

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 THREE

NATIONS TITLE COMPANY OF
CALIFORNIA, INC.,

Plaintiff and Appellant,

v.

SECURITY UNION TITLE
INSURANCE COMPANY, et al.,

Defendants and Respondents.

B279747

(Los Angeles County
Super. Ct. No. BC426001)

APPEAL from a postjudgment order of the Superior Court
of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.

Blecher Collins & Pepperman, Maxwell M. Blecher,
Howard K. Alperin, and Taylor C. Wagniere for Plaintiff and
Appellant.

Hennelly & Grossfeld, Michael G. King and Susan J.
Williams for Defendants and Respondents.

Plaintiff and appellant Nations Title Company of California, Inc. (Nations) appeals an order on remand that awarded expert witness fees in the amount of \$244,376.75 to defendants and respondents Security Union Title Insurance Company dba Pacific Coast Title (Pacific), Michael Lowther, Wayne Diaz, Tony Becker and Phil Jauregui (collectively, Defendants).

Our prior decision (*Nations Title Company of California v. Security Union Title Insurance Company, et al.* (Jan. 25, 2016, B250490, B253840) [nonpub. opn.] (*Nations I*)) concluded the trial court erred in denying Defendants’ motion for expert witness fees pursuant to Code of Civil Procedure section 998,¹ and remanded the matter to the trial court to determine which expert witness fees were reasonably necessary to Defendants’ trial preparation.

On remand, the trial court found Defendants were entitled to expert fees in the amount of \$244,376.75. We perceive no

¹ Code of Civil Procedure section 998 provides for the discretionary award of expert witness fees as follows: “If an offer [of compromise] made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, . . . the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and *reasonably necessary* in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.” (*Id.*, at subd. (c)(1), italics added.) The purpose of the statute “is to encourage the settlement of litigation without trial.” (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1483 (*Adams*).)

All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

abuse of discretion in the trial court's determination on remand and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND²

1. Overview.

a. The parties.

Nations and Pacific are title insurance companies in California. Tony Becker, a title officer, and Phil Jauregui, a sales manager, worked for Nations until June 2009 and then moved to Pacific. Michael Lowther and Wayne Diaz were executives at Pacific.

b. The lawsuit.

In November 2009, having lost customers to Pacific, Nations filed a seven count complaint against Defendants, alleging various statutory and tort claims. Nations later added a cause of action for breach of written contract.

In April 2012, Nations's damages expert, Karl Schulze, opined that Nations had suffered lost profits of \$5.13 million over a five-year period due to the wrongful acts of Defendants, although he later reduced his estimate of damages.

c. Section 998 settlement offers.

In July 2010, Defendants made a section 998 offer to compromise, offering to pay Nations \$75,000 in exchange for Nations dismissing its action with prejudice. Nations did not accept the offer. In March 2013, Becker and Pacific made a second offer to compromise, offering to pay Nations \$151,185.64 together with payment of Nations's recoverable costs in exchange for Nations's dismissal. Nations did not accept this offer either.

² This summary is derived in part from the prior opinion, *Nations I*.

2. Trial proceedings.

Beginning on April 29, 2013, the matter was tried to a jury on Nations's claims for breach of written contract, breach of fiduciary duty, and intentional interference with prospective economic relations.

a. Evidence adduced at trial concerning the practices of the title industry.

The customers who refer business to title companies are lending institutions, real estate agents, and escrow companies that repeatedly participate in real estate transactions. When a customer places an order for a title policy, it is referred to as an "open order." Only when an order "closes" are title documents recorded and money, including the title company's fees, paid out of escrow. If a title officer leaves a title company where an order is open and reopens that order at a new title company, the earlier order remains open while escrow is pending.

Customers are generally loyal to the sales representative or title officer who acts as the customer's point of contact with the title company, and it is not uncommon for customers to follow a sales representative or title officer who moves to a new title company. For this reason, title companies typically attempt to recruit employees who have strong customer relationships that will result in new business for the title company.

b. The Becker team moves to Nations and then leaves Nations to join Pacific; customers follow the Becker team to Pacific.

Becker had worked in the title industry for 25 years and developed relationships with hundreds of customers. Over the years, Becker and three family members worked as a team (the Becker team) at various title companies.

