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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID SIMON,

Plaintiff and Appellant,

v.

DAVID COLEMAN,

Defendant and Respondent.

B231229

(Los Angeles County  
Super. Ct. No. BC343918)

APPEAL from an amended judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Reversed and remanded.

David Simon, in pro. per., for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole and Jon D. Robinson for Defendant and Respondent.

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Appellant, David Simon, previously brought an attorney malpractice action against his former attorney, respondent David Coleman, arising out of respondent's representation of appellant in a conservatorship action over his father. Respondent cross-complained for unpaid fees. Respondent obtained summary judgment on appellant's complaint and a judgment after court trial in his favor on the cross-complaint. Respondent was also awarded costs of proof under Code of Civil Procedure,<sup>1</sup> section 2033.420<sup>2</sup> in connection with proving, at summary judgment, matters which appellant unreasonably denied in response to requests for admission. Appellant appealed that decision, in *Simon v. Coleman* (B215813 c/w B218219), and we concluded the trial court's costs-of-proof award encompassed certain costs to which respondent was not entitled. We reversed and remanded the order for a redetermination of the proper amount. In all other respects, we affirmed.

This appeal is from the trial court's recalculation of the costs-of-proof award on remand. We conclude that, to the extent the trial court's recalculation of the

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<sup>1</sup> All section references herein are to the Code of Civil Procedure unless otherwise noted.

<sup>2</sup> Section 2033.420 states, "(a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. [¶] (b) The court shall make this order unless it finds any of the following: [¶] (1) An objection to the request was sustained or a response to it was waived under Section 2033.290. [¶] (2) The admission sought was of no substantial importance. [¶] (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter. [¶] (4) There was other good reason for the failure to admit."

costs-of-proof award was consistent with our directions, it was not an abuse of discretion. However, we also conclude that the inclusion of respondent's attorneys' fees incurred after June 26, 2009, the date that the order granting respondent's request for costs of proof was entered with respect to *Simon I*, was improper. Therefore, we will reverse the trial court's judgment and remand with further instructions.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

The prior case, *Simon v. Coleman*, 2010 Cal. App. Unpub. LEXIS 7015 (Cal. App. 2d Dist. Aug. 31, 2010) (*Simon I*), includes a thorough discussion of the background facts and, thus, we need not describe them again here.

In *Simon I*, we reviewed the trial court's order that respondent was entitled to receive his costs of proof, pursuant to section 2033.420 (see n.2, *ante*), with respect to appellant's denial of certain requests for admissions. (*Simon I, supra*, 2010 Cal. App. Unpub. LEXIS 7015, 1.) We held that respondent was "not entitled to any amount for establishing that (1) he did not violate the standard of care; (2) he did not breach his contract; or (3) there was no legal procedure available to prevent Adelle Simon from taking Ernst Simon to Mexico. In all other respects, we affirm[ed]." (*Simon I, supra*, 2010 Cal. App. Unpub. LEXIS 7015, 32-33.) We then remanded the case to the trial court directing it "to vacate its order granting costs of proof and to enter a new and different order: (1) granting [respondent's] motion for costs of proof as it pertain[ed] to requests for admission 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 18, 20, 23, 24 and 25; (2) denying the motion for costs of proof as it pertain[ed] to requests for admission 6, 19 and 21; [and] (3) recalculating the award to include only the reasonable expenses

incurred in proving true the statements in requests for admission 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 18, 20, 23, 24 and 25.” (*Simon I*, *supra*, 2010 Cal. App. Unpub. LEXIS 7015, 33.) We ordered the parties to each bear his own costs on appeal. (*Ibid.*)

On remand, respondent filed a motion with the trial court seeking revised costs of proof in the amount of \$50,150. In addition, respondent sought attorneys’ fees incurred in filing the motion in the amount of \$2,350 and attorneys’ fees incurred in defending *Simon I* in the amount of \$13,787. In support of these costs and fees, respondent submitted the declaration of Jon D. Robinson (Robinson), his counsel. With respect to costs of proof incurred, Robinson included in the declaration descriptions of both his and his co-counsel’s experience and hourly rates. He also included detailed billing statements from November 19, 2007 through March 2, 2009, which had been revised to exclude any time billed for “attempting to prove that there was no breach of the standard of care.” With respect to attorneys’ fees incurred in filing the motion, Robinson declared, “1.8 hours were spent in reviewing and redacting the attorneys [sic] bills, 2.1 hours researching and preparing the draft of the motion, and .9 hours reviewing and revising same. Further, this office estimates 2.0 hours to review the opposition and prepare a reply thereto, and at least 2.5 hours to prepare for attend [sic] the hearing, for a total of 9.4 hours.” Finally, with respect to attorneys’ fees incurred for defending *Simon I* before this court, Robinson declared, “total reasonable fees incurred by [respondent] in opposing [appellant’s] appeal were \$27,575. Very conservatively, at least one half of that amount was incurred in obtaining affirmation by the Court of Appeal of the causation and scope of duty issues that [appellant] unreasonably refused

