

NICK VOYVODICH et al., Plaintiffs and Respondents,
v.
CHARLES T. MARSHALL, Defendant and Appellant.

[No. D072195.](#)

Court of Appeals of California, Fourth District, Division One.

Filed April 20, 2018.

APPEAL from a judgment of the Superior Court of San Diego County, Super. Ct. No. 37-2015-00033371-CU-PN-CTL, Kenneth J. Medel, Judge. Affirmed.

Charles T. Marshall, in pro. per.; and Ronald H. Freshman for Defendant and Appellant.

Albert L. Boasberg, Attorney at Law, for Plaintiffs and Respondents.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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GUERRERO, J.

Defendant Charles Marshall appeals from a judgment following a bench trial in favor of plaintiffs Nick and Melissa Voyvodich^[1] on their complaint for legal malpractice. Marshall contends the trial court erred by not requiring expert testimony on negligence and causation; applying the wrong causation standards; determining damages incorrectly; and failing to exclude evidence of his suspension from the California State Bar. Marshall did not provide a reporter's transcript or adequate substitute, so our review is limited accordingly. We find no merit in his contentions, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Voyvodiches sued Marshall for professional negligence. They alleged they consulted him in 2013 for advice regarding a mortgage loan

modification, retained him for the purpose of suing the lender, and followed his advice to not pay the loan pending the lawsuit, resulting in increased loan payments.

The matter proceeded to a bench trial, and Marshall represented himself. No court reporter was present. Melissa testified on behalf of the Voyvodiches. Marshall called his legal assistant Gaby Hernandez as a witness, but did not testify himself.

Marshall moved in limine to exclude evidence of his suspension from the State Bar and the Voyvodiches' damages summary. The State Bar evidence was a stipulation from a proceeding brought by the Voyvodiches. It indicated that Marshall admitted to certain facts, including pursuing a modification instead of litigation, and to culpability for "intentionally fail[ing] to perform legal services with competence" based on that conduct (as well as for a fee issue not pertinent to this appeal). The stipulation also reflected he had been suspended in a similar matter, unrelated to the Voyvodiches. The damages summary set forth the increased loan balance, new balloon payment, and higher monthly payments commencing in March 2015 and lasting the remaining life of the loan.^[2] The trial court admitted the evidence, and also took judicial notice of the stipulation. Because it is part of the record, the Voyvodiches' request for judicial notice of the document here is unnecessary.

Other evidence at trial included the parties' Agreement for Legal Services, which provided, in part: "The legal services covered by this Agreement cover litigation (lawsuit) services and associated negotiations. All legal services subject to this Agreement relate to civil litigation. . . ." The court also admitted e-mails to and from Melissa, reflecting the initial efforts to pursue modification with the lender and communications with Marshall and Hernandez.

The trial court provided its statement of decision, and Marshall objected. The court overruled his objections and adopted the statement of decision as final.

First, the court addressed Marshall's motions in limine, explaining it found the State Bar evidence relevant to corroborate Melissa's testimony and, since it was a court trial, it was confident it could avoid undue prejudice under

Evidence Code section 352. The court also indicated the Voyvodiches laid an appropriate foundation for their damages statement.

Next, the trial court provided its factual findings. The Voyvodiches lost income, became concerned about their mortgage, and sought to take protective action. After their lender said they might qualify for a modification if they missed three payments, they did not pay the mortgage for March, April, and May 2013, but the lender denied their modification. Melissa contacted Marshall, and he advised that litigation was the best way to achieve their goals, and, if retained, he would file a lawsuit. They retained him. Melissa asked Marshall if they should resume making payments and he told her they should not make payments pending the lawsuit. They continued to miss payments, and in January 2014, they learned their home was in preforeclosure. In July 2014, Melissa became aware that Marshall was suspended from the State Bar. After terminating the relationship with him, they were able to avoid foreclosure by agreeing to new terms in March 2015. The court summarized these terms, noting the increased amounts they already paid.

The court found Melissa testified "credibly that . . . [they] were ready, willing and able to make their original mortgage loan payment. . . ." The court also found she "testified with great confidence" that if she could not lower the payment through a modification or litigation, they would see to it the mortgage was satisfied, and "[i]t was only on the suggestion of [the lender] that she failed to pay the mortgage for three months . . . , and only on the affirmative advice of Mr. Marshall that [they] failed to pay thereafter until the promised anticipated litigation concluded."