In 2009, Pacific sought to expand its business in Los Angeles by recruiting people who had established relationships with customers. In May 2009, Pacific successfully recruited the Becker team from Nations, as well as Jauregui and Nanette Lee, who was a title sales representative at Nations.

It was up to each customer to decide whether to leave an open order at Nations or to reopen the order at Pacific. Various customers chose to follow the Becker team to Pacific.

c. The defense verdict.

On May 20, 2013, following a nine-day trial, the jury returned a defense verdict in favor of all Defendants.

3. Proceedings relating to Defendants' motion for expert witness fees.

After the trial court (Judge Dau) entered judgment in favor of Defendants on all claims, Defendants moved for an award of expert witness fees pursuant to section 998. The motion sought \$254,267.97 for the fees Defendants had paid to their damages expert, Carlyn Irwin, and her firm, Cornerstone Research (Cornerstone), as well as \$2,868 that Defendants had paid to Nations's damages expert, Schulze, for time spent in deposition.³

Defendants supported the motion with the declaration of their lead trial counsel, Michael King, who declared he had "substantial involvement with the defense and trial of this case and [was] familiar with the work expert witnesses have performed on behalf of Defendants." The declaration stated that Defendants retained Irwin as a "non-testifying consultant to analyze lost profits, unjust enrichment, and the facts necessary to

³ Nations did not challenge the fees that Defendants incurred in deposing Schulze.

defend against Nations's damage claims," that King had "authorized all work" performed by Irwin and Cornerstone, and that King used their work "[d]uring trial" to "explain[] the deficiencies in Nation's [*sic*] damage claims." King declared that Defendants had paid Cornerstone \$254,267.97 for the work performed by Irwin and her team, and he attached copies of the paid invoices as an exhibit to his declaration. The invoices included itemized descriptions of the tasks performed by each Cornerstone team member and the time billed by Cornerstone for the tasks.

Nations opposed the motion on three grounds. First, Nations argued Defendants had not made the settlement offers in good faith or with a reasonable belief that they might be accepted because the offers represented only a small fraction of the damages Nations claimed. Second, Nations argued defense counsel's billing records belied Defendants' claim that Cornerstone's services were reasonably necessary to their defense. In that regard, Nations emphasized that the defense billing records contained only four entries mentioning Cornerstone, totaling just two hours, while the bills showed counsel spent a significant amount of time independently analyzing Nations's damages claims. Finally, Nations argued Cornerstone's fees were excessive, even if some were reasonably necessary to the defense.

In support of this contention, Nations offered the declaration of Gerald Knapton, its putative expert on "hourly legal bills for professional services and supporting work product." Knapton's declaration stated: "If the Court finds that [D]efendants are entitled to their expert fee recovery pursuant to section 998, which I do not concede, it is my opinion that the

amount of expert fees incurred by [D]efendants that were reasonable and necessary for this matter may be \$172,951.34.” Knapton based the proposed reduction on Cornerstone’s having billed for what he characterized as duplicative work, block-billed descriptions, vague descriptions, excessive time billed, and rounded off entries that he identified in Cornerstone’s invoices.

The trial court denied Defendants’ section 998 motion in its entirety. The trial court rejected Nations’s contentions that Defendants’ offers were not made in good faith and that Cornerstone’s services were not reasonably necessary to defend the action. Nonetheless, the trial court denied Defendants’ request for expert witness fees on the ground that Defendants had failed to offer competent evidence in support of the motion, particularly because there was no supporting declaration from Irwin or her team.

4. *The prior appeal.*

Nations appealed the judgment on the verdict, and Defendants appealed the denial of their motion for expert witness fees.

In *Nations I* we affirmed the judgment, finding that substantial evidence supported the jury’s implicit finding that Defendants’ conduct was not a substantial factor in causing Nations’s claimed harm.

As for the order denying Defendants’ motion for expert witness fees, we reversed, finding that ruling to be an abuse of discretion. We concluded the trial court failed to exercise its discretion to determine what expert witness fees were “reasonably necessary” to Defendants’ trial preparation because the court erroneously concluded that Defendants’ proffered evidence was not competent to establish the work that

Cornerstone actually performed. However, “[c]ontrary to the trial court’s premise, a declaration from Irwin was not required to substantiate the reasonableness of the charges or to verify that the work had actually been performed.” Thus, “King’s declaration, as corroborated by the paid Cornerstone invoices, constituted competent evidence that Cornerstone’s expert fees were reasonably necessary to Defendants’ trial preparation.”