to admit in this action. Therefore, at least \$13,787 should be added to the fee judgment as a result of the appeal . . . . ”

Taking into consideration appellant’s opposition and respondent’s reply, the trial court found that respondent had not explained “what formula he used to reduce billing entries that related to the issue of the breach of the standard of care. In addition, [respondent] does not claim to have removed or reduced billing entries relating to ‘breach of this contract’ and the lack of ‘legal procedure available to prevent Adelle Simon from taking Ernst Simon to Mexico’ as the Appellate Court directed.” It then concluded that respondent failed to provide sufficient evidence that his recalculation of the costs-of-proof award was in accordance with our instructions on remand and reduced it further to \$45,000. The trial court found respondent’s evidence sufficient to support additional awards of attorneys’ fees in the amount of \$2,350 for filing the motion and \$13,787 for defending the appeal. An amended judgment was entered on January 6, 2011. This appeal followed.

### ***CONTENTIONS ON APPEAL***

Appellant contends that (1) there was insufficient evidence to support the trial court’s recalculated costs-of-proof award; and (2) attorneys’ fees incurred by respondent defending *Simon I* on appeal should not be included in such award. He seeks reversal of the amended judgment.

### ***DISCUSSION***

As we noted above, respondent submitted a motion seeking not only a recalculation of the costs-of-proof award in accordance with the remittitur we issued

to the trial court on November 4, 2010, but also attorneys' fees incurred for filing the motion and for defending *Simon I* on appeal. The trial court ruled on all of these requests in one amended judgment. This was improper.

"The appellate court clerk's issuance of the remittitur effects the transfer of jurisdiction to the lower court. [Citation.] . . . [T]he terms of the remittitur define the trial court's jurisdiction to act. 'The order of the appellate court as stated in the remittitur, 'is decisive of the character of the judgment to which the appellant is entitled.'" ' [Citations.]" (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 774, fn. 5.) Because the remittitur was limited to the recalculation of the costs-of-proof award, the trial court should have limited its amended judgment to that issue alone. Respondent's request for attorneys' fees incurred for filing the motion and for defending *Simon I* on appeal should have been ruled upon in a separate hearing with a separate order. In our review of the amended judgment, we shall treat the trial court's rulings with respect to the costs-of-proof recalculation, on the one hand, and the attorneys' fees incurred subsequent to the June 26, 2009 order, on the other hand, as two separate rulings.

1. *The Trial Court's Recalculation of the Costs-of-Proof Award*

- a. *Standard of Review*

Pursuant to section 2033.010, a party may serve requests for admission on another party requesting that such party "admit the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact." If the served party fails to admit the truth of any matter when so requested and

the requesting party thereafter proves the truth of that matter, the requesting party may move the court for an order requiring the served party to pay the reasonable expenses incurred in making such proof. (§ 2033.420, subd. (a).) These expenses may include attorneys' fees. (*Ibid.*) The trial court must grant the motion unless, unless one of the four exceptions listed in section 2033.420, subdivision (b), applies. (See fn. 2, *ante.*) We review a trial court's ruling as to whether such costs are proper for an abuse of discretion. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1275-1276.)

As we have already determined in *Simon I* that respondent was entitled to his costs of proof, our review in this appeal is limited to the trial court's recalculation of the *amount* of the costs-of-proof award. The trial court's determination of the amount of expenses incurred in proving such matters is also reviewed for an abuse of discretion. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 508 [discussing costs-of-proof award as authorized under section 2034, subdivision (c), which was repealed in 2005, the language of which now appears in substantial part in section 2033.420].)

