

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAW OFFICES OF ROGER E.  
NAGHASH,

Plaintiff, Cross-defendant and  
Appellant,

v.

THOMAS ROY et al.,

Defendants, Cross-complainants and  
Appellants;

ROGER E. NAGHASH,

Cross-defendant and Appellant.

G044785

(Super. Ct. No. 30-2009-00294275)

OPINION

Appeals from a judgment and postjudgment orders of the Superior Court of  
Orange County, Ronald L. Bauer, Judge. Affirmed.

Law Offices of Michael G. York and Michael G. York for Plaintiff,  
Cross-defendant and Appellant and for Cross-defendant and Appellant.

Ring & Green, Robert A. Ring and Susan H. Green for Defendants,  
Cross-complainants and Appellants.

\* \* \*

#### INTRODUCTION

The Law Offices of Roger E. Naghash, a sole proprietorship owned by Roger E. Naghash, sued former clients Thomas Roy and Wendy Roy (the Roys) for unpaid attorney fees incurred in an underlying litigation and appeal. The Roys filed a cross-complaint against the Law Offices of Roger E. Naghash and Roger Naghash individually, claiming, inter alia, legal malpractice. (We will refer to Naghash and to his law firm collectively as Naghash.) After a bench trial, the trial court found that the parties' claims were barred by an oral agreement, reached during a telephone conversation almost two years before Naghash's lawsuit was filed. Under the terms of the oral agreement, Naghash agreed to forego collection of outstanding legal fees, and the Roys agreed not to pursue their potential malpractice claim against Naghash. The trial court therefore entered judgment in favor of the Roys on Naghash's complaint, and in favor of Naghash on the Roys' cross-complaint. Both parties appeal from the judgment. Naghash also appeals from a postjudgment order denying a request for a statement of decision, and the Roys appeal from a postjudgment order granting a motion to tax as costs the Roys' expert witness fees. We affirm.

Substantial evidence supports the trial court's finding that the parties entered into an enforceable oral agreement that bars both the complaint and the cross-complaint. Although the oral agreement violated the State Bar Rules of Professional Conduct, rule 3-400(B) (rule 3-400(B)), it is enforceable. The oral agreement is voidable, but only by the Roys, and they have elected to enforce it. The claim for fraud in the Roys' cross-complaint would not have been barred by the oral

agreement because that claim arose after the oral agreement was entered into. However, the Roys failed to offer any evidence of damages at trial, and their claim therefore fails.

The trial court did not err in refusing to issue a further statement of decision, because the issues identified in Naghash's request for a statement of decision were not the principal controverted issues at trial.

Finally, the trial court did not err in granting the motion to tax the Roys' expert witness fees. The Roys' offer to settle the case did not meet the requirements of Code of Civil Procedure section 998 (section 998), and therefore was ineffective to shift costs. Additionally, the Roys failed to show the trial court's finding that the offer was a token offer was in error.

#### STATEMENT OF FACTS AND PROCEDURAL HISTORY

In April 2003, the Roys retained Naghash to represent them in connection with a dispute with their homeowners association. The association had refused to approve the Roys' plans to remodel their home. When attempts at resolution of the dispute failed, Naghash filed a lawsuit on the Roys' behalf against the association, seeking injunctive and declaratory relief. The case proceeded to trial; at Naghash's recommendation, the Roys dismissed their case without prejudice during trial. The association filed a motion to recover its attorney fees in an amount in excess of \$167,000; the trial court granted the motion.

Naghash represented the Roys on appeal, and obtained a reversal of the attorney fees award. (*Roy v. Highlands Community Assn.* (June 29, 2006, G036084) [nonpub. opn.].) Naghash continued to represent the Roys until February 16, 2007. The Roys later filed a complaint against Naghash with the California State Bar.

