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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DAUGHTERS OF CHARITY HEALTH
SYSTEM et al.,

Plaintiffs and Respondents,

v.

ROBERT A. SIMONCINI,

Defendant and Appellant.

A131947

(San Mateo County
Super. Ct. No. CIV 475945)

Appellant Robert A. Simoncini was hospitalized at Seton Medical Center, a hospital operated by Daughters of Charity Health System (DOCHS).¹ He was sued by California Service Bureau, Inc. (CSB), a collection agency, on common counts after failing to pay his hospital bill. Robert filed a cross-complaint against DOCHS for equitable indemnity, contribution, and declaratory relief, alleging that DOCHS had improperly failed to bill Medicare. A bench trial resulted in a judgment and award of attorney fees in favor of DOCHS. Robert contends that he was improperly denied trial by jury and challenges the evidence admitted at trial. We reject these claims, but modify the judgment to strike an award of attorney fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 30, 2006, Robert was brought to Seton Medical Center by ambulance and admitted to acute care for severe pain. He was covered by Medicare. Seton routinely

¹ Hereafter, we refer to appellant and his son, Kenneth Simoncini, by their first names to avoid confusion. No disrespect is intended.

presents its patients with a “Conditions of Admission” form upon arrival. The Conditions of Admission form provides: “The undersigned agrees . . . that in consideration of the services to be rendered to the patient, he/she hereby individually obligates himself/herself to pay the account of the Hospital in accordance with the regular rates and terms of the Hospital. Should the account be referred to an attorney or collection agency for collection, the undersigned shall pay actual attorney’s fees and collection expenses. [¶] The undersigned . . . authorizes the insurance company to make payments directly to the hospital for all services rendered by the hospital at a rate not to exceed the hospital’s regular charges. . . . It is also understood that the undersigned will be financially responsible for any charges not covered by this arrangement, such as deductibles, co-pays, or services denied by your insurance provider for any reason.”

A copy of the Conditions of Admission form in effect at the time of Robert’s admission was admitted into evidence at trial. It bears Robert’s name, the date “10/30/06,” and a notation that the patient was “unable to sign.” Although the form provided for the signature of the “patient’s legal representative [or] general agent,” no one signed the document in that capacity. The only signature on the page is on the line denominated “Witness.” Robert testified that he had not seen the Conditions of Admission before. He did not remember receiving any paperwork when he arrived at the hospital. Robert testified: “I was kind of out of it.”

DOCHS’s Director of Quality Risk Patient Safety and Corporate Compliance, Denise Kent, testified that the Conditions of Admission apply to a patient who is unable to sign due to a medical condition. Each patient is given a copy by the admitting department. She said: “If the patient won’t sign the form, then they won’t be treated. [¶] . . . [¶] And when they’re unable to sign, it’s verbally gone over with them. [¶] . . . [¶] They don’t read it verbatim. But it’s reviewed with them. They’ll go through each of the points and explain it.” The court asked: “If they are in such acute distress that they can’t sign it, they stand there and read it anyway?” Kent responded: “Depends on the presentation of the patient. [¶] . . . [¶] And their ability to understand.”

Robert was diagnosed with an infection in his lumbar spinal cord, specifically infectious diskitis and osteomyelitis. Robert remained in acute care and received antibiotics and pain medication. On November 15, 2006, Robert's condition had improved and he was no longer in extreme pain. His personal physician, Dr. Gerald Murphy, ordered Robert's transfer to a skilled nursing facility (SNF) within the hospital. The hospital and medical staff contacted Robert's son and lawyer, Kenneth, regarding the transfer and the financial implications of an extended stay in the SNF. Due to a shortfall in his Medicare coverage, Robert then had only six days of available coverage for SNF. Kenneth advised the hospital that he did not think his father was "in any kind of shape to be moved to skilled nursing."

On November 22, 2006, a transfer letter was issued to Robert. The Simoncinis were advised that Robert's Medicare coverage would expire and Kenneth looked into alternative arrangements. But, Robert remained in acute care at Seton and never asked to leave the hospital.² On November 29, 2006, Robert was transferred to the SNF when a private room became available. His treatment continued to be similar to that received in acute care. Dr. Murphy testified that Robert was transferred because "[Robert] didn't need . . . acute care at that time." Robert was finally discharged from Seton on January 3, 2007.

After Robert's discharge, DOCHS billed Medicare for the eligible portions of the total charges. Medicare covered over \$47,000 for six days of SNF charges and ancillary charges incurred throughout Robert's treatment. Robert's private AARP insurance

² Medicare beneficiaries must be notified of discharge plans. A beneficiary can seek review of the discharge plan by appealing to the peer review organization, which was Lumetra at the time. The Simoncinis appealed the transfer decision to Lumetra. The reviewer, in this case, opined that it was medically necessary, as of November 22, 2006, for Robert to stay in acute care. Thus, Lumetra, in a letter dated January 3, 2007, determined: "[O]n November 22, 2006, when the hospital issued you a notice of discharge, you required a continued stay in the hospital as you were still undergoing an evaluation and work-up of the L2-3 diskitis" When DOCHS received the January 3, 2007 letter, Robert had already been discharged.

coverage provided additional payment. DOCHS then billed Robert for the balance of the cost of his SNF stay—\$60,000. Robert did not pay the bill. Kenneth testified that he called DOCHS, after receiving the bill, and was told to “disregard the invoice.”

