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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

LAUREN CAZDEN, Individually and as Trustee, etc., Plaintiff and Appellant, v. JOSUE CISNEROS ESPINOZA, Defendant and Respondent.	B285907 (Los Angeles County Super. Ct. No. BC539462)

APPEAL from an order of the Superior Court for Los Angeles County, Howard L. Halm, Judge. Affirmed.

WLA Legal Services, Inc. and Steven Zelig for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Plaintiff Lauren Cazden[1] appeals from the trial court's order denying in part her motion to tax costs sought by defendant Josue Cisneros Espinoza, doing business as 7-Point Construction, following entry of judgment in favor of Espinoza after a jury trial. We affirm the order.

BACKGROUND

The facts of this case are set out in detail in our prior decision affirming the judgment in favor of Espinoza (*Cazden v. Espinoza*, case No. B281837, filed Nov. 15, 2018), and it is unnecessary to repeat them here. Suffice to say that in March 2014, Cazden filed a lawsuit against Espinoza, Builder Boy, Inc. (BBI), Jereme James (and the several names under which he conducted business), and others related to allegedly defective construction work they did on a home Cazden owned. For all intents and purposes, however, there were three defendants: James, Espinoza, and BBI. James was the general contractor on the project and Espinoza was a subcontractor who did a significant portion of the work at issue in the lawsuit; BBI was a corporation that James formed while the construction was ongoing, but it was not licensed until sometime after the construction at issue in the lawsuit was completed.

The case was tried before a jury in December 2016. The trial court granted BBI's motion for a directed verdict at the close of

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[1] Cazden filed the instant lawsuit individually and as trustee of the Laurie Cazden 2008 Revocable Trust UTA December 29, 2008. For ease of reference, we refer to her solely as Cazden.

evidence, and the jury returned a verdict finding no liability on the part of Espinoza and finding in favor of Cazden against James on certain claims. Cazden filed motions for judgment notwithstanding the verdict as to Espinoza and for new trials as to James and Espinoza, and the trial court denied all three motions. Cazden appealed from the denial of the motions as to Espinoza; we affirmed the court's denial of the motions in an unpublished opinion. (*Cazden v. Espinoza*, case No. B281837, filed Nov. 15, 2018.)

In the meantime, BBI and Espinoza each filed a memorandum of costs in which they each asked for (among other items) expert witness fees of their expert witness, Gregory Cornelius Nukes.[2] Cazden filed motions to tax costs as to each defendant. Because BBI no longer is a party to this appeal,[3] we focus our discussion on Espinoza's memorandum of costs and Cazden's motion to tax costs with respect to Espinoza.

In her motion to tax costs, Cazden argued (among other arguments) that (1) Espinoza was entitled to recover only his reasonable expert witness fees incurred after he made his Code of Civil Procedure section 998 offer to settle (998 offer); (2) Espinoza did not adequately describe the expert witness fees he was seeking to recover;

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[2] Espinoza subsequently filed an amended and a second amended memorandum of costs to correct certain mistakes in the original.

[3] Cazden filed a notice of settlement with respect to BBI and filed a notice of dismissal of the appeal as to BBI.

(3) Espinoza and BBI were seeking to recover the same costs; and
(4) Espinoza's 998 offer was vague, compound, and of no effect.

Espinoza's initial opposition to Cazden's motion was supported solely by his counsel's declaration, which attached various documents, including his 998 offer, which was served on Cazden on July 29, 2016, and the two invoices Nukes sent to Espinoza for what counsel declared was "nearly 40 hours of approved work separately invested by [Nukes] on behalf of defendant Espinoza."

At the initial hearing on the motion, the trial court noted that the invoices Espinoza submitted "d[id] not contain any information pertaining to the work performed by Nukes including when the work was performed and the type of services provided. There is also no declaration from Nukes describing the work performed. Moreover, the attached invoices make reference to an 'attached consulting time sheet' which has not been produced." The court noted that it could strike the expert witness fees outright, but it elected instead to continue the hearing on the motion "to allow Espinoza and 7-Point an opportunity to provide supplemental evidence of their expert witness fees, such as copies of Nukes' itemized billing statements."