In May 2007, Naghash sent the Roys a notice of right to arbitrate, claiming the Roys owed him \$93,786.87 plus interest, in unpaid legal fees. On September 24, 2007, Thomas Roy and Naghash had a 43-minute telephone conversation to discuss their dispute. According to Thomas Roy, during that conversation, he and Naghash agreed

that the Roys would absorb the \$143,000 they had already paid in attorney fees to Naghash and would not pursue any claims for malpractice, and Naghash would not pursue any claims for additional fees.

In August 2009, Naghash filed this lawsuit to recover outstanding attorney fees from the Roys. In their answer to Naghash's complaint, the Roys asserted estoppel and waiver, based on the September 24, 2007 conversation. The Roys also cross-complained for legal malpractice, breach of fiduciary duty, fraud, negligent misrepresentation, and breach of written and oral contracts. In one of the 79 affirmative defenses to the cross-complaint, Naghash asserted the Roys were barred from recovering on their cross-complaint due to "modification of written contract by Executed Oral Agreement."

Following a two-day bench trial, the court found that during the September 2007 conversation, Naghash and Thomas Roy had verbally agreed not to pursue their claims against each other, that each release constituted consideration for the other, and that the oral release had been raised by each party's pleadings. The court found Thomas Roy's testimony regarding the conversation to be more credible than Naghash's testimony. The court also found the parties' acts and omissions after the telephone conversation were consistent with an agreement not to pursue the parties' claims. The court ultimately enforced the parties' agreement not to pursue their claims against each other, and therefore ordered judgment to be entered in favor of the Roys on Naghash's complaint, and in favor of Naghash on the Roys' cross-complaint.

The trial court's tentative decision provided that it would "constitute the court's statement of decision unless either party makes a timely and proper request for a further statement." Naghash filed a timely request for a statement of decision, which specified five controverted issues; those controverted issues identified by Naghash involved whether malpractice had been committed, and when the Roys first knew or should have known Naghash had committed malpractice. In a minute order, the trial

court found there was no need to discuss any of the issues identified by Naghash, “which all seek to explore the timeliness of Roy’s cross-complaint [because n]one of those questions was material to the outcome of this case.” Naghash filed another request for a statement of decision, and a motion for issuance of a statement of decision; the trial court did not rule on either of those filings.

Judgment was entered on December 2, 2010. The Roys filed a memorandum of costs seeking, in part, \$15,911.25 in expert witness fees. Naghash filed a motion to tax the expert witness fees, which the trial court granted. Naghash filed a notice of appeal, and the Roys filed a notice of cross-appeal.

## DISCUSSION

### I.

#### *THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.*

### A.

#### *Validity of the oral agreement*

Naghash contends the Roys waived their claim for legal malpractice in connection with the litigation against the homeowners association when they entered into a written agreement with Naghash to represent them in the appeal of the association’s attorney fees award.

Naghash relies solely on *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175 (*Oakland Raiders*). We find that case distinguishable. In *Oakland Raiders*, the appellate court reaffirmed the longstanding rule “that one who, after discovery of an alleged fraud, ratifies the original contract by entering into a new agreement granting him substantial benefits with respect to the same subject matter, is deemed to have waived his right to claim damages for fraudulent inducement.” (*Id.* at p. 1186.) “In this case, the Raiders admittedly discovered the falsity of the [Oakland-Alameda County Coliseum, Inc.]’s ‘sellout’ representations regarding

[personal seat licenses] and other ticket sales not later than the end of the 1995 football season. In 1996, without any mention of fraud, they negotiated and executed a new agreement concerning the same subject matter, which modified the rights of the parties, granted the Raiders significant benefits, and otherwise reaffirmed the validity and enforceability of the August 7 agreements. Under the principles set forth in *Schmidt* [v. *Mesmer* (1897) 116 Cal. 267] and *Bagdasarian* [v. *Gragnon* (1948) 31 Cal.2d 744], these facts establish an implied waiver of the Raiders’ claim for fraudulent inducement.” (*Oakland Raiders, supra*, at pp. 1190-1191, fns. omitted.)

