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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ANA LEMAIRE,

Plaintiff and Respondent,

v.

COVENANT CARE CALIFORNIA,  
LLC,

Defendant and Appellant.

2d Civil No. B266493  
(Super. Ct. No. 56-2010-00383376-  
CU-PO-VTA)  
(Ventura County)

Defendant Covenant Care California, LLC (Covenant) appeals attorney fee and cost orders the trial court made in favor of Ana Lemaire (Lemaire) on remand from a prior appeal. It also challenges an order requiring it to post a bond pending appeal. We conclude, among other things, that 1) Lemaire is the prevailing party for attorney fees and costs, 2) the trial court did not abuse its discretion in determining the amount of attorney fees, but 3) the trial court erred in awarding Lemaire's expert witness costs, and 4) it also erred by requiring Covenant to post a bond. We affirm in part and reverse in part.

## FACTS

Lemaire’s mother was admitted to Covenant’s skilled nursing facility in 2010. After her death, Lemaire filed an action against Covenant for wrongful death, elder abuse, and the violation of “patients’ rights” under Health and Safety Code section 1430, subdivision (b).<sup>1</sup> The jury found against Lemaire on her wrongful death cause of action and her claims that Covenant provided insufficient nursing staff and did not treat her mother with dignity.

The jury found Lemaire proved that Covenant did not provide “complete and accurate health records” and “meaningful and informative nurses’ progress notes as often as the patient’s condition warrants.” It found 468 violations in the first category and 72 in the second. It awarded \$500 statutory damages for each “violation.” (§ 1430, subd. (b).) The trial court entered judgment against Covenant for \$270,000 in statutory damages (*ibid.*) and costs, and \$841,842 in attorney fees.

Covenant appealed. It claimed nursing care patients have no right to sue for violations of regulations that require it to have “complete and accurate health records” and “meaningful and informative nurses’ progress notes.”

We held nursing patients have a private right of action under section 1430, subdivision (b) (*Lemaire v. Covenant Care California, LLC* (2015) 234 Cal.App.4th 860, 864), but the statute “does not permit an award of \$500 damages for each violation” (*id.* at pp. 866, 868). It “only allows a maximum \$500 award for this action.” (*Id.* at p. 866.) We said, “Where there is a reversal of the award of statutory damages, as here, ‘the trial

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<sup>1</sup> All statutory references are to the Health and Safety Code unless stated otherwise.

court will need to redetermine the amount of attorney fees solely based on the result achieved under section 1430, subdivision (b).” (*Id.* at p. 868.) “Covenant contends it should now be considered the prevailing party . . . . But these issues must initially be decided by the trial court on remand.” (*Ibid.*)

On remand, Lemaire filed a motion for attorney fees and costs. The trial court found Lemaire was the prevailing party for attorney fees and costs. The court 1) reduced Lemaire’s request for \$841,842 in attorney fees to \$589,290, a 30 percent reduction; 2) awarded Lemaire \$112,500 in attorney fees on appeal; and 3) awarded Lemaire \$85,581.08 in trial court costs.<sup>2</sup>

## DISCUSSION

### *Attorney Fees*

Covenant contends the trial court erred by finding Lemaire the prevailing party and awarding her excessive attorney fees given her “minimal success in the litigation.” We disagree.

The trial court has substantial discretion in deciding attorney fee issues. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133, 1138; *Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74, 76.) Attorney fee awards will not be reversed unless the appellate court is “convinced” the ruling is “clearly wrong.” (*Cates v. Chiang* (2013) 213 Cal.App.4th 791, 820-821.) “Trial judges are . . . in the best position to assess the value of the professional services provided in their courts.” (*Id.* at p. 821.)

In *Lemaire v. Covenant Care California, LLC*, *supra*, 234 Cal.App.4th at page 869, we awarded costs on appeal to Covenant and remanded the case to the trial court. Covenant suggests its award of costs on appeal makes it the prevailing

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<sup>2</sup> We grant Covenant’s request for judicial notice.

party for attorney fees in this action. But “an award of costs on appeal does not determine, or even indicate, who is the prevailing party in the lawsuit for the purpose of awarding fees.” (*Wood v. Santa Monica Escrow Co.* (2009) 176 Cal.App.4th 802, 807.) Lemaire prevailed by obtaining the maximum statutory damages awardable under section 1430, subdivision (b). That statute provides for an award of attorney fees to the prevailing party Lemaire. (§ 1430, subd. (b).)