On August 22, 2008, CSB filed its complaint. Robert filed a cross-complaint and a first amended cross-complaint for equitable indemnity, contribution, and declaratory relief against DOCHS. DOCHS ultimately was substituted for CSB as plaintiff in the collection action.

On June 16, 2009, a jury trial was scheduled for January 19, 2010. Deposit of jury fees was required, pursuant to Code of Civil Procedure section 631, subdivision (b), “at least 25 calendar days” before the initially set trial date.³ Robert’s counsel did not submit jury fees until January 13, 2010. On January 21, 2010, after the case was assigned to a trial department, DOCHS moved to confirm Robert’s jury waiver,⁴ and Robert moved for relief from jury waiver. DOCHS argued that it had assumed Robert waived his right to a jury trial, given that no fees were posted until three business days before trial. DOCHS argued that its lead trial counsel would not be available for a jury trial because, in reliance on the failure to post fees, he had planned to be in Delaware and Southern California for a trial and arbitration, respectively. DOCHS also argued: “If this goes to jury trial, I do not believe [Dr. Murphy will] be able to attend. He’s given us two days of his time already.”

³ “Each party demanding a jury trial shall deposit advance jury fees with the clerk or judge. The total amount of the advance jury fees may not exceed one hundred fifty dollars (\$150) for each party. The deposit shall be made at least 25 calendar days before the date initially set for trial, except that in unlawful detainer actions the fees shall be deposited at least five days before the date set for trial.” (Code Civ. Proc., § 631, subd. (b).) All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

⁴ “A party waives trial by jury in any of the following ways: [¶] . . . [¶] By failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (b).” (§ 631, subd. (d)(5).)

Robert's counsel asserted that that failure to post jury fees was inadvertent and the result of mistake. She stated: "I was on vacation at the time the jury fees were to be posted. My assistant. . . had gone out on emergency medical leave and . . . she was still out; not in the office. [¶] And while I was gone, it was missed because no other people were working on the case at the time." Robert's counsel also stated: "[DOCHS's] counsel indicated that the medical doctor, who they plan on calling, will not be able to appear for trial if there's a jury trial. But I haven't seen any declaration from him or any evidence of that fact. [¶] The fact that witnesses and parties were here on Tuesday, and our party was here on Tuesday as well, that has nothing to do with us. We didn't have a courtroom on Tuesday." In response, DOCHS's counsel pointed out: "We've been in this courthouse every day, it seems, for the last month . . . being involved with other attorneys, senior attorneys, other than Miss Johnson."

The trial court denied Robert's motion for relief from the jury waiver. The trial court stated: "I am going to deny the motion based on the following factors: [¶] One is the prejudice that [DOCHS has] explained to me Also the fact there were multiple court appearances subsequent to the final date by which the jury fees were supposed to have been posted."

On the second day of the bench trial, near the conclusion of Robert's cross-examination, the court made an interim finding that: "[Robert] expected to have to pay. He was there long enough; took advantage of everything that was provided for him. And the terms and conditions upon which the Hospital kept him; they are relying on his not asking to leave or refusing service; obligates him to be bound by those terms and conditions."

After posttrial briefing, the trial court issued its statement of decision. The trial court found Robert liable to DOCHS under two alternate theories: breach of contract and quantum meruit. The court reasoned: "[Robert] argues that no contract exists because he never signed the Conditions of Admission or otherwise agreed to its terms. However, assent to be bound by a contract need not be written or verbal but may also be communicated through conduct. [(*California Emergency Physicians Medical Group v.*

PacifiCare of California (2003) 111 Cal.App.4th 1127, 1134.)] [Robert] received a copy of the Conditions of Admission and, even if he did not sign it, he was aware of the terms under which the hospital provides care to its patients. He had been hospitalized at Seton multiple times before, and every patient entering the hospital receives the Conditions of Admission. [¶] Had [Robert] been unable or unwilling to pay for such care or to abide by such terms, he could have sought alternative treatment elsewhere; but he did not do so. Having been made aware that his Medicare policy would not cover the full term of his stay in the skilled nursing facility, [Robert] remained in the facility and accepted SNF treatment for more than a month. [Robert] certainly knew that DOCHS did not offer this care for free and knew that he would be responsible for whatever portion of that care was not paid for by Medicare. . . . Despite not signing [the Conditions of Admission form], [Robert] assented to the contract by performance and is liable for a breach of his failure to fulfill the obligations he undertook.”

After receiving further briefing and argument on the issue of liability for attorney fees, the trial court signed a judgment, ordering [Robert] to pay DOCHS a total of \$145,066.70, which included \$60,837.50 in principal, \$29,446.37 in interest, \$49,716.00 in attorney fees and \$5,066.83 in costs. Robert filed a timely notice of appeal.

II. DISCUSSION

Robert contends: (1) that the trial court abused its discretion by denying his motion for relief from the jury waiver; (2) that the trial court abused its discretion in permitting several of DOCHS’s witnesses to testify at trial; and (3) that the trial court’s attorney fee award must be reversed because it is without contractual basis. We agree only on the final point.