Naghash argues that in this case, the Roys had knowledge of their malpractice claims against him at the time they entered the agreement to retain Naghash to represent them in the appeal of the homeowners association’s attorney fees award. The facts of this case are different from those of *Oakland Raiders* in at least two significant ways. First, the potential claims of the Roys against Naghash were for legal malpractice, not fraud in the inducement of an earlier contract. Second, the retainer agreement for the appeal was not a “new agreement concerning the same subject matter” (*Oakland Raiders, supra*, 144 Cal.App.4th at p. 1190) of an earlier contract; rather, the new retainer agreement was for a new subject matter—the appeal rather than the trial.

Thus, we conclude the trial court’s finding that the Roys and Naghash entered into an oral agreement during the September 24, 2007 telephone conversation to settle all disputes with each other is supported by substantial evidence.

## B.

*The oral agreement violates the State Bar Rules of Professional Conduct, but is nevertheless enforceable by the Roys.*

In response to this court’s invitation, the parties filed supplemental letter briefs addressing the following issues: (1) whether the oral agreement entered into during the September 24, 2007 telephone conversation violated rule 3-400(B),

(2) whether the oral agreement was an illegal contract, (3) whether the oral agreement could be enforced if it violated rule 3-400(B) or was an illegal contract, and (4) what the proper remedy would be on appeal if the oral agreement could not be enforced.

1. *Rule 3-400(B)*

Rule 3-400(B) provides: “A member shall not: [¶] . . . [¶] (B) Settle a claim or potential claim for the member’s liability to the client for the member’s professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client’s choice regarding the settlement and is given a reasonable opportunity to seek that advice.” The oral agreement reached by Naghash and Thomas Roy during their September 24 telephone conversation settled a claim or potential claim against Naghash for Naghash’s alleged malpractice, without the safeguards provided by rule 3-400(B). Therefore, the oral agreement violates rule 3-400(B); the parties concede this point.

“A violation of the Rules of Professional Conduct subjects an attorney to disciplinary proceedings, but does not in itself provide a basis for civil liability. [Citation.] But the rules, ‘together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which the attorney owes to his or her client.’ [Citation.]” (*BGJ Associates v. Wilson* (2003) 113 Cal.App.4th 1217, 1227.) Probate Code section 16004 has been held to be a “statutory complement” (*BGJ Associates v. Wilson, supra*, at p. 1227) to the State Bar Rules of Professional Conduct, rule 3-300 which, like rule 3-400(B), provides requirements for ensuring a client is fully informed and fairly represented before entering into a transaction with his or her attorney.<sup>1</sup> Probate Code section 16004, subdivision (c)

---

<sup>1</sup> “A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: [¶] (A) The

provides: “A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee’s influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee’s fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.”

If an agreement violates a trustee’s fiduciary duties under Probate Code section 16004, the agreement is voidable by the beneficiary. (*BGJ Associates v. Wilson, supra*, 113 Cal.App.4th at p. 1229; see also *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1154.) Rule 3-400(B) imposes duties on the attorney who is a “member” of the Bar, not on the client. That is, the agreement is voidable by the client, not void. The Roys’ use of the oral agreement as a defense to Naghash’s complaint shows their intent not to void the agreement. Therefore, the oral agreement may still be enforced by the Roys against Naghash despite his violation of rule 3-400(B).

## 2. *Illegality*

We also asked the parties to address whether the oral agreement was an illegal contract. “Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.” (Civ. Code, § 1598.) A contract is unlawful if it is: “1. Contrary to an express provision of law; [¶] 2. Contrary to the policy of express law, though not expressly prohibited; or,

---

transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client’s choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.” (Rules Prof. Conduct, rule 3-300.)

[¶] 3. Otherwise contrary to good morals.” (*Id.*, § 1667.) Additionally, where the consideration for a contract or a portion of a contract is unlawful, the entire contract is void. (*Id.*, § 1608.)

