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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SAMIR B. HAROUN, Plaintiff and Appellant, v. BMW OF NORTH AMERICA, LLC, Defendant and Respondent.	B272279 (Los Angeles County Super. Ct. No. BC512877)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rita J. Miller, Judge. Affirmed as modified.

Law Offices of René Korper, René Korper and Thomas E. Solmer for Plaintiff and Appellant.

Lehrman Law Group, Kate S. Lehrman and Robert A. Philipson for Defendant and Respondent.

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A car owner sued under our State's "lemon law" and lost. The trial court awarded costs to the car manufacturer who prevailed in the amount of $23,329. The car owner raises a number of challenges to the cost award. One of those challenges has merit; the rest do not. Accordingly, we reduce the cost award by $4,200, but otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

Samir B. Haroun (plaintiff) sued BMW of North America, LLC (BMW) under the Song-Beverly Consumer Warranty Act, Civil Code section 1790 et. seq., because the engine in the used 2008 BMW he purchased made an odd noise for a few seconds when first started every morning. A jury ultimately found nothing wrong with the car, and the trial court entered judgment for BMW. The judgment awarded BMW, as the prevailing party, its "costs of suit."

BMW filed a memorandum of costs seeking $23,682, along with exhibits documenting those costs. Specifically, BMW sought (1) filing and motion fees totaling $1,050; (2) jury fees totaling $787; (3) deposition costs totaling $2,048; (4) witness fees totaling $675; (5) models, blowups, and photocopies of exhibits totaling $8,673; and (6) court reporter fees totaling $10,449. With respect to the models, blowups, and photocopies of exhibits, BMW submitted invoices for (1) the cost of copying and collating exhibits (including those admitted into evidence and those not admitted), totaling $2,343; (2) the technical assistance of a person to create a PowerPoint presentation and to provide support during the trial, totaling $5,977; and (3) the cost of a timing chain for a BMW that was used as a exemplar, totaling $353. With respect to court reporter fees, BMW submitted invoices for (1) a "Deposit Estimate" of $4,200, and (2) a final invoice for $6,249.

Plaintiff moved to tax costs. In his motion, he challenged (1) the $8,673 for models, blowups, and photocopies of exhibits, (2) the $10,449 in court reporter fees, and (3) the entire cost award as excessive.

After further briefing, the trial court taxed the $353 for the exemplar timing chain, but otherwise overruled plaintiff's objections. Regarding the photocopies of exhibits that were prepared for trial but not actually introduced into evidence, the court ruled that BMW "had to prepare exhibits to defend against every argument plaintiff might have raised at trial" and that plaintiff "has not pointed to any exhibit which was irrelevant and could not have been used at trial." Regarding the person who created and then manned the PowerPoint presentation, the court found that "[t]he PowerPoint slides were presented to" and "reasonably helpful to the jury." Regarding the court reporter fees, the court noted that "a private court reporter was used" and that "[a] court reporter also is necessary to preserve a party's rights on appeal in this day and age where reporters no longer are provided by the court." The court concluded that the overall amount of costs as reduced by the court—$23,329—was not excessive.

Following entry of judgment, plaintiff filed a timely notice of appeal.

DISCUSSION

As a general rule, civil litigants finance their own litigation. (*Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1102 (*Science Applications*); *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1622 (*Ripley*).) This rule is not without exceptions, and our Legislature has provided that "a prevailing party is entitled . . . to recover [its]

costs" as set forth in Code of Civil Procedure section 1033.5.[1] (§ 1032, subd. (b).) Section 1033.5 itself erects three categories of costs: (1) explicitly "allowed" costs that the prevailing party is entitled to recover as long as they were "reasonably necessary to the conduct of the litigation" and "reasonable in amount" (§ 1033.5, subds. (a) & (c)(1)-(3)); (2) explicitly dis-"allowed" costs that are not ever recoverable (§ 1033.5, subd. (b)); and (3) costs "not mentioned" in section 1033.5 that may, "in the court's discretion," be recovered (§ 1033.5, subd. (c)(4)). The first category of "allowed" costs includes, among other things, "[m]odels and enlargements of exhibits and photocopies of exhibits . . . reasonably helpful to aid the trier of fact" (§ 1033.5, subd. (a)(13)), and "[c]ourt reporter fees as established by statute" (§ 1033.5, subd. (a)(11)).

