

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

In re the Marriage of CARRIE DYER and  
WAYNE DYER.

H038921  
(Santa Clara County  
Super. Ct. No. 1-07-FL138136)

CARRIE DYER,

Respondent,

v.

WAYNE DYER,

Appellant.

Appellant Wayne Dyer challenges the trial court's order awarding respondent Carrie Dyer \$60,000 in attorney's fees under Family Code sections 2030 and 271.<sup>1</sup> He claims that an attorney's fees clause in the parties' marital settlement agreement (MSA) precluded an attorney's fees award to Carrie under section 2030 because she was not the prevailing party in her action. He also asserts that the court's attorney's fees award to Carrie under section 271 is not supported by substantial evidence.

We conclude that Carrie's voluntary dismissal of her action precluded Wayne from being declared the prevailing party in the portion of Carrie's action that she

---

<sup>1</sup> Subsequent statutory references are to the Family Code unless otherwise specified.

dismissed. Since Carrie had prevailed in the only portion of her action that had been adjudicated prior to her voluntary dismissal, the trial court erred in finding Wayne to be the prevailing party. The MSA's attorney's fees clause did not preclude the trial court from awarding Carrie attorney's fees under section 2030 or section 271, and the court's award of section 271 attorney's fees to Carrie is supported by substantial evidence. We therefore affirm the court's order.

### **I. Background**

Wayne and Carrie were married for over 30 years. Their marriage was dissolved in 2007. A May 2007 mediation with mediator Charles E. Webb resulted in the MSA, and the MSA was incorporated into an October 2007 judgment of dissolution. The MSA was intended to be "a final and complete settlement, except as specifically set forth herein, of any and all property and support rights and obligations, and any and all claims either may have against the other arising out of their marital relationship prior to and/or during their marriage and after separation." The MSA provided that Wayne would pay spousal support to Carrie of \$4,200 per month from May 1, 2007 through April 30, 2010. "Effective May 1, 2010, spousal support shall be reduced to \$3,500 per month unless either party provides written notice to the other party of his or her request to review spousal support thirty (30) days prior to May 1, 2010. If either party makes such a written request, spousal support shall continue at \$4,200 per month until the review of spousal support is resolved, either through an agreement reached by the parties and their attorneys, in mediation, or via court order."

The MSA required the parties to pursue mediation before initiating a court action. "Except as set forth herein, in the event that any disputes arise between the Parties regarding the interpretation, implementation, and/or modification of this Agreement, the Parties agree to handle the matter as follows: [¶] a. They will first meet and confer with one another, either directly or through counsel, in an attempt to resolve the dispute. [¶]

b. If no resolution has been reached, they will then meet and confer with a mediator acceptable to both Parties. [¶] c. If there is no mediated resolution, they will submit the matter to a court of competent jurisdiction.” The MSA also contained an attorney’s fees clause. “In the event court action is undertaken to enforce any provision of this Agreement, or any judgment or decree based thereon, the party prevailing in such proceeding shall be entitled to recover from the other reasonable attorney fees and costs necessarily expended in such undertaking, as determined by the court.”

In June 2010, the parties stipulated that spousal support would increase to \$4,800 per month effective June 1, 2010 and continuing until the death of one of them, Carrie’s remarriage, or a court order terminating her spousal support. They agreed that “neither Party shall be required to show a material change of circumstances in any future proceeding to modify spousal support.”

In August 2011, Carrie filed an order to show cause (OSC) seeking a modification of spousal support. She asked the court to either set aside the October 2007 judgment and the June 2010 modification stipulation or require Wayne to participate in mediation as mandated by the MSA on the issue of modification of spousal support. Carrie also requested attorney’s fees and costs. Her motion was accompanied by both an income and expense declaration and a separate factual declaration in support of her requests. Her factual declaration alleged that the MSA had been procured by fraud, mistake, or Wayne’s breach of his disclosure obligations. Carrie asserted that Wayne had failed to disclose material information at the time that the MSA was negotiated in that he had not told her that he had received a lucrative employment offer from Apple Computer.

Wayne responded by asking the court to bifurcate the issues raised in Carrie’s motion and try the “set aside” issue first. Wayne asserted that trying the “set aside” issue first would narrow the amount of discovery required. Wayne said that he was willing to engage in mediation only if Webb was the mediator. He claimed that “[t]he parties have

already agreed to use Mr. Webb.”<sup>2</sup> Wayne asked the court to deny the request to set aside the judgment and then proceed to consider the request for modification of support. Wayne also brought a motion to compel production of documents and sought to recover his own attorney’s fees under section 271.