Espinoza subsequently submitted a declaration from Nukes, to which Nukes attached a spreadsheet (Exhibit 17) showing the dates he worked and the amount of time he spent and explanations of the work he did on each date. The information on Exhibit 17 was limited to the fees incurred after Espinoza's 998 offer was served on July 29, 2016. In his declaration, Nukes explained that he was contacted about the

Cazden case by defendants' attorney[4] in late April 2015, and that his initial scope of involvement was limited to consulting with the attorney on an as-needed basis regarding particular construction issues. He stated that his next major involvement was in September 2015, when he attended an inspection of the Cazden property. He was asked to be a retained expert for all three defendants in April 2016. He explained that he was asked by counsel to provide details of the time he spent working on the case after the 998 offers had been served, and that Exhibit 17 sets forth those details.

Nukes also explained that the time he spent working on the case for Espinoza was less than the time he spent working for James (doing business as Paint Boy) and BBI because Espinoza "was not involved in a lot of the activities with respect to the performance of the contract, supervision or project work. There were times when I was working on items that had nothing to do with 7-Point construction." Finally, Nukes described the challenges presented by the case and provided details to explain why he had to spend so many hours working on it.

Cazden filed a response and objection to the Nukes declaration and attachments, in which she asserted, in essence, that they were fraudulent due to perceived contradictions and inconsistencies between Nukes's testimony at trial and his declaration, and the attorneys' declarations.

In its ruling at the continued hearing on the motion to tax costs, the trial court noted that "[t]he crux of [Cazden's] objections is that

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[4] All of the defendants shared a single attorney for a time.

Nukes testified that his total bill was a little more than $16,000, while now Nukes is charging over $16,000 for his work done after either one or both settlement offers. [Cazden] points out that Nukes was retained by Defendants in April of 2015,[5] did an inspection of [Cazden's] property in September 2016 [*sic*], and, according to testimony by Defendants' counsel, . . . met with Espinoza on several occasions prior to March 2016. So, as [Cazden] protests, 'if the paperwork submitted in the supplemental papers of Mr. Espinoza and BBI is to be believed, Mr. Nukes did all of his work after July 29, 2016, did no work when he was initially engaged in July 2015, did not charge for the inspection of September 2015, and did no work up whatsoever from July 2015 until July 29, 2016.' [Citation.] This, despite there being three trial dates set in February 2016, April 2016, and June 2016."

The court also noted Cazden's concerns about (1) a discrepancy regarding his hourly rate (at trial, he testified he was charging $225 per hour, while in his declaration he stated he charged $125 per hour); (2) the fact that Nukes charged 47.9 hours to BBI but only 39.7 hours to Espinoza; (3) the fact that $16,000 in fees divided by $125 per hour results in 135 hours, which Cazden argues is an overcharge (and the court noted is inconsistent with the hours declared by BBI and Espinoza); and (4) the fact that Nukes split his charges in even thirds

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5 We note that in his declaration Nukes distinguished between the date he was first contacted to do limited consulting work (April 2015) and the date he was "retained" (April 2016). Cazden, however, consistently referred to Nukes's date of retention as April 2015, and the court adopted that date as the date Nukes was retained.

even though BBI argued and was found by the court not to have done any work on the Cazden project.

The trial court found that, "[a]lthough one of these issues may not alone be of concern, together they raise serious continuing questions about the fees claimed by Nukes following the [998] offers." The court noted it disagreed with Cazden as to exactly what evidence was required, but concluded that certain additional items were needed. Therefore, it continued the hearing one more time to give Espinoza and BBI one more opportunity "to provide exactly the following evidence in support of its opposition to tax costs: [¶] 1) A statement, similar to Nukes's Exhibit 17 to his declaration, showing a breakdown of work done by date, hours spent, and fees per hours charged from **the date of Nuke[s]'s retention in April, 2015**; [¶] 2) retainer agreement between Nukes and Espinoza/7-Point on the one hand, and Nukes/Builder Boy, on the other; [¶] 3) If there are bills or invoices showing the hours Nukes charged the Defendants since April 2015, the Court orders those produced; [¶] 4) Evidence of any payments made by Defendants and a calculation of balances still due."

In response to the trial court's order, Nukes submitted a second declaration, to which he attached (among other items) (1) a spreadsheet, similar to Exhibit 17, showing all of his time, expenses, and payments from the time of his engagement forward;[6] (2) his retainer agreements with Espinoza and BBI; and (3) the invoices he submitted to Espinoza,

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[6] This new spreadsheet shows four entries prior to September 14, 2016, for a total of nine and a half hours.

to BBI, and to Paint Boy. In his declaration, Nukes provided information about what payments were made by each defendant and explained the discrepancy between his actual billing rate and the rate he charged for his trial testimony (he was entitled under the agreement to be paid $225 per hour for trial testimony, but he forgot to change the billing rate on his spreadsheet).