A. *Jury Waiver*

Robert contends that the trial court abused its discretion by denying his motion for relief from the jury waiver. He argues that DOCHS did not show it would suffer prejudice if relief were granted.

Article I, section 16 of the California Constitution provides: “Trial by jury is an inviolate right and shall be secured to all In a civil cause, a jury may be waived by

the consent of the parties expressed as prescribed by statute.” As noted above, section 631 provides, in relevant part: “(a) The right to a trial by jury as declared by . . . the California Constitution shall be preserved to the parties inviolate. In civil cases, a jury may only be waived pursuant to subdivision (d). [¶] (b) Each party demanding a jury trial shall deposit advance jury fees with the clerk or judge. The total amount of the advance jury fees may not exceed one hundred fifty dollars (\$150) for each party. The deposit shall be made at least 25 calendar days before the date initially set for trial, except that in unlawful detainer actions the fees shall be deposited at least five days before the date set for trial. [¶] . . . [¶] (d) A party waives trial by jury in any of the following ways: [¶] . . . [¶] (5) By failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (b). [¶] . . . [¶] (e) *The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury.*” (Italics added.)

Under the terms of the statute, Robert waived trial by jury when his counsel failed to timely deposit his jury fees. (§ 631.) However, “a court may, in its discretion, allow a trial by jury although there has been a waiver.” (*Winston v. Superior Court* (1987) 196 Cal.App.3d 600, 602 (*Winston*)). “Courts have held that, given the public policy favoring trial by jury, the trial court should grant a motion to be relieved of a jury waiver ‘unless, and except, where granting such a motion would work serious hardship to the objecting party.’ (*Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806, 809.) Where doubt exists concerning the propriety of granting relief from such waiver, this doubt, by reason of the constitutional guarantee of right to jury trial (Cal. Const., art. I, § 16), should be resolved in favor of the party requesting trial by jury. [Citation.] [¶] The court abuses its discretion in denying relief where there has been no prejudice to the other party or to the court from an inadvertent waiver. [Citations.] The prejudice which must be shown from granting relief from the waiver is prejudice from the granting of relief and not prejudice from the jury trial. [Citation.]” (*Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1703–1704.)

“A trial court acts properly in denying relief and does not abuse its discretion where any reasonable factors supporting denial can be found.” (*March v. Pettis* (1977)

66 Cal.App.3d 473, 480.) “In exercising its discretion, a court is entitled to consider many factors, including the possibility of delay in rescheduling the trial for a jury, lack of funds, timeliness of request and prejudice to all the litigants.” (*Ibid.*; accord, *Gann v. Williams Brothers Realty, Inc.*, *supra*, 231 Cal.App.3d at p. 1704.) “[T]he likely inconvenience to witnesses” is another factor which can be considered by the trial court when determining whether to grant a motion for relief from jury waiver. (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507–508, 511.)

Robert insists that his motion for relief should have been granted because DOCHS did not show prejudice would result from relief. He relies on *Winston*, *supra*, 196 Cal.App.3d 600 and *Byram v. Superior Court* (1977) 74 Cal.App.3d 648 (*Byram*). In *Winston*, Division Four of this court held that the trial court had abused its discretion in denying relief when the waiver was inadvertent and there was no prejudice to the opposing party that could not be remedied by a continuance. (*Id.* at pp. 602–603.) The court rejected the argument that prejudice would result because a jury trial would take longer than a court trial. It observed: “The prejudice that [the party opposing relief] must show is prejudice from the granting of relief from waiver not prejudice from the jury trial.” (*Id.* at p. 603.)

In *Byram*, *supra*, 74 Cal.App.3d 648, the plaintiff’s counsel relied on his secretary to deposit jury fees, but she failed to do so in a timely manner. When the plaintiff’s counsel learned of the mistake, he filed, that same day, a motion for relief from the waiver. (*Id.* at p. 650.) At the hearing on the motion for relief, the opposing party made no showing that they would suffer any prejudice. Thus, the reviewing court held that the trial court had abused its discretion in denying the motion for relief. The court stated: “Inasmuch as the petitioner sought a jury trial throughout the proceedings and took prompt action upon receiving notice that the jury fees had not been deposited, and real parties in interest have not and did not establish that any prejudice would result from allowing a jury trial, and the court did not base its decision upon necessities for the smooth functioning of the proceedings before it, we hold that the denial of a jury trial to the petitioner in this case was an abuse of discretion.” (*Id.* at p. 654.)

But, unlike the plaintiff in *Winston*, DOCHS showed more than simply the fact that a jury trial would take longer. And, unlike the plaintiff in *Byram*, Robert's counsel did not seek relief from the jury waiver immediately after learning of her mistake. (*Byram, supra*, 74 Cal.App.3d at p. 653.) The facts here are closer to those presented in *Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 388 (*Still*). In *Still*, the defendant also did not post jury fees in a timely manner. Then, on the day of trial, the defendant moved for relief from jury waiver. (*Id.* at pp. 384, 387.) In affirming the denial of the motion for relief, the Court of Appeal reasoned: "Rather than promptly moving for relief from the waiver, counsel waited until the morning of trial to seek relief. The matter was within the discretion of the trial judge, and we find no abuse of discretion." (*Id.* at p. 388.)