Carrie made a motion to disqualify Wayne’s attorney. She also opposed Wayne’s request for bifurcation on the ground that bifurcation would be more costly and time consuming. She objected to using Webb as a mediator on the grounds that he was neither neutral nor effective. Moreover, her attorney had contacted Webb, and Webb was not willing to serve as a mediator for the parties.

At an October 2011 hearing, the court first denied Carrie’s disqualification motion. The court then found that the MSA required the parties to mediate their dispute and “order[ed] both parties to go to mediation.” It told the parties to “select a mutually agreed upon mediator.” Wayne’s attorney expressly insisted on “Santa Clara County mediators.” It was agreed that Carrie’s attorney would provide Wayne’s attorney with a list of three mediators within seven days, and Wayne’s attorney would select one of these three within seven days. The court reserved all of the remaining issues and set a hearing for January 2012, with the idea that mediation would be undertaken before that hearing.

At the January 2012 hearing, Carrie’s attorney reported that he had submitted six names of “Santa Clara” mediators to Wayne’s attorney, but Wayne’s attorney “failed to choose any of them.” Wayne’s attorney insisted that the mediators had to be “in San Jose.” At least two of the mediators submitted by Carrie’s attorney were in San Jose. The court confirmed that it had ordered that the mediator be “a Santa Clara county mediator,” and it directed Wayne’s attorney to select one of those submitted by Carrie’s

---

<sup>2</sup> The MSA provided: “The Parties agree that communications with Charles E. Webb [the mediator] have been confidential and neither Party may call Charles E. Webb to testify or request that he provided any of the materials from the mediation process to either of the Parties’ attorneys or to the court in any litigation that may arise.”

attorney “by this Friday.” The court noted that Wayne’s attorney “was supposed to respond within seven days, so he’s way past that date.” A February 2012 hearing was set to consider attorney’s fees.

The delay in going to mediation caused Carrie to incur a substantial amount of attorney’s fees. At the February 2012 hearing, Carrie’s attorney explained that the pending issues included attorney’s fees, mediation, and discovery. Wayne had still failed to participate in mediation, although the parties had finally agreed on a mediator. Wayne’s attorney asserted the pending issues were bifurcation of the “set aside” issue, discovery, and attorney’s fees. The court set a hearing for March 2012 with the understanding that mediation would occur before then.

In March 2012, the parties participated in an unsuccessful mediation. Two days before the scheduled March 2012 hearing, Carrie submitted to the court and served on Wayne a request to dismiss her action without prejudice. Her request for dismissal was not heard until after the commencement of the March hearing. Carrie’s attorney explained that “we finally had our mediation, and it was unsuccessful.” Carrie had decided to dismiss her motion due to her medical condition and lack of financial resources. The court granted Carrie’s motion to dismiss without prejudice with the condition that it did not prevent the attorney’s fees issues from proceeding.<sup>3</sup> It set a May 2012 hearing on the attorney’s fees issues.

The parties disputed who was entitled to attorney’s fees, for what, and on what basis. Carrie claimed that she was entitled to prevailing party attorney’s fees because Wayne had refused to participate in mediation and the court had ordered mediation. She also claimed a right to attorney’s fees under sections 271 and 2030. Her attorney

---

<sup>3</sup> Carrie was willing to stipulate that Wayne could still seek his attorney’s fees despite the dismissal. Wayne was willing to agree to that only if the dismissal was with prejudice.

declared that most of her fees were “a direct result of [Wayne’s] refusal to participate in mediation.” She sought over \$80,000 in attorney’s fees. Carrie claimed that Wayne could not recover prevailing party attorney’s fees because she had voluntarily dismissed the remainder of her action after obtaining mediation. Wayne sought over \$36,000 in attorney’s fees, claiming that he was the prevailing party and also that he was entitled to fees under section 271.

At the May 2012 hearing, the only issues addressed by the court were the parties’ entitlement to attorney’s fees and costs. The court found that Carrie’s voluntary dismissal did not preclude it from finding Wayne to be the prevailing party because her voluntary dismissal was “untimely.” The court concluded that Carrie was not the prevailing party because she had succeeded only on mediation and had not succeeded in obtaining more spousal support, which the court deemed her “paramount litigation objective.” It found that Wayne was the prevailing party because he had avoided paying more spousal support and was therefore entitled to attorney’s fees under the MSA’s attorney’s fees clause. On the other hand, the court decided that the bulk of Wayne’s fees had been incurred opposing mediation and that those fees had not been reasonably incurred. The only fees that Wayne was entitled to recover were those he “incurred in filing an opposition” to Carrie’s OSC, which the court deemed “minimal.” The court rejected Wayne’s requests for fees under section 271 and other statutes. The court ruled that Carrie was entitled to “need-based attorney fees for the reasonable costs of bringing the portion of the OSC that requested mediation and discovery” and to fees under section 271 as sanctions due to Wayne’s unreasonable opposition to mediation. The court found that Wayne “forced [Carrie] to file a court proceeding to compel mediation that should have occurred without court intervention.” The court continued the matter to July 2012 for a determination of the amounts of fees.