Further, citing King’s declaration that he used Cornerstone’s work during trial to explain the deficiencies in Nations’s damage claims, we concluded that “[t]he record compels a finding that at least some of the fees paid to Cornerstone were ‘reasonably necessary’ to Defendants’ trial preparation. (§ 998, subd. (c)(1).)” (*Nations I* slip opn., *supra*, at p. 22.) We also noted that Knapton, “Nations’[s] putative litigation fee expert[,] opined that the presence of duplicative work, block-billed descriptions, vague descriptions, excessive time billed, and rounded off entries in Cornerstone’s invoices *supported a reduction of no more than \$81,316.63* from the total fees requested by Defendants’ motion.” (*Id.* at p. 22, fn. 10, italics added.)

Because the trial court had erred in denying Defendants’ motion in its entirety, and because the trial court was in the best position to determine which tasks performed by Cornerstone met the “reasonably necessary” standard, we reversed the order denying section 998 expert witness fees and remanded the matter to the trial court to make that determination. The disposition directed the trial court “to determine which expert witness fees were reasonably necessary based on the evidence presented and the court’s experience with the case.” (*Nations I* slip opn., *supra*, at p. 32.)

5. *Proceedings on remand.*

Unfortunately, in July 2016, following the issuance of the remittitur in *Nations I*, but before the matter could be heard, Judge Dau passed away. The matter then was reassigned to Judge Mackey, who ordered supplemental briefing regarding “section 998 expert witness fees and their necessity to prepare for trial.”

a. *Defendants’ supplemental brief.*

Defendants filed a supplemental brief asserting that all of the requested fees were reasonably necessary to their trial preparation. Defendants also invoked Knapton’s earlier declaration, in which he opined that the amount of expert fees incurred by Defendants “that were reasonable and necessary for this matter may be \$172,951.34.” As for the portion of Cornerstone’s fees that Knapton did challenge, Defendants argued that Knapton did not demonstrate or even opine that those fees were not reasonably necessary to Defendants’ trial preparation; instead, Knapton merely had criticized Cornerstone’s billing practices, such as block billing, and had opined that the costs were not adequately explained. However, “[c]omplaints about Cornerstone’s billing practices do not demonstrate that Cornerstone’s work was not reasonably necessary to [D]efendants’ trial preparation.”

In addition, Defendants referred to the previously filed declaration of King, their trial counsel, as establishing “that Cornerstone’s work was essential to [D]efendants’ successful defense of this action.” The central role of the King declaration was highlighted by *Nations I*, which stated that “ ‘King’s declaration, as corroborated by the paid Cornerstone invoices, constituted competent evidence that Cornerstone’s expert fees

were reasonably necessary to Defendants' trial preparation.' ” The King declaration enumerated the tasks performed by Cornerstone at Defendants' request, including but not limited to: analyzing Nations's financial and other documents; analyzing Pacific's financial and other records; analyzing the expert reports prepared by Nations's expert witness, Schulze, and the documents Schulze had relied on to support his multiple opinions; performing a forensic analysis of the financial documents produced by Nations in support of its multimillion-dollar claim for damages; analyzing the parties' audited financials; analyzing numerous non-financial documents supporting Nations's damage claims (e.g., deposition transcripts, discovery responses) to determine the basis for Nations's claim for damages; researching historical sales trends for the title insurance industry; and analyzing Nations's and Pacific's open and closed title orders that formed the basis for Nations's claim for damages.

The King declaration further showed that Cornerstone's fees had increased because of the need to analyze Schulze's multiple expert reports and the changing damages calculations that he prepared over a period of months. Over the course of the litigation, Schulze serially opined that Nations's damages were as follows: \$5.13 million in lost profits over five years (April 2012); \$3.45 million in lost profits over five years (November 2012); \$1.8 million in lost profits over 43 months (March 2013); \$1.1 million in damages over 13 months (May 2013); and \$590,000 in damages over two months (May 2013).⁴