Hernandez testified that Marshall had filed lawsuits pertaining to foreclosure issues, some settling favorably, and that in other cases they did not advise clients to miss payments. She also stated there were a wide variety of outcomes to the cases, with some resulting in higher payments. The trial court "had substantial difficulty with [her] testimony," explaining she "appeared to be under duress" and her "demeanor and the style of questioning completely undermined her credibility."

The trial court then provided its analysis, beginning with negligence. First, the court found Marshall was negligent in failing to pursue litigation, noting he "admitted this was substandard before the State Bar. . . ." The court acknowledged the Voyvodiches did not have an expert, but explained that

"where the attorney's performance is so clearly contrary to established standards that a trier of fact may find professional negligence without expert testimony, it is not required." The court found Marshall's negligence was "overwhelmingly established" and "readily apparent from the facts of the case." Second, the court addressed the advice to miss payments, noting that "[i]n isolation and out of context, expert testimony would probably be necessary. . . ." But it found the advice "truly aggravates" the failure to pursue litigation, explaining Marshall should have known this failure "put Plaintiffs in great danger given his advice to not make . . . payments." The court concluded that "[t]he synergy of these elements may be construed as a second ground of negligence. . . ."

On causation, the trial court set forth the text of CACI jury instruction No. 430 (Causation: Substantial Factor): "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." The court explained "the crucial causation inquiry is *what would have happened if the defendant attorney had not been negligent*," quoting [*Viner v. Sweet* \(2003\) 30 Cal.4th 1232, 1242 \(*Viner*\)](#), italics modified by trial court.

The trial court acknowledged it could consider what the result would be if Marshall followed through on litigation, how that compared to what happened, and whether an expert was necessary, but stated these questions were "misdirected here. . . ." The court began by stating the Voyvodiches' theory of causation relied on "no facts peculiarly within an expert's knowledge." It explained the determinative facts on causation included their confidence they could pay and that they only stopped paying due to advice from the lender and then Marshall, while he pursued litigation. It also found there was no evidence they were unable to pay, and inferred they could have paid if litigation failed. The court stated the harm was "the difference between the terms of the original loan . . ., and the onerous loan imposed. . . ." It explained that Marshall's "negligent failure to pursue litigation for an extended period of time in the face of his advice to not pay the monthly mortgage, caused . . . the imminent threat of foreclosure on their home," and this threat "necessitated a re-negotiation of the loan in a manner that was economically damaging to Plaintiffs." The court concluded that Marshall's negligence was a substantial factor in causing harm to the Voyvodiches.

Finally, the court determined that the "measure of damages broadly is the difference between the original loan terms and the new loan imposed on Plaintiffs on threat of foreclosure in March 2015" (with adjustments for overlaps and reduction of future payments to present value). The court found the Voyvodiches proved \$6,694.79 for increases in past payments; \$65,590.04 for future payments; and \$25,849.63 for the future balloon payment, for a total award of \$98,134.46.^[3]

The trial court entered judgment for the Voyvodiches, and Marshall timely appealed.

DISCUSSION

A. Applicable Law and Standard of Review

"The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." ([Budd v. Nixen](#) (1971) 6 Cal.3d 195, 200 ([Budd](#)), superseded by statute on other grounds.)

When we review a statement of decision by a trial court, "findings on questions of fact are reviewed under the substantial evidence standard." ([Brewer v. Murphy](#) (2008) 161 Cal.App.4th 928, 935.) We infer "factual findings necessary to support the judgment. . . ." ([Ermoian v. Desert Hospital](#) (2007) 152 Cal.App.4th 475, 494.)^[4] The trial court's "conclusions of law are subject to independent review by an appellate court." ([Brewer](#), at p. 936.) We review evidentiary rulings for abuse of discretion. ([Employers Reinsurance Co. v. Superior Court](#) (2008) 161 Cal.App.4th 906, 919.)

B. Impact of No Reporter's Transcript and Noncompliant Opening Brief

There are two preliminary issues that impact our analysis. First, there is no reporter's transcript of the trial, nor is there an adequate substitute such as a settled statement under California Rules of Court, rule 8.137. (See Cal. Rules of Court, rule 8.120(b) [record of the oral proceedings].) "[A] party challenging a judgment has the burden of showing reversible error by an adequate record." ([Ballard v. Uribe](#) (1986) 41 Cal.3d 564, 574 ([Ballard](#)).

"Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be conclusively presumed correct as to all evidentiary matters. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." ([Estate of Fain \(1999\) 75 Cal.App.4th 973, 992](#), italics omitted; see [Nielsen v. Gibson \(2009\) 178 Cal.App.4th 318, 324-325](#) ["`Our review is limited to determining whether any error `appears on the face of the record.'"]).)

Second, Marshall's opening brief does not comply with the court rules and appellate practice. He was required to "[p]rovide a summary of the significant facts limited to matters in the record." (Cal. Rules of Court, rule 8.204(a)(2)(C).) He not only failed to obtain a trial transcript (or appropriate substitute), impairing his ability to summarize the significant facts, but he also discusses purported testimony from the trial and other issues outside the record. We will not consider these matters. Marshall also improperly provided a fact summary that is substantially one-sided. ([In re S.C. \(2006\) 138 Cal.App.4th 396, 402](#).) Among other things, he identified purported factual and legal errors in the statement of decision, rather than describing it neutrally. We are unable to address the factual arguments, but note they largely contest the strength of the Voyvodiches' evidence—which we would not reweigh, regardless. ([R.M. v. T.A. \(2015\) 233 Cal.App.4th 760, 780](#).)^[51] We address the alleged legal errors in our analysis, *post*.

C. Analysis

1. Negligence

Marshall argues the court erred by not requiring expert testimony on negligence, contending that whether a lawsuit should have been filed is disputed and noting modification results vary.

The trial court correctly observed that expert testimony is not required when the attorney's performance is clearly deficient. "Where the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required." ([Wilkinson v. Rives \(1981\) 116 Cal.App.3d 641, 647-648](#); accord, [Day v. Rosenthal \(1985\) 170 Cal.App.3d 1125, 1146](#).) "An attorney's duty, the

breach of which amounts to negligence, is not limited to his failure to use the skill required of lawyers. Rather, it is a wider obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances." (*Day*, at p. 1147, italics omitted.) The court concluded Marshall was negligent in failing to file the promised lawsuit and, coupled with that failure, his advice not to pay. Given the absence of a trial transcript, we assume the court found sufficient evidence of clear negligence to obviate the need for an expert.

Marshall's arguments are unpersuasive. The negligence at issue was not his failure to obtain a modification through litigation, so no expert on such lawsuits or their outcomes was necessary.^[6]

2. Causation

Marshall argues the court erred by failing to apply "but for" causation, by not requiring the Voyvodiches to establish they would have achieved a better outcome had he not been negligent (which he maintains required a "trial within a trial"), and by not requiring expert testimony.

First, the trial court did not apply the wrong causation standards. In *Viner*, a legal malpractice case, the California Supreme Court confirmed the substantial factor standard applies to cause-in-fact determinations, and "subsumes the traditional 'but for' test of causation. . . ." (*Viner, supra*, 30 Cal.4th at p. 1239 & fn. 4.) The court stated that **"the crucial causation inquiry is what would have happened if the defendant attorney had not been negligent."** (*Id.* at p. 1242, italics omitted.) Here, the trial court set forth the substantial factor standard, quoted the causation inquiry language from *Viner*, and reasoned that, given the Voyvodiches could have made their payments, the harm they experienced was the difference between the terms of those payments and the onerous new terms. The court found this harm resulted from Marshall's negligence (i.e., failing to pursue litigation while advising them to continue withholding payments, leading to the threat of foreclosure and the need to renegotiate). Put differently, had Marshall not been negligent, the Voyvodiches would not have needed to accept the new terms.^[7] The court applied appropriate causation standards, consistent with *Viner*.

Second, there is no merit to Marshall's contention that the trial court did not require the Voyvodiches to prove they would have achieved a better

outcome had he not been negligent. It is true the court determined there was no need to inquire as to the outcome of a hypothetical lawsuit against the lender. However, "[t]he requirement that the plaintiff prove causation should not be confused with the method or means of doing so. Phrases such as 'trial within a trial,' 'case within a case,' 'no deal' scenario, and 'better deal' scenario describe methods of proving causation, not the causation requirement itself or the test for determining whether causation has been established." ([Viner, supra, 30 Cal.4th at p. 1240, fn. 4](#); *id.* at p. 1242 ["Determining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not."].) The court's analysis properly focused on the relevant hypothetical in this case: whether the increase in mortgage payments was caused by Marshall's negligence (i.e., would not have occurred absent it).