Covenant claims Lemaire did not secure an “important public right justifying a large fee award” and did not “benefit” other nursing care residents. “[I]n many cases the important gains or contributions rendered by public interest litigation will be reflected in nonmonetary advances.” (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 939.) “[T]he public always has a significant interest in seeing that legal strictures are properly enforced . . . .” (*Ibid.*)

Lemaire established the right of patients to sue for “violation of regulations requiring Covenant to have ‘complete and accurate health records’ and ‘meaningful and informative nurses’ progress notes.’” (*Lemaire v. Covenant Care California, LLC, supra*, 234 Cal.App.4th at p. 864.) We said that “[t]he duties imposed by the regulations that Covenant violated directly affect the patient’s right to proper diagnosis, treatment and care.” (*Id.* at p. 865.) “Failure to maintain complete health care records may lead to serious health and treatment consequences.” (*Id.* at pp. 865-866.) This lawsuit benefited the rights of nursing care patients to bring actions “to encourage regulatory compliance and prevent injury.” (*Id.* at p. 866, italics omitted.) We said Lemaire’s “action furthers these goals by enforcing regulations involving the rights of residents of nursing care facilities.” (*Ibid.*)

### *Abuse of Discretion*

Covenant contends the trial court abused its discretion by not making a “true redetermination of an appropriate fee award.” The trial court had the complete record. Covenant, however, produced only a small portion of the record. Where the record is incomplete, we presume the missing portions support the trial court’s findings. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.)

But even on this record, Covenant has not shown an abuse of discretion. It claims the attorney fee award should be small because Lemaire only received a statutory award of \$500. In *Lemaire*, we said, notwithstanding the \$500 cap on statutory damages, “[t]he statute has an attorney fee provision that ‘may generate *substantial attorney fee awards irrespective of the amount the patient actually recovers . . .*’” (*Lemaire v. Covenant Care California, LLC, supra*, 234 Cal.App.4th at p. 867, italics added.)

Lemaire’s counsel successfully litigated numerous Covenant regulatory violations and sought statutory damages for each violation. This occurred before the appellate decision that ruled the maximum cap on those damages was \$500 per action. A trier of fact could find counsel acted reasonably because prior to that decision trial courts had awarded \$500 per each violation. “[I]t is impossible for an attorney to determine before starting work on a potentially meritorious legal theory whether it will or will not be accepted by a court years later following litigation.” (*Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 273.) An award of attorney fees is “just compensation for expenses actually incurred in vindicating a public right.” (*Ibid.*) “To reduce the attorneys’ fees of a successful party because he did not

prevail on all his arguments, makes it the attorney, and not the defendant, who pays the cost of enforcing that public right.”

*(Ibid.)*

Lemaire’s counsel noted that Judge McGrath had awarded attorney fees of \$841,842 before the first appeal. They claimed this amount was reasonable for a fee award after remand because: 1) they “isolated the fees for work on the section 1430 claim from fees for the other causes of action, so the hard work of apportionment was done by Lemaire’s attorneys before they submitted their fee motion”; and 2) “Judge McGrath nevertheless reduced Lemaire’s claim by another 25 percent . . . .”

In deciding the fee motion after the remand, the trial court said, “[T]he evaluation of their success is decreased by the huge reduction in the damage award from \$270,000 to \$500.” But it also noted what Lemaire’s counsel had achieved. It ruled Lemaire “clearly prevailed on her § 1430 claim.” Lemaire’s counsel proved Covenant committed 468 violations in its duty to maintain complete and accurate health records and 72 violations in failing to maintain meaningful and informative nurses’ progress notes. The court said, “The large number of violations found by the jury is an indication of the importance of the facts being brought to light in this case. Attorneys could not afford to pursue such cases if they could not have the possibility of recouping their fees and expenses.” (*Sundance v. Municipal Court, supra*, 192 Cal.App.3d at p. 273.)

Judge Riley also reduced the fees by “30 percent.” The requested award of \$841,842 was reduced to \$589,290. Covenant notes her tentative ruling was for a smaller award. But preliminary comments may not “be used to impeach the [final] order.” (*Burbank-Glendale-Pasadena Airport Authority v.*

*Hensler* (1991) 233 Cal.App.3d 577, 591.) Moreover, Covenant has not shown “that any amount sought was unreasonable” (*Lin v. Jeng* (2012) 203 Cal.App.4th 1008, 1026), or that counsel’s hours, services, or rates were excessive or unnecessary. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 562.)

#### *Fees on Appeal*

Covenant contends the trial court erred by awarding Lemaire \$112,500 in attorney fees on appeal. It notes that it received costs on appeal. But that does not preclude an attorney fee award for Lemaire. (*Wood v. Santa Monica Escrow Co.*, *supra*, 176 Cal.App.4th at p. 807.) The ruling on the statutory damage cap which triggered the remand was only one of the issues on appeal. The trial court could reasonably consider that Lemaire prevailed on other issues which protected the rights of *all* nursing home residents.<sup>3</sup> This case involved important issues of first impression. The court could find counsel’s efforts involved high quality work for which an award of fees was proper. Moreover, Covenant has not shown which hours or services should be disallowed.

#### *Costs*

##### *Lemaire’s Motion for Costs*

Covenant contends the cost orders in favor of Lemaire were “legally erroneous and an abuse of discretion.”

