464, 470 (*Software Design*).) "Review of the trial court's determination is subject to 'the same deference on appeal as any other ruling of the court on an issue of fact.' [Citation.] Under

the applicable 'substantial evidence' test, we review the record in the light most favorable to respondents, we do not weigh the evidence, and we indulge all intendments and reasonable inferences which favor sustaining the trier of fact's findings." (*Heller,* at p. 1382.)

In determining whether the parol evidence rule applied, the trial court received what amounted to conflicting evidence about the parties' intentions with respect to the alleged collateral offset agreement. Under cross-examination by Cooper as to whether there had been "a discussion about working off time which was owed to me in the [other lawsuit] in terms of your efforts as an expert in the *Rutigliano* case," Petersons responded that no such discussion had occurred. Contrary to Petersons's denial, Cooper testified that he had an "agreement with Dr. Petersons to offset his services against the amount he owed me in the [other lawsuit]." The trial court asked Cooper why the terms of the offset had not been included in the written retainer agreement, and Cooper responded only that "[w]e were very close friends" and "I thought a handshake was enough with Dr. Petersons."

Based on the foregoing testimony, and the stipulated fact that Cooper "drafted the retainer agreement," the trial court reasoned that "if [Cooper] wanted other financial obligations set off from [Petersons's] billing herein, he could easily have added the appropriate terms to the contract." That assessment was consistent with the evidence and in keeping with the trial court's function to "consider all the surrounding circumstances," including "the collateral agreement itself[,] to ascertain if it was meant to be part of the bargain." (*Software Design, supra,* 49 Cal.App.4th at p. 470.) Because the evidence supported the finding that the retainer agreement was integrated as to "the

matter and amount of payment," the court properly applied the parol evidence rule to preclude Cooper from presenting evidence to alter the written contract's terms.

5. *Substantial Evidence Supports the Fee Award; the Trial Court Reasonably Rejected Cooper's Unconscionability Defense*

Cooper contends the damages awarded to Petersons under the retainer agreement were "unconscionable" because the *Rutigliano* plaintiffs' recoverable damages were capped at $250,000 under MICRA. (See fn. 1, *ante*.) The fundamental problem with this contention is that nothing in the retainer agreement between Cooper and Petersons provided that Petersons's compensation would be deducted from the recovery of the *Rutigliano* plaintiffs, who were not parties to the retainer agreement. The retainer agreement provides only that "Doctor shall be compensated for his services at the rates as set forth in the Schedule of Rates attached hereto." The only party obligated to pay those fees is Cooper, as the party retaining Petersons to provide professional services. As the trial court properly reasoned, Cooper "himself drafted" the agreement and, thus, "could have protected himself in many ways, such as [by] limiting the hours [Petersons] was authorized to incur, and insist[ing] upon monthly statements." Cooper's failure to insist on these provisions does not convert reasonably incurred expert witness fees into unconscionable damages.

Substantial evidence supports the trial court's award, and nothing in the record compels a finding that the damages were "unconscionable and grossly oppressive" so as to be "contrary to substantial justice." (Civ. Code, § 3359 [providing that "no more than reasonable damages can be recovered"].) " 'The amount of

damages is a fact question,' " committed to the discretion of the trial court in the case of a bench trial. (*Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 727.) "In assessing a claim that the [trial court's] award of damages is excessive, we do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor. We may interfere with an award of damages only when it is so large that it shocks the conscience and suggests passion, prejudice or corruption on the part of the [trial court]." (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1074.)

The trial court awarded Petersons $75,150 in fees under the retainer agreement—nearly $30,000 less than Petersons's original claim of $104,824.50. In doing so, the court properly relied upon Petersons's testimony and his contemporaneous written records of the time spent on specified tasks. There is simply no indication that the amount of the damages award was motivated by passion or prejudice. To the contrary, the court's statement of decision confirms that the trial judge was discerning in his assessment of what claims to compensate, and reasonably disallowed fees for work that Petersons failed to describe explicitly in his billing records. There is no basis for reversal of the damages award on this record.

DISPOSITION

The judgment is affirmed. Petersons is entitled to his costs.

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.