The oral agreement, as it was found to exist by the trial court, had a single object—the avoidance of further litigation between Naghash and the Roys through a walkaway, where the Roys would give up claims for legal malpractice against Naghash, and Naghash would forego recovery of outstanding attorney fees owed by the Roys. The object of the oral agreement is lawful. (Civ. Code, § 1550, subd. 3.) The parties’ intent was to resolve the differences between them regarding the provision of Naghash’s services, and the payment of attorney fees for those services. The oral agreement to mutually release claims does not violate a provision of law, is not contrary to the policy of law, and is not contrary to good morals.

Further, the consideration for the oral agreement—Naghash and the Roys’ mutual waivers of their claims for attorney fees and for legal malpractice, respectively—is not unlawful. (*Union Bank v. Ross* (1976) 54 Cal.App.3d 290, 298-299 [compromise of a claim constitutes valid consideration].) The trial court’s finding that there was consideration for the oral agreement is supported by substantial evidence.

*McIntosh v. Mills* (2004) 121 Cal.App.4th 333 does not compel a different result. In that case, the court concluded the agreement violating State Bar Rules of Professional Conduct, rule 1-320(A)—an agreement regarding fee sharing with a nonattorney—was unenforceable because the consideration for the contract was illegal. (*McIntosh v. Mills, supra*, at pp. 344-346.) Contrary to Naghash’s contention in his supplemental letter brief, not every contract in violation of the State Bar Rules of Professional Conduct is illegal and unenforceable.

Naghash’s failure to comply with the State Bar Rules of Professional Conduct in entering into the oral agreement with Thomas Roy does not make the otherwise lawful contract an unlawful contract.

## C.

*The Roys did not release their post-September 2007 claims against Naghash, but failed to offer evidence of damages at trial.*

The Roys argue that their claims against Naghash, for breach of the oral agreement and fraud in entering into the oral agreement, were not barred by the oral agreement, because those claims arose after September 24, 2007, and therefore could not have been released through the oral agreement. As damages, the Roys sought the attorney fees and costs incurred in pursuing their cross-complaint.

Naghash's argument on appeal is limited to the contention that the Roys would not be able to recover attorney fees, because neither the written retainer agreement nor the oral agreement entered into during the September 24, 2007 telephone conversation contained an attorney fees provision, citing 7 Witkin, California Procedure (5th ed. 2008) Judgment, section 149, and Code of Civil Procedure section 1021.

"It is 'the established rule that attorney fees incurred as a direct result of another's tort are recoverable damages.' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 826.) The Roys should have been able to claim attorney fees resulting from any misrepresentations by Naghash in the September 24, 2007 conversation. However, the Roys did not offer any evidence at trial of the attorney fees they incurred in defending against Naghash's collection claims, or in pursuing their cross-complaint against Naghash. In the absence of proof of damages, the Roys' fraud claim fails. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 219-220.)

## II.

*DID THE TRIAL COURT ERR BY DENYING NAGHASH'S MOTION FOR  
ISSUANCE OF A STATEMENT OF DECISION?*

A trial court is required, upon request, to issue a statement of decision "explaining the factual and legal basis for its decision as to each of the principal

controverted issues at trial.” (Code Civ. Proc., § 632.) The failure to do so is reversible error. (*In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010.)

Here, however, the trial court did issue a statement of decision which explained the factual and legal basis for its determination that the parties released all of their claims against each other in the September 24 conversation. The court’s refusal to address additional issues identified in Naghash’s request for a statement of decision or later motion for issuance of a statement of decision is not error. “The trial court is not required to make an express finding of fact on every factual matter controverted at trial, where the statement of decision sufficiently disposes of all the basic issues in the case.” (*Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118.)

### III.

#### *DID THE TRIAL COURT ERR BY GRANTING THE MOTION TO TAX AS COSTS THE ROYS’ EXPERT WITNESS FEES?*

Before trial, the Roys made an offer to settle the case, pursuant to section 998. Naghash did not accept the offer. After trial, the Roys filed a memorandum of costs, asking, in part, for their expert witness fees. The trial court granted Naghash’s motion to tax the expert witness fees.