Appellant contends that there was insufficient evidence to support the trial court's costs-of-proof award. Appellant asserts in support of this contention that respondent was required, pursuant to our directive, to "tie the requests on a request-by-request basis to the amount of fees claimed." Additionally, appellant asserts that the motion for costs of proof contained "three glaring inconsistencies which show that the motion contains insufficient proof of the amount of fees[:]" (1) the new costs-of-proof amount sought by respondent was only slightly lower than the fees

previously awarded;<sup>3</sup> (2) assuming respondent was entitled to attorneys' fees incurred for the appeal of *Simon I* (which we address below), the 50 percent reduction in those fees sought conflicts with the percentage reduction of the costs-of-proof in (1); and (3) the bills attached show arbitrarily reduced amounts of time billed without specific billing descriptions and include costs of proof with respect to the facts that we previously held respondent failed to prove.

None of these assertions has merit. First, these arguments are the same as were made before the trial court. They address respondent's motion rather than pointing out how the trial court abused its discretion in recalculating the award. Next, the record contains ample evidence on which the trial court could base its calculations. Robinson's declaration included a description of his and his co-counsel's relevant experience and billing rates, as well as detailed billing sheets from 2007 through 2009. Finally, the trial court stated that it was necessary to further reduce the award below the amount requested by respondent to reflect our directions on remand. The record indicates that the trial court considered the evidence and both respondent's and appellant's arguments and properly exercised its discretion in recalculating the award in compliance with our directions.

### 3. *Attorneys' Fees Incurred Subsequent to June 26, 2009*

Appellant asserts that there is no authority supporting respondent's request for inclusion of his attorneys' fees incurred for the appeal of *Simon I* in the recalculation of

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<sup>3</sup> Appellant specifically claims that the difference is only \$2,880 less. This is incorrect, however. Respondent requested a revised costs-of-proof award in the amount of \$50,150, a difference of \$5,270.



the costs-of-proof award. “Statutory authorization for recovering attorney[s’] fees in the trial court necessarily includes attorney[s’] fees incurred on appeal unless the statute specifically provides otherwise. [Citations.]” (*Community Facilities Dist. v. Harvill* (1999) 74 Cal.App.4th 876, 883.) Nowhere in section 2033.420 does it state that attorneys’ fees incurred on appeal are not included in costs of proof. However, this rule is to be applied in general and did not expand the terms of the remittitur to include such fees in the recalculation.

He also asserts that respondent failed to follow the proper procedure under California Rules of Court, Rules 3.1702 and 8.276 in requesting such fees because respondent was required to make a request by separate motion. Appellant’s reliance on these rules is misplaced as neither Rule 3.1702 nor Rule 8.276<sup>4</sup> applies in this context, which involves whether the trial court properly complied with a remittitur. Although we disagree with appellant’s citing to these rules in support of his argument, we agree that respondent was required to make a request by separate motion as we noted above. The terms of the remittitur directed the trial court to enter an amended judgment after recalculating the costs-of-proof award. The remittitur did not include any new amounts,

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<sup>4</sup> California Rules of Court, Rule 3.1702 applies in civil cases to claims for statutory attorneys’ fees. It establishes the deadline by which a motion for attorneys’ fees must be served and permits the parties to stipulate to extend such time. (Cal. Rules of Ct., Rule 3.1702, subd. (b) and (c).)

California Rules of Court, Rule 8.276 governs motions for sanctions on a party or an attorney for: “(1) Taking a frivolous appeal or appealing solely to cause delay; [¶] (2) Including in the record any matter not reasonably material to the appeal’s determination; [¶] (3) Filing a frivolous motion; or [¶] (4) Committing any other unreasonable violation of these rules.” (Cal. Rules of Ct., Rule 8.276, subd. (a).) This rule does not apply to the facts of this appeal as the costs-of-proof award does not fall under any of the reasons for sanctions governed by Rule 8.276.

such as respondent's attorneys' fees incurred on appeal of *Simon I* or those incurred in filing any motion subsequent to the appeal, in this recalculation. These fees should have been requested by separate motion and we will remand the issue to the trial court for further proceedings.

***DISPOSITION***

The amended judgment is reversed. The matter is remanded to the trial court with directions (1) to vacate its amended judgment; (2) to enter a new amended judgment awarding costs of proof in the amount of \$45,000 to respondent; and (3) to enter a separate order regarding attorneys' fees incurred after June 26, 2009 after hearing arguments and considering such admissible evidence of the basis for the additional fees as may be presented by respondent. Each party shall bear his own costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.