At the July 2012 hearing, the court determined that the amount of prevailing party attorney’s fees to which Wayne was entitled was \$6,000. Carrie was entitled to section

2030 fees of \$50,000 and section 271 fees of \$10,000. Wayne timely filed a notice of appeal.

## **II. Discussion**

Wayne contends that because the trial court found that he was the prevailing party, he was the only party who could be awarded attorney's fees, and the court erred in awarding Carrie attorney's fees under section 2030. He also claims that the court's award of attorney's fees to Carrie under section 271 is not supported by the record.

### **A. Civil Code Section 1717, Subdivision (b)(2)**

Since Wayne's challenge to the court's award of section 2030 attorney's fees is premised on the court's determination that Wayne was the prevailing party, we must begin by considering whether that determination was valid. Carrie contends that her dismissal request was indisputably objectively timely so the trial court erred in finding it untimely. Wayne argues that the trial court's finding that Carrie's request was untimely was accurate and, in any case, that Civil Code section 1717, subdivision (b)(2) did not apply because his responsive declaration seeking fees was a request for affirmative relief that precluded a voluntary dismissal, a position that the trial court explicitly rejected.<sup>4</sup>

#### **1. Background**

After Carrie submitted her request for dismissal without prejudice on March 26, 2012, Wayne claimed that she was prohibited from dismissing without

---

<sup>4</sup> Wayne also claims that Civil Code section 1717, subdivision (b)(2) cannot apply because the court and the parties agreed that the dismissal would be without prejudice to subsequent consideration of their fee motions. This claim has no validity. At the time of the dismissal, both parties had requested fees under provisions independent of Civil Code section 1717, so permitting consideration of their fee motions did not necessarily entail the applicability of Civil Code section 1717.

prejudice because he had filed a responsive pleading seeking attorney's fees, which he characterized as "affirmative relief." The trial court permitted Carrie to dismiss without prejudice on the condition that the attorney's fees issue would be determined after dismissal.

Carrie subsequently contended that Civil Code section 1717, subdivision (b)(2) precluded Wayne from obtaining prevailing party attorney's fees. She claimed that she was entitled to prevailing party attorney's fees because she had prevailed on her request for mediation, which had already been adjudicated prior to her dismissal.<sup>5</sup>

Wayne responded that Carrie's dismissal of her action without prejudice was ineffective for purposes of Civil Code section 1717, subdivision (b)(2) because he had sought affirmative relief in his responsive pleading. He claimed that he and only he was entitled to attorney's fees because he had prevailed when Carrie dismissed her action.

The trial court rejected Wayne's argument that his claim for attorney's fees qualified as "affirmative relief" that precluded Carrie from dismissing her action without prejudice. It reasoned: "If this was a rule, then no party would ever be able to voluntarily dismiss before trial because the other side would always be able to have an affirmative claim for attorney fees." However, the court concluded that Carrie's dismissal did not invoke the provisions of Civil Code section 1717, subdivision (b)(2) because her dismissal was "untimely." The court stated: "In this case the minutes, the court minutes of the March 28, 2012 hearing indicate and show that the parties were sworn in before the Court granted Wife's request to dismiss her motion. This means that the trial had already commenced. As a result Wife's request to dismiss was untimely." Because the court found that Civil Code section 1717, subdivision (b)(2) was

---

<sup>5</sup> The court agreed with Carrie that Wayne was not entitled to prevailing party attorney's fees based solely on his opposition to her disqualification motion because that was not an action to enforce the MSA.

inapplicable due to the alleged “untimel[iness]” of Carrie’s dismissal, it found that Wayne was the prevailing party.

## 2. Analysis

We must consider whether the trial court correctly concluded that Carrie’s dismissal was untimely. Civil Code section 1717 provides: “(a) 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, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs. [¶] . . . [¶] (b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section. [¶] (2) *Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.*” (Civ. Code, § 1717, italics added.)