Even if we ignore the argument of potential inconvenience to Dr. Murphy, the trial court did not abuse its discretion. In this case, Robert submitted his jury fees more than 15 days late, on January 13, 2010, and only three court days before trial. (§ 631, subd. (b).) Then, after recognizing the mistake and attempting to late file the fees on January 13, and despite having made an intervening court appearance on the initial trial date of January 19, Robert's counsel still waited until the matter was actually assigned to a trial department to seek relief from the waiver. Thus, the court could properly conclude that Robert's motion for relief was untimely and deny it on that basis. (See *Still, supra*, 21 Cal.App.3d at p. 388.) Further, in these circumstances, DOCHS's counsel was justified in assuming that trial would be to the court. Thus, counsel adequately established prejudice in having conflicting trial appearances in two other matters already scheduled in reliance on the jury waiver. The trial court therefore did not abuse its discretion in denying the motion for relief.

B. *Evidentiary Challenges*

Next, Robert argues that the trial court abused its discretion in permitting, over his objection, certain DOCHS witnesses to testify at trial. We generally review the trial court's ruling on evidentiary matters for abuse of discretion. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078; *Boston v. Penny Lane*

Centers, Inc. (2009) 170 Cal.App.4th 936, 950.) “A decision ‘that transgresses the confines of the applicable principles of law is outside the scope of discretion’ and is an abuse of discretion.” (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.)

1. *Background*

During pretrial discovery, Robert noticed the deposition of Seton’s person most knowledgeable (PMK) on the following topics: 1. Robert’s admission to Seton Hospital on October 30, 2006; 2. Applicable Medicare coverages and guidelines; 3. Review and analysis of the medical services being administered to Robert for purposes of determination of applicable and available coverages; 4. The November 22, 2006 decision to transfer Robert from acute care to skilled nursing care; and 5. The decision to terminate Medicare coverages as of November 22, 2006. After no witness was produced on the noticed date, Robert filed a motion to compel. The trial court signed an ex parte discovery order, which provided: “[Robert’s] Motion to Compel the Deposition of the Person Most Knowledgeable was heard ex parte on January 5 at 2:30 p.m. in department 3 the Honorable Judge Freeman presiding. Counsel for [Robert] and [DOCHS] appeared at this hearing. The parties *stipulated* to the deposition of Seton’s PMK taking place on January 13, 2010 at defense counsel’s office at 9:30 a.m.” (Italics added.)

DOCHS designated Kent as the person most knowledgeable on all five topics. Kent testified that she had no interaction with Robert while he was at Seton. She was also unable to answer several questions regarding the Lumetra appeal and DOCHS’s billing practices. Kent testified: “Billing is not my area of expertise.” Robert’s counsel stated: “I’m not sure we have the person most knowledgeable on all the categories.”

Robert filed motions in limine at trial, one seeking to preclude testimony by Kent. With respect to Kent, Robert argued, in his written motion in limine, that she lacked personal knowledge on the issues set forth in his PMK notice. In opposing Robert’s motion, DOCHS indicated that it would call Kent to testify as an expert witness. Robert also objected at trial, on the ground that DOCHS was precluded from offering her as an

expert witness because she was not disclosed as such. The trial court did not explicitly rule on Robert's motion to exclude Kent's testimony, determining that it would rule on objections as they were presented.

In another motion in limine, Robert sought to preclude DOCHS from calling any witness other than Kent to testify to the issues in his PMK deposition notice. Specifically, he objected to testimony by Antonio Fonseca, who was called by DOCHS to testify as to its billing record. Robert argued that Fonseca should be precluded from testifying regarding billing issues because he was not produced in response to the PMK deposition notice. The trial court allowed Fonseca to testify after offering Robert's counsel the opportunity to depose him before cross-examination.

Fonseca was employed by DOCHS beginning in 2002. In 2005 and 2006, he served as supervisor of DOCHS's customer call center, in which he assisted patients in paying their bills and supervised the managed care insurance follow-up team. By 2010, Fonseca served as DOCHS's revenue integrity services manager. Fonseca reviewed Robert's itemized bills from acute care and the SNF. The acute care bill was paid in full by Medicare. A Medicare claim was filed and paid for six days of care in the SNF, which was all that Robert retained coverage for. AARP was billed for a nominal amount and Robert was billed for the remainder of the charges.

Fonseca also testified: "And so there are notes in our accounting system that we made . . . , [Robert], and the family, aware that there was going to be possibly reduced benefits; because his secondary insurance, AARP has limited benefits. . . . We don't have a contract with them. Therefore, there's no additional discount given after they would make a payment. [¶] And they paid a very small amount after his Medicare insurance is exhausted. It was about \$238.00 per day . . . since he was that kind of under insured to us, he was offered a daily rate of \$1,438.00. [¶] To my knowledge the family didn't accept that rate for the days not covered by Medicare. Therefore, we ended up billing AARP his secondary insurance. And they paid a nominal amount." Fonseca testified: "Medicare . . . won't allow us to bill for something they're not going to pay for."