Courts employ a burden-shifting mechanism when awarding costs. The prevailing party bears the initial burden of establishing a prima facie entitlement to recovery of costs, and carries this burden if the items it seeks are allowed by statute and if its verified cost bill appears "'proper on its face.'" (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 855-856 (*Benach*); *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557 (*Seever*).) At that point, the burden shifts to the losing party to refute the propriety of those charges; simply objecting is not enough. (*Benach*, at p. 856.)

We review a trial court's award of costs for an abuse of discretion. (*El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 617 (*El Dorado*). In evaluating whether a trial court has abused its discretion, we

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

review its interpretation of section 1033.5 de novo; review its findings that a cost is reasonably necessary and reasonable in amount for substantial evidence; and review any award of discretionary costs for an abuse of discretion. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52 (*Chaaban*); *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 363-364; *El Dorado*, at p. 617.)

In this appeal, plaintiff attacks the trial court's (1) award of costs for photocopying as well as creating and providing support for the PowerPoint presentation, (2) award of court reporter fees, and (3) entire cost award as excessive. We examine each in turn.

I. Award of Photocopying and PowerPoint Costs

Section 1033.5 expressly allows for the recovery of the cost of "[m]odels and enlargements of exhibits and photocopies of exhibits . . . reasonably helpful to aid the trier of fact." (§ 1033.5, subd. (a)(13).)

A. Photocopying Costs

This provision reaches the photocopying costs for not only those exhibits actually admitted into evidence at trial (*El Dorado*, *supra*, 150 Cal.App.4th at p. 618), but also those exhibits that the prevailing party prepared for trial but did not end up admitting into evidence if those exhibits were reasonably helpful to the trier of fact (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1298). Under this authority, and in light of the trial court's finding that none of the exhibits BMW prepared but did not admit were irrelevant, the court's award of photocopying costs was not an abuse of discretion.

Plaintiff raises three arguments in response. First, he argues that *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761 and *Seever*, *supra*, 141 Cal.App.4th 1550

dictate a different result. *Ladas* overturned an award of costs for photocopying exhibits because the case had been dismissed on the eve of trial, such that no trier of fact was aided by any of the exhibits. (*Ladas*, at p. 775.) Plaintiff's case went to trial. *Seever* overturned an award of costs for "exhibits not used at trial." (*Sever*, at pp. 1557-1558.) To the extent "not used at trial" means they were not prepared for potential use as exhibits, the exhibits in *Seever* are distinguishable from the exhibits in this case; to the extent "not used at trial" means they were simply not admitted as evidence, *Seever* is at odds with the case law cited above, and we choose to follow that other case law. Indeed, because all exhibits admitted into evidence are presumptively "helpful to aid the trier of fact," our Legislature's inclusion of that requirement in section 1033.5 would be surplusage unless courts also had the power to award costs for the copying of exhibits not actually admitted into evidence. (*Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087 ["no part of [a statutory] enactment[] should be rendered surplusage if a construction is available that avoids doing so"].)

Second, plaintiff argues that BMW is effectively seeking to charge him more than $2 per photocopy, and he calculates this figure by dividing the total cost of all copying, video conversion, binding, and assembly ($2,343) by four times the number of pages of exhibits actually admitted at trial (1,120, or 280 pages times four). Plaintiff's math is misleading because it lumps non-photocopying costs in with photocopying costs. The invoices themselves reflect that the actual costs for copying black and white pages was $0.09 per copy and for copying color pages was $0.65 per copy. This is within the realm of reasonable costs. (E,g., *Benach*, *supra*, 149 Cal.App.4th at pp. 856-857 [$0.15 per copy for black and white pages is reasonable].)

Lastly, plaintiff argues that BMW is not entitled to its photocopying costs because it has not itemized precisely why each of the 3,103 black and white photocopies and 352 color photocopies that appeared on the invoices was needed. We reject this argument. Because BMW has carried its initial burden of making a prima facie case for entitlement to costs, it is up to plaintiff to present evidence refuting those costs; objecting is not enough, and that is all plaintiff has done. (*Benach*, *supra*, 149 Cal.App.4th at pp. 855-856.)

B. PowerPoint Costs

The provision allowing for "[m]odels and enlargements of exhibits and photocopies of exhibits" reaches the rental of equipment such as projectors and the technicians to support them. (*Ripley*, *supra*, 23 Cal.App.4th at p. 1623 [overhead projector]; *El Dorado*, *supra*, 150 Cal.App.4th at p. 619 [projector]; *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1373-1374 [technician to "monitor . . . equipment and quickly resolve any glitches"].) It also reaches the creation of videos. (*Science Applications*, *supra*, 39 Cal.App.4th at p. 1104.) And, more to the point, it reaches the creation of PowerPoint presentations and the personnel to support them. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 990-991 (*Bender*).)