⁴ Schulze's five reports, which went into exhaustive detail, were appended to the King declaration as exhibits. Among other things, Schulze sorted through and analyzed pre and post June 1,

b. *Nations's supplemental papers.*

Nations's opposing brief requested that the trial court either deny Defendants' fee request as excessive, or significantly reduce the amount of expert witness fees. In a supplemental declaration by Knapton, filed on remand, he opined that if the court were to find that Defendants were entitled to expert witness fees under section 998, which he did not concede, "the amount of Cornerstone expert fees incurred by [D]efendants that were 'reasonably necessary' for [D]efendants' 'preparation for trial' and 'during trial' may be \$43,237.83."⁵

c. *Defendants' objection to Knapton's supplemental declaration.*

Defendants filed a written objection to Knapton's supplemental declaration on the ground that it contravened the

2009 escrows and title orders, determined the portion of those orders that related to the Becker group, segregated escrows that closed after June 1, 2009 that were opened before that date, determined the volume of continuing business from each source that originated after June 1, 2009, compared the volume of business before June 1, 2009 to afterward for any sources under Becker's management, determined the volume of business by source that was lost to the Becker group after June 1, 2009, determined the amount of lost business through trial, net of incremental costs, extended such losses for two additional years, and discounted the resulting amounts back to the expected trial date.

⁵ We note that Knapton's supplemental declaration did not reconcile his new opinion with the opinion he expressed in the earlier declaration that "the amount of expert fees incurred by [D]efendants that were reasonable and necessary for this matter may be \$172,951.34."

directive of the appellate court to decide the issue “based on the evidence presented,”⁶ and that the new declaration was an improper attempt to slash the amount of expert fees that Knapton previously had conceded was reasonably necessary.

d. *Trial court’s ruling.*

On November 22, 2016, the matter came on for hearing. After considering the parties’ arguments, the trial court awarded Defendants \$244,376.75 of the \$257,135.97 in expert witness fees that they had requested. The trial court disallowed \$1,200.00 as duplicative, based upon an objection made by Knapton. It also appears the trial court denied recovery of any of Cornerstone’s billed costs of \$8,691.22, and did not award the \$2,868 that Defendants requested for Schulze’s deposition. The trial court rejected Nations’s other arguments related to “block billing, unclear descriptions, and other types of unreasonable expense[.]”

On December 22, 2016, Nations filed a timely notice of appeal from the order.⁷

CONTENTIONS

Nations contends: the trial court failed to conduct an inquiry into the amount and propriety of the fees and simply “rubber stamped” Defendants’ request, and the amount awarded was not reasonably necessary for Defendants’ trial preparation.

⁶ On remand, the trial court “is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void.” (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655.)

⁷ The order is appealable as an order after judgment. (§ 904.1, subd. (a)(2).)

DISCUSSION

1. *Standard of appellate review.*

As Nations acknowledges, our review is governed by the deferential abuse of discretion standard. “In reviewing a trial court’s award of costs pursuant to section 998, the appropriate standard of review is abuse of discretion. (*Najera v. Huerta* (2011) 191 Cal.App.4th 872, 877.) 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.]’ (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) 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.’ (*Najera*, at p. 877.)” (*Adams, supra*, 199 Cal.App.4th at p. 1482.)

Although Judge Mackey, who made the order under review, was not the trial judge, our review remains deferential, but we may exercise greater latitude in determining whether there has been an abuse of discretion. (*Gonzalez v. Santa Clara County Dept. of Social Services* (2017) 9 Cal.App.5th 162, 169-170.)

2. *Nations fails to establish the amount awarded to Defendants for expert witness fees was an abuse of discretion.*

The issue on appeal is narrow. *Nations I* established Defendants’ entitlement to recover expert witness fees under section 998. Thus, the sole issue before the trial court on remand was to determine “which expert witness fees were reasonably necessary.” As explained below, we perceive no abuse of discretion in the amount that the trial court awarded.

Nations contends the defense expert witness fees in the amount of \$244,376.75 were not reasonably necessary because Defendants valued the case at not more than \$151,000, as reflected in their second offer to compromise. The argument is unpersuasive. Irrespective of Defendants' valuation of the matter, they had to defend a lawsuit in which they were being sued for \$5.13 million.