At the conclusion of Fonseca's direct examination, the following colloquy occurred on the record: "THE COURT: Do you want to wait until you've taken his deposition before you question him? [¶] . . . [¶] [ROBERT'S COUNSEL]: Your Honor, yes, . . . with—waiving my objections to this witness, I'll proceed with the cross-examination. [¶] THE COURT: And what about the deposition? [¶] [ROBERT'S COUNSEL:] I'll proceed with the cross-examination in lieu of the deposition."

Kent testified that she worked at DOCHS, since 2005, as "Quality Review Nurse Risk Manager" and then "Director of Quality Risk Patient Safety and Corporate Compliance." She had also worked at other hospitals as a case manager and had extensive experience with the Medicare guidelines. Kent testified that the treating doctor is the one who suggests a transfer and the case manager looks at the Medicare guidelines to help the doctor determine the appropriate level of care. Kent never served as a case manager at DOCHS.

Kent also testified that DOCHS received the results of the Medicare peer review conducted by Lumetra on January 3, 2007, the same day Robert was discharged. Lumetra determined that, as of November 22, Robert should remain in acute care until additional diagnostic tests were completed. DOCHS took no action after receiving the letter.

Robert's counsel made several hearsay objections during Kent's testimony. One such objection was sustained. The other objections were overruled. Robert's counsel also objected, on several occasions, that questions called for expert testimony and Kent had not been disclosed as an expert witness. Most of the objections were overruled. In one such instance, the following colloquy occurred: "Q. . . . Based on your review of the file, Dr. Murphy determined that skilled nursing was the appropriate level of care for [Robert]? [¶] A. Correct. [¶] Q. And to your experience, based on your lengthy career at Seton . . . would it be inappropriate for a case manager to override the physician to try to maximize Medicare? [¶] [ROBERT'S COUNSEL]: Objection. Calls for expert opinion. She hasn't been disclosed as an expert. [¶] THE COURT: But it falls within

her job. Overruled. [¶] [KENT]: A case manager cannot overrule the decision of a physician. It's not within their scope of their job.”

Robert takes issue with Kent's testimony regarding Medicare guidelines and the level of service required for Robert. He objected that her testimony was based on hearsay and was improper expert opinion. Kent testified that she was familiar with the guidelines through her work experience, and that, in Robert's case, “he lacked the appropriate intensity of service. When you look at the document, you either need to have one on the right or . . . three treatments on the left. He had neither.” But, the trial court later granted a motion to strike this testimony. The court stated: “I am taking this as how the process works; what a person in her position, case manager, would do or not do.” Nonetheless, Kent then went on to testify that, based on her review of Robert's records, “From 11/8 on, he did not meet the acute care guidelines. [¶] He was only getting IV antibiotics. That's not enough to justify the intensity of service.”

2. *Analysis*

Robert argues that the trial court abused its discretion by allowing Fonseca to testify at trial, despite DOCHS's failure to identify him or produce him in response to Robert's PMK deposition notice. Robert also argues that Kent's testimony constituted inadmissible hearsay because it was based solely on her review of Robert's medical records, which she did not author. Robert also contends that Kent's testimony should have been excluded because she was not timely designated as an expert witness.

We first address Robert's argument that Fonseca should have been precluded from testifying since he was not produced in response to the PMK deposition notice.

Section 2023.030 provides in relevant part: “To the extent authorized by the chapter governing any particular discovery method . . . , the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, *may* impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process: [¶] . . . [¶] (c) The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence.” (Italics added.) “This means that the statutes governing the

particular discovery methods limit the permissible sanctions to those sanctions provided under the applicable governing statutes.” (*New Albertsons, Inc. v. Superior Court*, *supra*, 168 Cal.App.4th at p. 1422.)

Pursuant to section 2025.480, subdivision (a), “[i]f a deponent fails to answer any question . . . the party seeking discovery may move the court for an order compelling that answer” Evidence sanctions may be imposed only after a motion to compel is made and granted and the party to be sanctioned has failed to comply with that order.

(§ 2025.480, subds. (f), (g); *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1214.) Thus, “absent unusual circumstances, such as repeated and egregious discovery abuses, two facts are generally prerequisite to the imposition of a nonmonetary sanction. There must be a failure to comply with a court order and the failure must be willful.” (*Lee v. Lee* (2009) 175 Cal.App.4th 1553, 1559.)

Here, Fonseca testified regarding DOCHS’s billing practices. Robert never sought to depose DOCHS’s person most knowledgeable regarding billing practices. Furthermore, even if we assume that, as Robert asserts, Fonseca, and not Kent, was the person most knowledgeable regarding “[a]pplicable Medicare coverages and guidelines,” the trial court did not abuse its discretion in permitting Fonseca’s testimony. Contrary to Robert’s assertion, there was no court order compelling Seton or DOCHS to produce Fonseca for deposition.⁵ Robert has made no showing that the failure to produce Fonseca was in violation of any court order or a willful or repeated discovery abuse. (But see *Karlsson, supra*, 140 Cal.App.4th at pp. 1215–1216 [holding evidence sanctions justified based on pattern of willful discovery abuses in addition to findings that party violated court orders when it failed to designate PMK for deposition after court-ordered meet-and-confer session].)