Plaintiff points to the portion of *Science Applications* declining to award costs for hiring assistants to create and maintain trial exhibits. (*Science Applications*, *supra*, 39 Cal.App.4th at pp. 1104-1105.) Relatedly, he argues that BMW's counsel should have just operated the equipment itself. However, as *Bender* observed, more than "20 years have passed since *Science Applications* was decided, during which time the

use of technology in the courtroom has become commonplace (including a technician to monitor the equipment and quickly resolve any glitches), and technology costs have dramatically declined." (*Bender*, *supra*, 217 Cal.App.4th at p. 991.) We agree with *Bender* that *Science Applications'* refusal to award costs for technical assistance has been eclipsed by the march of technology, and we decline to follow it.

II. Court Reporter Fees

Section 1033.5 also provides for the recovery of "[c]ourt reporter fees as established by statute." (§ 1033.5, subd. (a)(11); *Benach*, *supra*, 149 Cal.App.4th at p. 858.) Thus, BMW is entitled to its court reporter fees. However, the *amount* of fees awarded—$10,449—is not supported by substantial evidence. That is because the trial court added the $4,200 "Deposit Estimate" for reporting on February 24 through February 27 to the $6,249 later billed for February 23 through March 3. In so doing, the court awarded fees for the same days twice, as indicated by the overlapping days as well as the identical daily fee. Because the "Deposit Estimate" is subsumed into the final bill, we reduce the costs for court reporter fees to $6,249.

Plaintiff contends that *no* fees should be awarded, and offers two arguments. First, he argues that a prevailing party may obtain court reporter fees only if "ordered by the court." In making this argument, plaintiff borrows language from the portion of section 1033.5 that allows an award for the cost of "*[t]ranscripts* of court proceedings ordered by the court." (§ 1033.5, subd. (a)(9), italics added.) However, "court reporter fees" are "an entirely different expense" than "transcripts." (*Chaaban*, *supra*, 203 Cal.App.4th p. 58.) Plaintiff's attempt to

import subdivision (a)(9)'s limitation into subdivision (a)(11) is without merit.

Second, plaintiff asserts that court reporter fees are limited to those "as established by statute," which Government Code section 69948 caps at $55 per day. (§ 1033.5, subd. (a)(11); Gov. Code, § 69948.) However, Government Code section 69948 and its cap only apply to "official superior court reporters," not private court reporters hired by a litigant. (*Gamage v. Medical Board* (1998) 60 Cal.App.4th 936, 938; *Barwis v. Superior Court* (1978) 87 Cal.App.3d 239, 242, fn. 3.) Because the court reporter here was privately hired, the cap plaintiff seeks to impose does not apply. Further, the trial court's finding that the court reporter's fee was reasonably necessary and reasonable in amount is supported by substantial evidence.

III. Policy-Based Argument

Plaintiff lastly asserts that the entire cost award should be invalidated because its total—$23,329—stands as a disincentive for plaintiffs to sue under the Song-Beverly Act, an Act that is specifically aimed at protecting consumers. (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990, superseded on other grounds by § 998; *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 817.) Thus, plaintiff reasons, trial courts should be barred from awarding costs to defendants in cases brought under the Act. Alternatively, plaintiff urges that we "scale" the cost award down to avoid deterring meritorious lawsuits under the Act. (See *Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, 284 [contemplating "scaling" down expert fee awards in Fair Employment and Housing Act cases]; *Seever*, *supra*, 141 Cal.App.4th at pp. 1561-1562 [same, in context of § 998 fees

for experts]; *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 186 [same].)

We decline plaintiff's invitation to implicitly repeal or rewrite section 1033.5 for cases under the Song-Beverly Act when the defendant is the prevailing party. Implied repeals are disfavored. (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.) This is especially true where, as here, the Legislature specifically modified one aspect of the mechanism for awarding costs and attorney's fees, but not the aspect at issue here. (See Civ. Code, § 1794, subd. (d) [altering the general rule that litigants bear the cost of their own attorney's fees to allow prevailing *plaintiffs* (but not prevailing *defendants*) to recover their costs and attorney's fees].) For much the same reason, we see no opening for us to rewrite section 1033.5 to impose a "scaling down" mandate for costs where such a mandate appears nowhere in the statute itself.

DISPOSITION

The cost award is reduced by $4,200 to $19,129. As modified, the judgment is affirmed. Each party is to bear its own costs.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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