Section 998, subdivision (b) provides, in relevant part: “Not less than 10 days prior to commencement of trial or arbitration . . . of a dispute to be resolved by arbitration, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, *and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.* Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall

be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party.” (Italics added.)

If a party makes an offer to settle a case pursuant to section 998 which the other party does not accept, and the nonaccepting party does not do better at trial than the offer, section 998 shifts the responsibility for paying postoffer costs to the nonaccepting party. (§ 998, subds. (c), (d) & (e).) In those circumstances, the trial court has the discretion to order the nonaccepting party to pay the offering party’s expert witness fees. (§ 998, subds. (c), (d).)

In *Puerta v. Torres* (2011) 195 Cal.App.4th 1267, 1273, a panel of this court held that the italicized language of section 998, subdivision (b), *ante*, means what it says—an offer that does not include a provision addressing the manner of acceptance of the offer is invalid for purposes of shifting postoffer costs. (See *Perez v. Torres* (2012) 206 Cal.App.4th 418, 425-426.)

The Roys’ section 998 offer reads, in full, as follows: “To all parties herein and to their attorneys of record: [¶] Pursuant to the applicable provisions of California Code of Civil Procedure Section 998, Defendants/Cross-Complainants Thomas Roy and Wendy Roy hereby offer to have judgment entered against them, jointly and severally, in the total amount of Three Thousand, Five Hundred Dollars (\$3,500.00) in full settlement of this matter, both Complaint and Cross-Complaint, inclusive of principal, interest, attorney’s fees and costs of suit.” (Some capitalization omitted.) The Roys’ section 998 offer does not contain a provision that Naghash could indicate acceptance of the offer by signing a statement that the offer was accepted. Indeed, the section 998 offer does not make any reference to acceptance. We conclude the section 998 offer was invalid for purposes of shifting costs, including, but not limited to, expert witness fees.

The Roys argue that the reference to section 998 in the offer “in effect informed the recipient to follow the language in the statute concerning acceptance.” Therefore, the Roys argue, Naghash had “at least *some* indication of how to accept” the

offer. (*Puerta v. Torres, supra*, 195 Cal.App.4th at p. 1273.) However, “the legislative purpose of section 998 is generally better served by a bright line rule in which the parties know that any judgment will be measured against a single, valid statutory offer . . . .” (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 728.) The section 998 offer by the Roys does not comply with the bright-line rule set forth in *Perez v. Torres* and *Puerta v. Torres*. Therefore, we find no error in the trial court’s order.

The Roys also argue the trial court abused its discretion by determining the section 998 offer was a token offer. A token or nominal offer which is not made in good faith does not effectuate section 998’s purpose of encouraging settlement, and will not support an award of postoffer costs and expert witness fees. (*Arno v. Helinet Corp.* (2005) 130 Cal.App.4th 1019, 1024-1025.) The reasonableness of the offer depends on the information that was available to the parties at the time it was made. (*Id.* at p. 1025.)

“Whether the settlement offer was reasonable and made in good faith is left to the sound discretion of the trial court. [Citation.] However, when a party obtains a judgment more favorable than its pretrial offer, it is presumed to have been reasonable and the opposing party bears the burden of showing otherwise. [Citation.] ‘Even a modest or “token” offer may be reasonable if an action is completely lacking in merit.’ [Citation.] On appeal, the losing party has the burden of establishing the trial court abused its discretion. [Citation.] We will not substitute our opinion for that of the trial court unless the trial court clearly abused its discretion, resulting in a miscarriage of justice. [Citation.]” (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 338-339.)

Here, the trial court found the Roys’ section 998 offer “was not within the realm of an offer reasonably likely to be accepted at a time when there was a real doubt about the timeliness of the cross-complaint and no doubt about the timeliness of the complaint.” We conclude the trial court did not abuse its discretion, and we therefore affirm the order taxing costs.

DISPOSITION

The judgment is affirmed. The postjudgment order denying the request for a statement of decision is affirmed. The postjudgment order taxing expert witness fees is affirmed. Because both parties prevailed in part, no party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.