⁵ Despite Kent’s inability to answer several questions at the deposition, Robert did not file a motion to compel further responses after her deposition. (See § 2025.480, subd. (a).)

With respect to Kent, Robert argues that “[Kent] clearly had no personal knowledge and . . . her testimony constituted hearsay because her testimony was based solely on the review of the medical records, none of which she authored or had any input in whatsoever.” But, at least some of Robert’s medical records were admitted in evidence, after authentication by Dr. Murphy, under the business records exception to the hearsay rule. (Evid. Code, § 1271.) And, Robert concedes that, if timely disclosed, Kent was qualified to offer expert witness testimony.⁶ Even if the medical records Kent relied on were not admissible, an expert may properly give opinion testimony based on hearsay. (Evid. Code, § 801, subd. (b); *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1324–1325.) Thus, we turn to a discussion of whether Kent’s testimony should have been excluded to sanction an untimely designation.

Section 2034.210, subdivision (a), provides: “After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other’s expert trial witnesses to the following extent: [¶] (a) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.” If an expert witness is “an employee of a party” the designation of that witness is to include an expert witness declaration. (§ 2030.210, subd. (b).) These sections require a party to “ ‘disclose the *substance* of the facts and the opinions to which the expert will testify, either in his witness exchange list,

⁶ “[B]y definition, an ‘expert’ witness is one entitled to give opinion testimony.” (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 34.) Opinion testimony by an expert witness is admissible if it is “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).) “A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.” (Evid. Code, § 720, subd. (a).)

or in his deposition, or both.’ [Citation.]” (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 778 (*Easterby*)). The purpose of these provisions is “ ‘to give fair notice of what an expert will say at trial.’ ” (*Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1522.)

Failure to submit a required declaration may result in exclusion of the expert opinion. (*Schreiber v. Estate of Kiser, supra*, 22 Cal.4th at p. 34.) Section 2034.300 provides: “[O]n objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court *shall* exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: [¶] (a) List that witness as an expert under Section 2034.260. [¶] (b) Submit an expert witness declaration. [¶] (c) Produce reports and writings of expert witnesses under Section 2034.270. [¶] (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).”⁷

The record does not show Robert’s standing to object because it does not contain his demand for expert witness disclosure under section 2034.210, or evidence of Robert’s “ ‘complete and timely compliance with Section 2034.260.’ ” (§ 2034.300; see also *Hirano v. Hirano* (2007) 158 Cal.App.4th 1, 6, 8; *West Hills Hospital v. Superior Court* (1979) 98 Cal.App.3d 656, 659–660 [a party not in strict compliance with expert disclosure requirements does not have standing to object to other party’s expert disclosure failures].) We are only able to infer that Robert made such a demand by virtue of the DOCHS response, dated December 3, 2009, which stated it did not intend to call an expert witness. DOCHS, however, does not dispute that Robert made timely demand for the exchange, and at least implicitly acknowledges it. Even assuming that we have an adequate record to review this issue, and that DOCHS was required to disclose Kent as an expert in response to pretrial demand, Robert has not shown prejudice.

An evidentiary ruling, even if erroneous, is not reversible absent a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *People v. Watson* (1956)

⁷ Section 2034.260 governs the timing and content of exchange of expert witness information.

46 Cal.2d 818, 836.) “ ‘[A] “miscarriage of justice” should be declared only when the court, “after an examination of the entire cause, including the evidence,” is of the “opinion” that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ ” (*Easterby, supra*, 171 Cal.App.4th at p. 783, citing *Watson*, at p. 836.) Kent was in fact deposed on the subject matter of her testimony. Based on her deposition testimony, Robert anticipated that Kent might be offered as an expert. Robert therefore had “fair notice of what [Kent would] say at trial.” (*Dozier, supra*, 199 Cal.App.4th at p. 1522.) Robert makes no attempt to show that her trial testimony exceeded the scope of her deposition testimony, or that he suffered any unfair surprise by virtue of her testimony. In fact, Kent testified at her deposition that, at the time Robert was being considered for transfer, he was receiving only intravenous antibiotics. And, according to the Medicare guidelines, this level of care was insufficient to require acute care. Further, as DOCHS notes, the trial court, in its statement of decision, makes no reference to any of the testimony to which Robert objects in support of its decision. (See *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1526 [“[A] trial court is presumed to ignore material it knows is incompetent, irrelevant, or inadmissible. . . . [¶] . . . Only proof that the evidence actually figured in the court’s decision will overcome these presumptions”].)

C. *Attorney Fees*

Finally, Robert argues that the trial court’s attorney fee order should be reversed because “[t]here is no contractual or statutory basis for attorney’s fees.” Specifically, Robert contends: “The trial court’s ruling that the Conditions of Admission constituted a valid contract and that [he] was bound by all the terms and conditions contained therein, even though it was unsigned, is contrary to current California case law.” On this point, we agree.

The general rule is that each party to a lawsuit must pay its own attorney fees, unless an “agreement, express or implied” or statute provides otherwise. (§ 1021.) Section 1033.5, subdivision (a)(10), provides that attorney fees are “allowable as costs” when they are “authorized by” either “Contract,” “Statute,” or “Law.” We consider

whether there is a contractual basis for fees in this case. Civil Code section 1717, subdivision (a), provides, in relevant part: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney’s fees in addition to other costs.”