“An action may be dismissed in any of the following instances: [¶] (1) With or without prejudice, upon written request of the plaintiff to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if any.” (Code Civ. Proc., § 581, subd. (b)(1).) “A plaintiff may dismiss his or her complaint, or any cause of action asserted in it, in its entirety, or as to any defendant or defendants, with or without prejudice *prior to the actual commencement of trial.*” (Code Civ. Proc., § 581, subd. (c), italics added.)

The trial court concluded that Civil Code section 1717's voluntary dismissal provision did not apply here because Carrie's request for dismissal was not "granted" until after the commencement of "trial." "[T]he timeliness of a voluntary dismissal under section 581 is measured by an *objective* standard of whether a commencement of trial has occurred under section 581." (*Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp.* (2009) 174 Cal.App.4th 67, 80.) Because the relevant facts are undisputed, we apply a de novo standard of review to the trial court's finding that the voluntary dismissal was untimely. (*Estate of Wilson* (2012) 211 Cal.App.4th 1284, 1290.) Nowhere in Code of Civil Procedure section 581 is there any requirement that a plaintiff's timely submitted and served *request* for dismissal be *granted* before the commencement of trial. The statutory language requires only that the request be submitted to the court before the commencement of trial. Here, it was undisputed that Carrie's written request for dismissal without prejudice was "submitted to the Court" and served on Wayne two days *prior to* the March 2012 hearing that the court found was the commencement of trial. The fact that the court did not *act* on that request until after commencement of the hearing did not render the *request* untimely for purposes of Civil Code section 1717, subdivision (b)(2). "[Civil Code section 1717, s]ubdivision (b)(2) contains no temporal limitation; it 'bars recovery of section 1717 attorney fees regardless of when the dismissal is filed.' [Citation.]" (*Marina Glencoe, L.P. v. Neue Sentimental Film AG* (2008) 168 Cal.App.4th 874, 877.) We conclude that the trial court erred in finding that Carrie's voluntary dismissal was untimely.

Wayne did not contend below that Carrie's request for dismissal was untimely. His contention was that Carrie was not permitted to voluntarily dismiss her action at all because he had sought "affirmative relief" in his response to her motion. "No dismissal of an action may be made or entered, or both, under paragraph (1) of subdivision (b) *where affirmative relief has been sought* by the cross-complaint of a defendant . . . ." (Code Civ. Proc., § 581, subd. (i), italics added.) A response in a family law action is

treated as a cross-complaint for purposes of Code of Civil Procedure section 581, subdivision (i). (*In re Marriage of Tamraz* (1994) 24 Cal.App.4th 1740, 1747.) Wayne's initial response to Carrie's motion sought bifurcation of Carrie's request for the MSA to be set aside, and he also claimed a right to attorney's fees under section 271. Wayne later sought to compel production of documents related to Carrie's motion and added to his request for statutory attorney's fees, this time citing several different code sections under which he claimed an entitlement to fees. Shortly before Carrie submitted her request for dismissal, Wayne added a request for attorney's fees as the prevailing party. Thus, at the time of Carrie's request for dismissal, Wayne's responses had sought bifurcation and attorney's fees and to compel production of documents relevant to the litigation of Carrie's motion.

Nothing in Wayne's responses to Carrie's OSC sought "affirmative relief" within the meaning of Code of Civil Procedure section 581, subdivision (i). "By affirmative relief as used in section 581 of the Code of Civil Procedure is meant the allegation of new matter which in effect amounts to a counterattack. In other words, the relief sought, if granted, operates not as a defense but, affirmatively and positively to defeat plaintiff's cause of action." (*Simpson v. Superior Court of Los Angeles County* (1945) 68 Cal.App.2d 821, 825.) Wayne's requests for bifurcation, discovery, and attorney's fees were not a "counterattack" that, if successful, would have "defeat[ed]" Carrie's action. His responses to her action were limited to ancillary requests, none of which would have defeated her action. Hence, Wayne's responses did not seek "affirmative relief" and did not preclude Carrie from voluntarily dismissing her motion.

Since Carrie's voluntary dismissal of her action was timely and procedurally proper, Civil Code section 1717, subdivision (b)(2) precluded the court from finding that there was a prevailing party on the portions of Carrie's action that she voluntarily dismissed. It follows that Wayne cannot rely on the court's finding that he was the prevailing party as that finding was legally incorrect.

## B. Section 2030 Attorney's Fees

Wayne claims that the trial court was precluded from awarding Carrie attorney's fees under section 2030 because the MSA's attorney's fees clause was the exclusive source of entitlement to attorney's fees.

The trial court in a dissolution action "shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." (§ 2030, subd. (a)(1).)