Further, during the litigation, Nations's expert, Schulze, generated five separate damages calculations under various theories of liability and for different time periods. Consequently, Cornerstone repeatedly had to redo its analysis to address Schulze's changing valuations. King's declaration set forth the work that was required, including: analyzing Nations's and Pacific's financial and other records; analyzing Schulze's reports and the documents that he utilized to support his multiple opinions; performing a forensic analysis of the financial documents produced by Nations in support of its multimillion-dollar claim for damages; analyzing the parties' audited financials; analyzing numerous non-financial documents supporting Nations's damage claims, such as discovery responses, to determine the basis for Nations's claimed damages; researching historical sales trends for the title insurance industry; and analyzing Nations's and Pacific's open and closed title orders for the sales representatives that formed the basis for Nations's claim for damages.

Further, bearing in mind the issue is whether the \$244,376.75 award was excessive, we note that Knapton's initial declaration acknowledged that "the amount of expert fees incurred by [D]efendants that were reasonable and necessary for this matter may be \$172,951.34." In other words, Nations

already has conceded that more than 70 percent of the amount that Judge Mackey ultimately awarded was reasonably necessary.

On appeal, Nations has eschewed Knapton's original declaration. Instead, Nations relies heavily on the supplemental declaration that Knapton authored for the proceedings on remand. In the supplemental declaration, Knapton opined that the expert fees "that were 'reasonably necessary' for [D]efendants' 'preparation for trial' and 'during trial' may be \$43,237.83."

Knapton's supplemental declaration is of no assistance to Nations for two reasons. First, the disposition in *Nations I* directed the trial court to determine which expert witness fees were reasonably necessary "based on the evidence presented." (*Nations I* slip opn., *supra*, at p. 32.) Thus, *Nations I* precluded the record from being enlarged with additional evidence in connection with the motion for expert witness fees.⁸ In addition, Knapton's supplemental declaration failed to explain his highly inconsistent positions with respect to the amount of expert fees that were reasonably necessary. (See fn. 5, *ante*.) Therefore, Nations failed to show that it should not be held to its earlier concession that the reasonably necessary fees amounted to \$172,951.34. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 396 [an admission is binding unless there is

⁸ Although the trial court's inquiry on remand was limited to the evidence that previously had been presented, we note the trial court's ruling specified Knapton's supplemental declaration as the basis for disallowing the sum of \$1,200.00 as duplicative. However, Knapton's earlier declaration contained that identical objection, making the trial court's citation to the later declaration of no import.

a credible explanation for the inconsistent positions taken by a party].)

Nations's additional arguments are unavailing. Its contentions that the trial court failed to conduct any inquiry into the amount of Defendants' expert witness fees that were reasonably necessary, and that it simply "rubber stamped" Defendants' request, are belied by the record. As set forth above, the trial court awarded Defendants nearly \$13,000 less than they had requested. Thus, there is no merit to Nations's claim that the trial court simply acquiesced in Defendants' request.

Further, although Nations faults the trial court for failing to explain why it awarded nearly the full amount that Defendants requested, the trial court was not required to set forth on the record the precise manner in which it arrived at its decision. There is "no California case law analogue to section 632 [statements of decision] requiring trial courts to explain their decisions on all motions for attorney fees and costs." (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 67; accord, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 [trial court not required to issue statement of decision with regard to fee award]; *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1250.)

Also, while Nations emphasizes that Irwin, of the Cornerstone firm, did not testify at trial, "recovery of expert witness fees under . . . section 998 is not limited to actual time consumed in examination." (*Michelson v. Camp* (1999) 72 Cal.App.4th 958, 975.) Rather, expert witness fees are recoverable if they are "actually incurred and reasonably necessary in . . . *preparation for trial* . . . or during trial . . . of the case by the defendant." (§ 998, subd. (c)(1), italics added.)

Defendants showed that Cornerstone's services were reasonably necessary to enable Defendants to prepare for trial, so as to entitle Defendants to recover the fees they incurred for Cornerstone's services.

In sum, given the sizable damages claimed by Nations, Schulze's multiple valuations of Nations's losses, which necessitated repeated analyses by Cornerstone, the complexity of the damages issues, and Knapton's (Nations's) concession that Defendants may be entitled to \$172,951 in the event they were awarded expert witness fees, the trial court acted within the bounds of its discretion in awarding the amount that it did. Stated another way, there is no basis to conclude that the trial court's award was " 'arbitrary, capricious or patently absurd[.]' " (*Adams, supra*, 199 Cal.App.4th at p. 1482.)

DISPOSITION

The postjudgment order awarding Defendants their expert witness fees in the sum of \$244,376.75 is affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

GOODMAN, J.*

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