After remand, Lemaire filed a motion for attorney fees and costs for prevailing on Health and Safety Code section 1430, subdivision (b). She sought more than \$85,000 in costs. Her counsel said this was reasonable because Judge McGrath

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<sup>3</sup> We grant Lemaire’s request to take judicial notice of the appellate briefs in the prior appeal.

awarded this amount prior to the decision on the first appeal and he had “halfed many of Lemaire’s costs.” They attached as an exhibit a memorandum of costs listing total costs as \$85,581.08. Covenant challenged the attorney fee claim, but did not contest the costs.

The trial court ruled, “The burden is on Covenant Care to object to and demonstrate the impropriety of facially valid entries on Plaintiff’s verified Memorandum of Costs. In the absence of any such objections/demonstrations, the court awards Plaintiff . . . \$85,581.08 . . . .”

Covenant contends it was not required to respond to the costs sought in Lemaire’s motion because she did not file a new separate memorandum of costs. We disagree. The motion contained a memorandum of costs. It was originally filed in 2013. Lemaire did not file a new memorandum of costs because “[t]he trial costs did not change between the first appeal and Judge Riley’s order.” The motion gave notice that costs were at issue.

#### *Prevailing Party for Costs*

But even on the merits, the result is the same. A prevailing party for costs is usually the one who obtains the favorable “net monetary recovery” in the litigation. (Code Civ. Proc., § 1032, subd. (a)(4); *Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1200-1201.) Lemaire notes her award of statutory damages, attorney fees and trial court costs exceeded “the \$4,949 Covenant recovered for appellate costs.”

Moreover, section 1430, subdivision (b) states, “The licensee *shall be liable* for up to five hundred dollars (\$500), *and for costs . . .*” (Italics added.) Lemaire prevailed by receiving that maximum statutory damage award. A party may also be a prevailing party for costs based on the non-monetary relief it



obtained. (Code Civ. Proc., § 1032, subd. (a)(4); *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1155.) Here that relief was substantial. Lemaire established a new private right of action and proved Covenant committed *540 violations* of its duties.

Covenant raises several challenges to the trial court's rulings on costs. With the exception of one area (Lemaire's expert fees), we conclude the trial court did not err.

#### *Expert Fees*

In a motion challenging Lemaire's awarded costs, Covenant's counsel declared that he did not raise cost challenges in response to Lemaire's motion. He believed Lemaire had to file a new memorandum of costs before cost issues were ripe.

The trial court treated counsel's declaration as a motion for relief from a mistake by counsel (Code Civ. Proc., § 473, subd. (b)), and then denied it. It should have granted relief to allow Covenant to challenge the award for Lemaire's expert fees. (*Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1135.) Counsel made a mistake on procedure. Covenant should not incur a default cost judgment solely because of counsel's excusable mistake. (*Ibid.*)

The trial court awarded Lemaire \$85,581.08 in trial court costs, but \$57,185.43 of those costs were for "expert fees."

In *First Nationwide Bank v. Mountain Cascade, Inc.* (2000) 77 Cal.App.4th 871, 875-876, the court held "parties may not recover expert witness fees as costs 'except when expressly authorized by law.'" It said, "[S]uch express authorization exists in instances when the expert is court appointed . . . or when the judgment awarded is lower than a rejected settlement offer . . . ." (*Id.* at p. 876.) Covenant contends Lemaire's experts were not

court appointed and Lemaire did not file a valid Code of Civil Procedure section 998 offer. Lemaire responds that “Code of Civil Procedure section 998 is irrelevant to this debate, because [her] right to recover expert fees arises under section 1430(b), as an element of her recovery.”

Section 1430, subdivision (b) states, “The licensee shall be liable for up to five hundred dollars (\$500), *and for costs . . .*” (Italics added) But expert fees are not “expressly authorized.” (*First Nationwide Bank v. Mountain Cascade, Inc., supra*, 77 Cal.App.4th at pp. 875-876.) The trial court erred by awarding them.

*The Order Ruling Covenant Had To Post a Bond*

Covenant contends the trial court erred by ruling it had to post a bond to stay enforcement of this judgment on appeal. We agree. Covenant moved for a protective order claiming enforcement of this judgment for attorney fees and costs was automatically stayed on appeal.

The trial court, relying on *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, denied the motion and ruled the judgment was not stayed. In *Dowling*, the court said the rule that a judgment for costs and attorney fees is automatically stayed on appeal does not apply for judgments for anti-SLAPP statute attorney fees. They are not stayed because anti-SLAPP protection is “intended to deter SLAPP litigation” in trial and appellate courts “to protect . . . First Amendment rights.” (*Id.* at p. 1433.) But that anti-SLAPP exception to the rule to protect litigants from harassment on appeal is not applicable here. A bond was not required. (*Ziello v. Superior Court* (1999) 75 Cal.App.4th 651, 655.)

DISPOSITION

The order granting attorney fees to Lemaire is affirmed. That portion of the order granting costs to Lemaire for expert fees is reversed. The order requiring Covenant to post a bond is reversed. In all other respects, the judgment, rulings and orders are affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Rebecca S. Riley, Roger Picquet, Judges

Superior Court County of Ventura

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