Nukes also addressed his testimony at trial that he had billed a little over $16,000 at the time of trial. Nukes declared that that was his best recollection from the witness stand of how much he had billed. He also noted that that figure would not have included his hours from the day before he testified or the day of his testimony. With regard to the difference in hours billed to BBI versus Espinoza, Nukes stated that he did not spend as much time working on Espinoza matters, as he explained in his previous declaration.

In its ruling from the continued hearing on Cazden's motion, the trial court found that Nukes "substantially complied" with the court's order to produce additional information. The court then addressed Cazden's objection that the amount Nukes charged for work done after the 998 offers is more than the total amount Nukes had testified he had charged, even though there were three trial dates set before Espinoza made his 998 offer. The court found "Nukes' explanation for the timing of these charges not only reasonable, but typical from a defense standpoint when retaining experts. Unlike a plaintiff, who must obtain much of their discovery and expert opinion early in the proceedings so as to build the case for prosecution, a defendant typically waits to engage their expert in earnest for their case until much closer to trial in

order to save costs. Defendants typically wait to see how a plaintiff's case against them builds, and only after attempts to settle have failed and trial is absolutely inevitable, does their retained expert do much of his or her work. Thus, here, it makes sense that Nukes merely did an initial inspection and had a few meetings with Defendants early in the case, and then was held off until right before trial in November, 2016. Moreover, each of the previous trial dates appear to have been continued by the parties. Therefore, Defendant would not have had to engage their expert prior to the previous trial dates if they had known they were going to be continued."

Addressing Cazden's other objections, the court found Nukes's explanation regarding the discrepancy in his hourly rates to be reasonable, and found the hours charged to each defendant, and the total number of hours charged, to be reasonable. However, the court noted that based upon the invoices Nukes sent to Espinoza, it appears that Espinoza's costs and fees beyond $4,000 were waived by Nukes. Therefore, the court found that Espinoza could not recover more than that amount. Finally, the court found it was reasonable for Nukes to split his fees into even thirds (for James, Espinoza, and BBI) even though BBI argued it did no work on the Cazden project, because it was reasonable for BBI to consult Nukes in preparing its motion for nonsuit and its request to dispense with the claims against it.

The trial court thus granted in part Cazden's motion to strike and/or tax the memorandum of costs filed by Espinoza, ordering that

Espinoza's costs (for expert witness fees)[7] are limited to $4,000. Cazden timely filed a notice of appeal from the court's order.

DISCUSSION

Cazden argues on appeal that Espinoza's entire memorandum of costs should be stricken in its entirety because there are a "myriad of oddities, inconsistencies, [and] irregularities" regarding the expert witness fees. We find the trial court did not abuse its discretion in allowing Espinoza to recover $4,000 of Nukes' fees.

A. *Standard of Review for Rulings on Motions to Tax Costs*

Code of Civil Procedure[8] section 1032 provides that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) The items that are and are not recoverable are set forth in section 1033.5. Although that statute provides that fees of experts not ordered by the court are not recoverable as costs, it provides

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[7] The trial court's order is somewhat confusing. The entire discussion of costs in the typed portion of the order -- including the $4,000 limitation for Espinoza -- is solely related to expert witness fees. Following its discussion of expert fees, the court inserted in handwriting: "Plaintiff's motion to strike Espinoza's jury fees and court reported fees are DENIED." The typed order then continued to the conclusion, which stated that "Espinoza and 7-Point's costs are limited to $4,000." We interpret the order to mean that only Espinoza's costs *related to expert witness fees* are so limited.

[8] Further undesignated statutory references are to the Code of Civil Procedure.

an exception when those fees are expressly authorized by law. (§ 1033.5, subd. (b)(1).) Section 998 provides that if a 998 offer is made by a defendant and not accepted, and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff must pay the defendant's costs from the time of the offer. (§ 998, subd. (c)(1).) Those costs may include, at the court's discretion, a reasonable sum to cover the postoffer costs for the services of expert witnesses. (*Ibid.*)

To recover costs, the prevailing party submits a memorandum of costs. "A 'verified memorandum of costs is prima facie evidence of [the] propriety' of the items listed on it, and the burden is on the party challenging these costs to demonstrate that they were not reasonable or necessary." (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1486.) If, as in this case, the items are objected to in a motion to tax costs as not reasonable, the burden of proof is on the party claiming them as costs. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) Whether a cost item is reasonable and necessary to the litigation is a question of fact for the trial court. (*Ibid.*)

"In reviewing a trial court's award of costs pursuant to section 998, the appropriate standard of review is abuse of discretion. [Citation.] The party appealing the trial court's decision to award costs bears the burden '"to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citations.]' [Citation.] To meet its burden, a complaining party must therefore show that the trial court exercised its discretion in an 'arbitrary,

capricious or patently absurd manner.' [Citation.]" (*Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1482.)