Marshall appears to assume the harm at issue was his failure to obtain the modification sought by the Voyvodiches. If that were so, focusing on a hypothetical lawsuit would have been appropriate and even necessary. ([Viner, supra, 30 Cal.4th at p. 1241](#) [litigation malpractice requires establishing that "**but for the alleged negligence . . . , the plaintiff would have obtained a more favorable judgment or settlement**"; [Campbell v. Magana \(1960\) 184 Cal.App.2d 751, 754](#) ["[O]ne who establishes malpractice on the part of his attorney in prosecuting . . . a lawsuit must also prove that careful management of it would have resulted in recovery of a favorable judgment and collection of same. . . ."]].) But the harm here was the imposition of worse terms, not the lost chance to get better ones. Marshall's focus, and his reliance on *Campbell*, are thus misplaced. ([DiPalma v. Seldman \(1994\) 27 Cal.App.4th 1499, 1506-1507 \(DiPalma\)](#) ["It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof."].) Further, **the purpose of the trial-within-a-trial is to avoid speculative damages.** ([Mattco Forge, Inc. v. Arthur Young & Co. \(1997\) 52 Cal.App.4th 820, 832-833](#) [trial-within-a-trial "avoids 'speculative values as a measure of recovery. . . ."]].) The damages are increased mortgage terms that have already been imposed. There is nothing speculative about them.

Finally, the trial court did not err by finding no expert testimony was required on causation. "[T]he ability of an expert witness to testify . . . is limited to matters that are not common knowledge." (*ABM Industries Overtime Cases (2017) 19 Cal.App.5th 277, 295.*) The theory of causation

here was straightforward: given the Voyvodiches' ability to pay their existing mortgage, they would not have needed to renegotiate and accept worse terms absent Marshall's negligence. No expert testimony was needed. Marshall maintains an expert was necessary to opine on whether a lawsuit could have resulted in the desired modification. But, again, that was not the harm at issue, and we need not address whether expert testimony would have been necessary or appropriate under Marshall's (erroneous) view of the case. (Cf. [Piscitelli v. Friedenberg \(2001\) 87 Cal.App.4th 953, 974](#) [trial court erred by permitting expert to testify in legal malpractice case that arbitrator would have granted the plaintiff relief, because it invaded the jury's function].)

3. Damages

Marshall contends the trial court erred by awarding actual mortgage payments as damages (including holding him responsible for the months missed before his retention and after it ended), because the Voyvodiches were responsible for their mortgage and this was not the correct measure of damages.

First, the trial court did not award mortgage payments as damages, for any month, and there is no dispute the Voyvodiches remained responsible for their mortgage. The court awarded the *increases* in payments owed under the new terms that commenced in March 2015, after determining they resulted from Marshall's negligence.

Second, we reject Marshall's argument that the applicable damages measure here is the difference between what a competent attorney could have achieved and what he achieved. That standard may apply where the alleged negligence is losing or mishandling a claim, as reflected in [Norton v. Superior Court \(1994\) 24 Cal.App.4th 1750](#), cited by Marshall, but that is not the harm at issue. (*Id.* at p. 1758 ["Where the attorney's negligence does not result in a total loss of the client's claim, the measure of damages is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission."].) The other case cited by Marshall, *DiPalma*, confirms a plaintiff only needs to establish a favorable judgment when the negligence consists of mishandling a claim. ([DiPalma, supra, 27 Cal.App.4th at pp. 1506-1507.](#))^[8]

4. Admission of Evidence from State Bar Proceeding

Finally, Marshall contends the court erred by denying his motion in limine to exclude the State Bar evidence on Evidence Code section 352 grounds. Specifically, he argues there was no "intersection" between the matters, and it was thus unduly prejudicial for the court to admit the evidence and rely upon it in determining damages.

Evidence Code section 352 permits a trial court to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . ." "An exercise of discretion under Evidence Code section 352 will be disturbed on appeal only if the trial court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice." ([Boeken v. Philip Morris, Inc. \(2005\) 127 Cal.App.4th 1640, 1685.](#))

Marshall does not establish any abuse of discretion. The trial court found the State Bar evidence was relevant because it corroborated Melissa's testimony, and we must assume the record supports this finding. Further, the stipulation clearly addressed issues pertinent to the trial, such as Marshall's failure to file a lawsuit, even if other issues did not overlap. We reject his contention that there was no "intersection" between the matters.