We review “a determination of the legal basis for an award of attorney fees de novo as a question of law.” (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.) “In particular, we independently review the trial court’s determination with respect to whether the terms of a written agreement constitute a legal basis for awarding attorney fees.” (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1605.) But, in this case, there is no dispute that the financial agreement contained within the Conditions of Admission provides for an award of attorney fees. Specifically, the financial agreement provision states: “The undersigned agrees . . . that in consideration of the services to be rendered to the patient, he/she hereby individually obligates himself/herself to pay the account of the Hospital in accordance with the regular rates and terms of the Hospital. *Should the account be referred to an attorney or collection agency for collection, the undersigned shall pay actual attorney’s fees and collection expenses.*” (Italics added.) The question is whether the parties agreed to be bound by the Conditions of Admission. Whether a contract exists is a question of law, subject to our independent review, if the facts are undisputed. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.) Where, as here, the evidence is conflicting, the existence of the contract is a question of fact, and we must uphold the trial court’s finding if it is supported by substantial evidence. (*Ibid.*; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Substantial evidence is evidence of “ ‘ ‘ponderable legal significance,’ ” ” “ ‘ ‘reasonable in nature, credible, and of solid value’ ” [Citations.]” (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) “The ultimate determination is whether a reasonable trier of fact

could have found for the respondent based on the whole record. [Citation.]” (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633, italics omitted.)

“It is essential to the existence of a contract that there should be: (1) Parties capable of contracting; [¶] (2) Their consent; [¶] (3) A lawful object; and [¶] (4) A sufficient cause or consideration.” (Civ. Code, § 1550.) Here, we consider only whether the parties mutually assented to the Conditions of Admission. Robert has not contested any of the other elements. “To form a contract, a manifestation of mutual assent is necessary. [Citation.] Mutual assent may be manifested by written or spoken words, or by conduct.” (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 850.) “The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.” (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942–943.)

“A contract is either express or implied.” (Civ. Code, § 1619.) “An express contract is one, the terms of which are stated in words.” (Civil Code, § 1620.) “An implied contract is one, the existence and terms of which are manifested by conduct.” (Civ. Code, § 1621.) “[C]ontracts are either made in fact or the obligation is implied in law. If made in fact, contracts may be established by direct evidence or they may be inferred from circumstantial evidence. The only difference is in the method of proof. In either case they would appear to be express contracts. Otherwise, it would seem that they, or the presumed contractual obligation, must be implied at law. A so-called ‘implied-in-fact’ contract, however, as the term is used by some writers, may be found although there has been no meeting of the minds.” (*Desny v. Wilder* (1956) 46 Cal.2d 715, 735–736.) “Such ‘implied’ or ‘implied-in-fact’ contracts are . . . more accurately described as express contracts proved by circumstantial evidence.” (*Id.* at p. 738, fn. 9.)

In its statement of decision, the trial court found Robert liable to DOCHS on two alternative grounds—breach of an express contract and quantum meruit. In awarding attorney fees to DOCHS, the trial court found that an express contract—the Conditions of Admission—governed. Robert takes issue with this latter finding, pointing out that he never signed the Conditions of Admission and there was no evidence that he orally

agreed to its terms. DOCHS, on the other hand, argues that “[Robert] assented to the contract by his conduct”—when he accepted the hospital’s medical services without objection.

The trial court agreed with DOCHS. Specifically, on the second day of the bench trial, near the conclusion of Robert’s cross-examination, the court made an interim finding that: “[Robert] expected to have to pay. He was there long enough; took advantage of everything that was provided for him. *And the terms and conditions upon which the hospital kept him; they are relying on his not asking to leave or refusing service; obligates him to be bound by those terms and conditions.*” (Italics added.) Then again, in its statement of decision, the trial court stated: “[Robert] argues that no contract exists because he never signed the Conditions of Admission or otherwise agreed to its terms. However, *assent to be bound by a contract need not be written or verbal but may also be communicated through conduct.* [Citation.] [Robert] received a copy of the Conditions of Admission and, even if he did not sign it, he was aware of the terms under which the hospital provides care to its patients. He had been hospitalized at Seton multiple times before . . . and every patient entering the hospital receives the Conditions of Admission. . . . [¶] Had [Robert] been unable or unwilling to pay for such care or to abide by such terms, he could have sought alternative treatment elsewhere, but he did not do so. . . . As the Court ruled at trial, in taking advantage of the SNF services offered, [Robert] clearly manifested his intent to be bound by the contract’s terms and conditions and he understood that he would be financially responsible. . . . Despite not signing it, [Robert] assented to the contract by performance and is liable for a breach for his failure to fulfill the obligations he undertook.” (Italics added.)