B. *Cazden Fails to Show an Abuse of Discretion*

In her opening brief, Cazden identifies 16 "oddities" that she contends establish that Espinoza's expert witness fee request is so exaggerated or misrepresentative that the trial court should have rejected that cost item in its entirety. In making this argument, Cazden relies upon two cases from the California Supreme Court, *Serrano v. Unruh* (1982) 32 Cal.3d 621 (*Serrano*) and *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 (*Chavez*). Both of these cases involve attorney fee requests under a private attorney general theory (*Serrano*) or under the Fair Employment and Housing Act (*Chavez*). It is unclear that either case applies to expert witness fee costs under section 998. But even if those cases do apply here, we nevertheless conclude that Cazden's so-called "oddities" do not present any ground for rejecting Espinoza's expert witness fee request in its entirety.

1. *"Oddity" Nos. 1 through 4*

The first four "oddities" are variations on a common theme: that Nukes testified at trial that he had billed a little over $16,000 up to that point, that the evidence shows that Nukes was retained in April 2015 and attended an inspection in September 2015, but his invoices and/or spreadsheets show $16,931.62 in fees incurred after July 29, 2016. Cazden contends this amount of post-July 2016 is particularly odd given

that trial was originally set to take place in February 2016, and was continued to April 2016 and then June 2016.[9] While Cazden correctly recites those facts, she ignores several things.

First, Nukes explained that his testimony at trial was based upon his best recollection from the witness stand, and did not include his time spent on the day before trial or on the day of trial.

Second, Nukes stated that the scope of his involvement for the first year after he was retained was very narrow, and the spreadsheet he submitted showing all of the work that he did from the time of his engagement confirms that he performed only nine and a half hours of work prior to September 14, 2016.

Finally, as the trial court noted, it is not unusual for a defense expert to delay working in earnest on the case until defendants are sure that the case is going to go to trial and, since the trial dates in this case were continued each time by stipulation of the parties, the defendants here would have known not to have Nukes prepare for trial on those dates.

In short, there is no "oddity" here.

2. *"Oddity" No. 5*

In the fifth "oddity," Cazden claims something is "fishy" because in Espinoza's expert designation his counsel stated that Nukes would be

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[9] Cazden also notes that Nukes submitted a statement of post-April 29, 2016 fees (i.e., fees incurred after BBI's 998 offer) and a statement of post-July 29, 2016 fees (i.e., fees incurred after Espinoza's 998 offer), and both statements have the same amount of fees.

charging $225 per hour, and Nukes testified at trial that he was charging $225 per hour, but in his memorandum of costs Espinoza stated that Nukes charged $125 per hour. She contends that if, in fact, Nukes charged only $125 per hour, it means "he spent close to 3.5 weeks preparing for less than 1 hour of testimony," which Cazden asserts strains credulity.

As to Cazden's first assertion, she omits key facts. First, although Espinoza's expert designation did state that Nukes would charge $225 per hour, it expressly stated that that rate was his *deposition fee* rate. Second, although Nukes did testify at trial that he was charging $225 per hour, that testimony was in response to a question asking him how much he was charging "*to be here*" -- i.e., at trial. (Italics added.) As Nukes explained in his second declaration, he had the right under his retainer agreement to charge $225 per hour for trial testimony, but he neglected to change his billing rate from $125 to $225 on his spreadsheet for his trial work. The trial court found this explanation reasonable; we agree.

As to Cazden's second assertion, the trial court expressly found that the 135 hours Nukes spent in total for all three defendants was reasonable in light of Nukes's spreadsheet setting forth all the work that he did. Given that the trial court "had observed the expert witnesses at trial, and had the opportunity to evaluate the weight of their testimony, [it] was in the best position to determine the reasonableness of the expert fees." (*Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1488.) We have no reason to second guess the trial court on this issue.