The court then found there was little risk of prejudice, given it was conducting a bench trial. This reasoning is sound. (See [In re Jose M. \(1994\) 21 Cal.App.4th 1470, 1481](#) [**court trial minimizes danger of undue prejudice**].) Marshall's contention that the court relied on the State Bar evidence for damages is not supported by the statement of decision, and would not establish prejudice regardless. (Cf. [Shaw v. County of Santa Cruz \(2008\) 170 Cal.App.4th 229, 282](#) [appellants "fail[ed] to demonstrate how any claim of error in the . . . exclusion of evidence would have made any difference in the outcome"].)^[9] Even if Marshall had an argument for prejudice, the lack of a reporter's transcript would prevent us from assessing it. (See [Ballard, supra, 41 Cal.3d at pp. 574-575](#) [failure to provide transcript or settled statement precluded review to determine whether it was reasonably probable juror misconduct or instructional error affected damages].)

DISPOSITION

The judgment is affirmed. The Voyvodiches are awarded costs on appeal.

BENKE, Acting P. J. and AARON, J., concurs.

[1] As the Voyvodiches have the same last name, we refer to them as Nick and Melissa as needed, in the interest of clarity. We intend no disrespect.

[2] The increased balance was \$62,842.03, the balloon payment was \$210,159.65, and the monthly payments increased by \$222.59 in March 2015, \$94.17 in March 2016, and \$119.46 in March 2017 (resulting in \$436.22 for future monthly payments).

[3] The court did not award the increase in the loan principal, explaining the monthly payments included money toward the principal and, without an expert, it was unable to parse the relationship.

[4] We recognize Marshall objected to the statement of decision, but as discussed *post*, the absence of a reporter's transcript requires us to infer the court found evidence to support its decision. (See [Hellman v. La Cumbre Golf & Country Club \(1992\) 6 Cal.App.4th 1224, 1230](#) [omission of finding on material issue is "harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings"].)

[5] In one of the factual arguments, Marshall suggests the court applied incorrect standards to the damages evidence by permitting the "weaker evidence" of the summary (rather than loan documents), and it should be viewed with distrust, citing Evidence Code section 412. But the court found the summary admissible, and it supports the damage award. We do not consider the issue further.

[6] Marshall cites various cases here, but they simply confirm there is case law on modifications (which is not in dispute), confirm borrowers can seek damages (which does not help him), or are otherwise inapposite. (See, e.g., [Rufini v. CitiMortgage, Inc. \(2014\) 227 Cal.App.4th 299, 305](#) [collecting cases regarding modification attempts]; [Bushell v. JPMorgan Chase Bank, N.A. \(2013\) 220 Cal.App.4th 915, 928](#) [disagreeing plaintiffs could not allege damages "because all [they] did was make . . . payments they were already obligated to make"]; [Yvanova v. New Century Mortgage Corp. \(2016\) 62 Cal.4th 919, 924](#) [addressing standing in foreclosure context].)

[7] We are not persuaded by Marshall's conclusory assertion that factors noted in *Viner* as grounds for denying recovery (i.e., outcome was likely to occur anyway, client knew the problems, and client misconduct caused the problems) exist here.

[8] In his opening brief, Marshall also stated, without authority, that the Voyvodiches had to show they were not required to retain the mortgage payments. On reply, he contended they were required to mitigate damages and put the withheld payments in trust. We will not address these improperly presented issues. ([People v. Stanley \(1995\) 10 Cal.4th 764, 793](#) ("[**E]VERY BRIEF SHOULD CONTAIN A LEGAL ARGUMENT WITH CITATION OF AUTHORITIES ON THE POINTS MADE.** If none is furnished on a particular point, the court may treat it as waived. . . ."); [American Drug Stores, Inc. v. Stroh \(1992\) 10 Cal.App.4th 1446, 1453](#) ["Points raised for the first time in a reply brief

will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument."].)

[9] Marshall also cites cases where Evidence Code section 352 supported exclusion of evidence. They are distinguishable. ([*Gherman v. Colburn* \(1977\) 72 Cal.App.3d 544, 582](#) [evidence regarding prior loan transaction was irrelevant and speculative]; [*DePalma v. Westland Software House* \(1990\) 225 Cal.App.3d 1534, 1544-1545](#) [evidence of tax consequences had little probative value, and was complicated and confusing].)