The trial court was correct that the absence of a signature is not necessarily fatal to an express contract claim. Although uncited by either DOCHS or the trial court, our Civil Code provides: “A *voluntary* acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, *so far as the facts are known, or ought to be known*, to the persons accepting.” (Civ. Code, § 1589, italics added; see also Civ. Code, § 1584 [“acceptance of the consideration offered with a proposal, is an

acceptance of the proposal”]; *Fidelity etc. Co. v. Fresno Flume etc. Co.* (1911) 161 Cal. 466, 473 [“receipt and acceptance by one party of a paper signed by the other, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper”]; *Beatty v. Oakland Sheet Metal etc. Co.* (1952) 111 Cal.App.2d 53, 62; *Dallman Supply Co. v. Smith-Blair, Inc.* (1951) 103 Cal.App.2d 129, 132; *Grant v. Long* (1939) 33 Cal.App.2d 725, 736 [“[w]hile an express contract is one, the terms of which are stated in words . . . one party may use the words and the other may accept, either in words or by his actions or conduct”].)

We know of no case in which assent by conduct principles have been applied to a similar factual situation—when an incapacitated patient is brought by ambulance to an emergency room. But, even if we assume that a prospective hospital patient can assent to all terms of a written agreement solely by his conduct, we nonetheless conclude that the trial court’s findings, in this case, are not supported by substantial evidence. It is undisputed that Robert never asked to leave Seton during his nine weeks of treatment. Such conduct evidences an agreement to pay for the medical services he received. But this could only be reasonably viewed as assent to other terms of the Conditions of Admission if Robert knew or ought to have known of those terms. (See Civ. Code, § 1589; *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 462.)

There is no substantial evidence that Robert knew or reasonably ought to have known of the attorney fee provision in the Conditions of Admission. The trial court found: “[Robert] received a copy of the Conditions of Admission and, even if he did not sign it, he was aware of the terms under which the hospital provides care to its patients.” The trial court may have completely discredited Robert’s testimony that he had never seen the Conditions of Admission, but that leaves little to no evidence of what actually occurred upon Robert’s admission in October 2006. In arguing that the trial court’s finding is supported by substantial evidence, DOCHS relies on Kent’s testimony regarding the hospital’s customary practices, the copy of the Conditions of Admission

form bearing Robert's name and the date "10/30/06," as well as Robert's prior hospitalizations at Seton.

Kent testified that patients unable to sign are given a copy of the Conditions of Admission. She also testified: "[I]f the patient is unable to sign [the Conditions of Admission] due to medical condition, it still applies to the patient. [¶] If the patient won't sign it, then they won't be treated. [¶] . . . [¶] And when they're unable to sign, it's verbally gone over with them." The court asked: "If they are in such acute distress that they can't sign it, they stand there and read it anyway?" Kent responded: "Depends on the presentation of the patient. [¶] . . . [¶] And their ability to understand." Therefore, according to Kent's testimony, whether any explanation of the Conditions of Admission was actually provided to Robert at the time of his admission was dependent upon his "ability to understand" in view of his medical condition.⁸ If the record contained testimony from whomever signed the form, as a witness, on October 30, 2006, this very well might be a different case. But, DOCHS did not introduce any direct evidence of what occurred at the time of Robert's admission. It was speculative for the trial court to rely on Kent's testimony to infer that Robert did, in fact, receive an explanation of the terms of the Conditions of Admission, including the provision for attorney fees. Evidence that Robert had previously been hospitalized at Seton does not fill the evidentiary gap. Both Kenneth and Robert testified that Robert had previously been admitted to Seton. But, there is no evidence in the record that Robert previously signed the same Conditions of Admission, or any other contracts containing the attorney fee provision. Kenneth was also asked: "And [Robert] had been shown the conditions of admission when he was there prior; isn't that right, sir?" Kenneth answered only: "I'm assuming so. I'm not specific as to when you're asking me." Although it was undisputed that Robert had been treated at Seton before, there simply was no substantial evidence that he had thereby previously been put on notice of his obligation to pay attorney fees.

⁸ There was no evidence that the Conditions of Admission were presented to Robert, or discussed with him, at any other time.

Although there was certainly evidence that Robert expected to be obligated to pay DOCHS for services rendered, substantial evidence does not support the trial court's finding that the parties agreed to the recovery of attorney fees in a dispute over payment for services.

Contrary to DOCHS's argument, our conclusion does not leave hospitals without a remedy when faced with treating a patient, like Robert, unable to sign the Conditions of Admission. The record amply supports the finding that Robert breached an implied contract to pay for medical services. Such an agreement is implied whenever a patient is admitted to a hospital for treatment. (*Reichle v. Hazie* (1937) 22 Cal.App.2d 543, 547.) We are mindful that DOCHS has had to expend substantial attorney fees in an effort to recover payment from Robert. As we have noted, a signature is not always required to incur an obligation to pay such fees. We are constrained, however, by the trial court record before us.

Because substantial evidence does not support the trial court's finding that Robert assented to the written Conditions of Admission, it was error to award attorney fees. We need not reach Robert's argument that the trial court could not find breach of an express contract when the complaint was for common counts or that the Conditions of Admission was unenforceable as a contract of adhesion. (See *Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 360–361 [standardized Conditions of Admission form signed by patient contained unenforceable arbitration provision].)

III. DISPOSITION

The judgment is modified to strike the award of attorney fees. As so modified, the judgment is affirmed. The parties shall bear their costs on appeal.

Bruiniers, J.

We concur:

Simons, Acting P. J.

Needham, J.