3. *"Oddity" Nos. 6, 10, and 16*

Cazden's sixth, tenth, and sixteenth "oddities" all challenge the fact that Nukes essentially billed each of the three defendants for one-third of the total amount of work performed, although BBI was charged for several hours more than Espinoza. She contends this is an "oddity" because Espinoza was the defendant who performed most of the problematic construction work and BBI successfully argued that it performed none of the construction work at issue. Nukes explained in his first declaration, however, that he was retained by all three defendants, but there were times when he was working on issues in which Espinoza was not involved, and therefore he did not charge Espinoza for those hours. Moreover, the trial court, who was in a better position to evaluate the amount of time Nukes spent, specifically found that the 39.7 hours Nukes billed to Espinoza and the 87.6 hours he billed to BBI and James was reasonable. (*Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1488.) Cazden has offered no evidence to suggest that finding is an abuse of discretion.

4. *"Oddity" No. 7*

Cazden finds it an "oddity" that Nukes submitted a bill to Espinoza for a "'singular' charge of $4,000 for all activities" before trial started, and then submitted a second bill after the verdict in Espinoza's favor with an additional charge. We need not address the validity of this "oddity" because it is irrelevant; the trial court limited Espinoza's recovery of expert witness fees to $4,000 in light of the agreement

referenced in Nukes's first bill to Espinoza in which Nukes agreed to waive all fees and costs beyond that $4,000.

5. *"Oddity" No. 8, 13, and 14*

Cazden's eighth, thirteenth, and fourteenth "oddities" assert that Espinoza and BBI failed to produce certain documents and/or proof. But those items either were produced, or the trial court found they were not necessary. For example, the retainer agreements that Cazden asserts were not produced were attached as exhibits to Nukes's second declaration; with regard to Espinoza's alleged failure to produce proof of payments, Nukes declared that both invoices he sent to Espinoza had been paid in full. With regard to the other documents Cazden claims were not produced, the trial court determined that Espinoza and BBI substantially complied by producing the documents and/or proof the court deemed necessary. In any event, Cazden fails to explain how those documents would provide relevant information that had not already been provided.

6. *"Oddity" No. 9*

In "oddity" number 9, Cazden complains that Espinoza is "attempting to be reimbursed for time spent by Mr. Nukes 'trying' to attend trial on December 20, 2016." She asserts that Nukes was supposed to be in court that day, but did not show up. Even if Cazden were correct that Espinoza would not be entitled to reimbursement of those fees (which we do not decide), the record shows that Cazden's complaint is irrelevant. Although Nukes's spreadsheet shows that he

recorded time and expenses for that day and calculated how much Espinoza would have been responsible for, Espinoza did not recover those fees. As noted, the trial court limited Espinoza's recovery of expert witness fees to $4,000. Nukes' spreadsheet shows that total amount of fees charged to Espinoza as of December 21, 2016 was $5,244.54. Thus, Espinoza was awarded $1,244.54 less than the total amount charged to him as of December 21, 2016. Since the amount charged to all three defendants on December 20 and 21, 2016 was $1,281.64 (with Espinoza's one-third coming to $427.21), it is clear that Espinoza did not recover his portion of Nukes's fees incurred on December 20, 2016.

7. *"Oddity" No. 11*

Cazden's assertion in her eleventh "oddity" is the same as the second part of her fifth "oddity" -- i.e., that the 135 hours worked by Nukes was unreasonable. The trial court disagreed, finding the number of hours reasonable in light of Nukes's spreadsheet setting forth all the work that he did. Cazden gives us no reason to conclude the trial court abused its discretion in making this finding. (*Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1488.)

8. *"Oddity" No. 12*

Cazden's twelfth "oddity" asserts that Espinoza did not produce any evidence of payment. This assertion is belied by the record. In fact, Nukes stated in his declaration that his invoices to Espinoza were paid

in full. Moreover, the second invoice sent to Espinoza states that the first invoice for $4,000 had paid in full.

9. *"Oddity" No. 15*

Cazden's fifteenth "oddity" relates solely to BBI and need not be addressed here in light of the dismissal of BBI from this appeal.

10. *Conclusion*

As is evident from our discussion of Cazden's "oddities," Cazden has failed to demonstrate that the trial court abused its discretion in denying Cazden's request to strike all of the expert witness fees sought by Espinoza -- the only ruling Cazden challenges in this appeal. Accordingly, we affirm the trial court's order granting in part and denying in part Cazden's motion to tax costs.

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DISPOSITION

The order granting in part and denying in part Cazden's motion to tax costs is affirmed. Espinoza shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.