"The purpose of such an award is to provide one of the parties, if necessary, with an amount adequate to properly litigate the controversy. [Citations.] [¶] The court may award attorney fees under section 2030 'where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.'" (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 629.) We ordinarily review a trial court's award under section 2030 for abuse of discretion. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768.) Nevertheless, because Wayne raises a purely legal issue based on undisputed facts, we will apply de novo review. (*Estate of Wilson, supra*, 211 Cal.App.4th at p. 1290.)

Wayne relies heavily on this court's decision in *In re Marriage of Guilardi* (2011) 200 Cal.App.4th 770 (*Guilardi*). In *Guilardi*, the parties had entered into an MSA containing a broad attorney's fees clause. This clause read: "If either party brings an action or other proceeding to enforce this Agreement, or to enforce or modify any judgment or order made by a court in connection with this Agreement or to obtain any judgment or order relating to or arising from the subject matter of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and other costs from the other party as established by the court of competent jurisdiction.'" (*Guilardi*, at p. 775,

italics added.) This court held that the wife, who had not prevailed in her action, was barred by this clause from asserting a right to statutory attorney's fees under section 2030. (*Guilardi*, at pp. 775-776.)

Wayne insists that, under *Guilardi*, the MSA's attorney's fees clause "waived" any statutory entitlement to attorney's fees. We disagree. The attorney's fees clause in *Guilardi*, unlike the one here, applied not just to actions to enforce the MSA but to *any action* "relating to or arising from the subject matter" of the MSA. Since the attorney's fees clause in *Guilardi* covered *all possible actions* that the wife might bring related to the dissolution, it necessarily preempted any right to recover section 2030 attorney's fees. The same is not true here. The MSA before us is limited to actions "undertaken to enforce any provision of this Agreement." It does not apply to *all possible actions* by a party related to the dissolution. Consequently, the MSA's attorney's fees clause did not impliedly waive any statutory entitlement to attorney's fees and therefore did not preclude an award of attorney's fees under section 2030. Since there was no waiver, the general rule applies. "[T]here is no requirement that attorney fees be awarded only to prevailing parties, as they may be awarded *against* a prevailing party in family law proceedings." (*In re Marriage of Hublou* (1991) 231 Cal.App.3d 956, 966.)

Furthermore, unlike the wife in *Guilardi* who had not prevailed on anything, the trial court explicitly found that Carrie had prevailed on her request for mediation, which was the only part of her action that she did not voluntarily dismiss. Since Carrie actually *was* the prevailing party under the MSA, the MSA's attorney's fees clause did not *preclude* her from recovering her fees incurred in enforcing the MSA.

The trial court did not err in awarding section 2030 fees to Carrie because, unlike in *Guilardi*, Wayne was *not* the prevailing party under the MSA's attorney's fees clause

and the MSA's attorney's fees clause did not impliedly waive Carrie's right to seek fees under section 2030.<sup>6</sup>

### C. Section 271 Attorney's Fees

Wayne also challenges the trial court's award of section 271 attorney's fees to Carrie.

“Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys.” (§ 271, subd. (a).) “A sanction order under Family Code section 271 is reviewed under the abuse of discretion standard. “The trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order . . . .” [Citation.]’ [Citation.]” (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82.)

Wayne claims that the trial court erroneously awarded these fees based on his request for bifurcation. Not so. The trial court awarded section 271 fees to Carrie because it found that Wayne had *unreasonably opposed* Carrie's “effort to mediate spousal support based upon full discovery” as the MSA permitted her to do. Wayne's citation to the record in support of his claim is to part of the court's explanation for the amount of attorney's fees it was awarding *to Wayne*. That part of the court's reasoning was not part of its rationale for its award of attorney's fees *to Carrie* under section 271.

Wayne also claims that there is no evidence in the record to support the court's rationale that Wayne's opposition to mediation was unreasonable. The record is replete

---

<sup>6</sup> Carrie did not appeal from the court's order awarding Wayne \$6,000 in attorney's fees as the prevailing party.

with evidence that Wayne repeatedly attempted to avoid mediation even after the court had ordered that it occur. His insistence on a “San Jose” mediator rather than a “Santa Clara County” mediator is an example of his attempts to frustrate Carrie’s efforts to obtain mediation in a timely fashion. As the trial court found, Wayne “forced [Carrie] to file a court proceeding to compel mediation that should have occurred without court intervention.” As the MSA required Wayne to engage in mediation, his opposition was unreasonable.

The trial court did not err in awarding Carrie attorney’s fees under section 271.

### **III. Disposition**

The order is affirmed.

---

Mihara, J.

WE CONCUR:

---

Bamattre-Manoukian, Acting P. J.

---

Grover, J.