G048368

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT
DIVISION THREE

DOROTHY MAE MEDICAL CLINIC, INC. and MICHAEL J. SINGLETON,

Plaintiffs and Appellants,

vs.

PAUL ZWERDLING, individually and dba PAUL ZWERDLING AND ASSOCIATES,

Defendant and Respondent.

Appeal from the Superior Court for Orange County (**30-2008-00115857**)
Luis Rodriguez, Judge

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: G048368
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APPELLANT/PETITIONER: Dorothy Mae Medical Clinic, Michael Singleton RESPONDENT/REAL PARTY IN INTEREST: Paul Zwerdling	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Plaintiffs-Appellants

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) Michael J. Singleton	Plaintiff-Appellant
(2) Dorothy Mae Medical Clinic	Plaintiff-Appellant
(3) Paul Zwerdling	Defendant-Respondent
(4) Paul Zwerdling & Associates (DBA)	Defendant-Respondent
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 24, 2013

Thomas D. Mauriello, Esq.
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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STATEMENT OF APPEALABILITY

Plaintiffs and Appellants Dorothy Mae Medical Clinic, Inc. and Michael J. Singleton (hereinafter, collectively, "Appellant" or "Singleton") have appealed from the trial court's order dated February 26, 2013 (served on February 27, 2013) granting Defendant'-Respondents' Paul Zwerdling's (hereinafter, "Respondents" or "Zwerdling") motion for cost of proof sanctions in the amount of $175,000 [Clerk's Transcript ("CT") 838] and the Supplemental Judgment awarding cost of proof sanctions filed on April 22, 2013. [CT 860-862.]

Appellants filed their notice of appeal on April 25, 2013 [CT 863-866, 867-868] and their supplemental notice of appeal on June 20, 2013. [Supplemental Clerk's Transcript ("SCT") 167-168.]

ISSUES ON APPEAL

I. Whether the trial court abused its discretion in determining that Appellant did not have "reasonable ground to believe" (Code of Civil Procedure Section 2033.420(b)(3)) that he would prevail on the subject matter of Requests for Admission Nos. 1 and 2, which each sought an admission that "the last time [Respondent] provided any legal services to [Appellant] was in May 2006," and in subsequently imposing cost of proof sanctions of $175,000.

II. Whether the trial court abused its discretion in determining that Appellant did not have "good reason for the failure to admit" (Code of Civil Procedure Section 2033.420(b)(4)) Requests for Admission Nos. 1 and 2, which each sought an admission that "the last time [Respondent] provided any legal services to [Appellant] was in May 2006," and in subsequently imposing cost of proof sanctions of $175,000.

III. Whether the trial court, having determined that cost of proof sanctions were appropriate, abused its discretion and proceeded without substantial evidence in awarding cost of proof sanctions in the amount $175,000,

solely to prove the fact that the last time Respondent provided any legal services to Appellant was in May 2006.

STATEMENT OF THE CASE

Appellant Michael Singleton's "Complaint for Damages for Professional Negligence" – *i.e.*, legal malpractice -- was originally filed March 28, 2008 in Los Angeles Superior Court. [Clerk's Transcript ("CT") 74.] As Respondent Paul Zwerdling resided in Orange County, the case was transferred and was filed in Orange County Superior Court. [CT 72, 74.] Zwerdling answered the complaint. [CT 79.]

Singleton filed a "First Amended Complaint for Damages for Professional Negligence." [CT 102.] Zwerdling answered the amended complaint. [CT 111.]

Singleton filed a "Second Amended Complaint for Damages for Professional Negligence." [CT 123.] The second amended complaint added a claim for breach of fiduciary duty in addition to the claim for professional negligence. [CT 123-128.] Zwerdling answered the second amended complaint. [CT 111.]

Singleton filed a "Third Amended Complaint for Damages for Professional Negligence." [CT 130.] Zwerdling answered the third amended complaint. [CT 142.]

Respondent Zwerdling filed a motion to bifurcate the affirmative defense of statute of limitations. [CT 151.] Singleton filed an opposition to the motion. [CT 418; see also CT 326-417.] The trial court granted Zwerdling's motion to bifurcate as to the statute of limitations defense. [CT 465.]

A bench trial was held on August 15, 17, 20, 21, 22, and 24, 2012. [CT 465; 480-489; 497-498; 506-507.]

During trial, Singleton filed a motion for leave to further amend the

complaint to conform to proof and to clarify the accrual of the statute of limitations. [CT 490-496.] The proposed amendment included an allegation that would have broadened the applicable statute of limitations from that of legal malpractice to "other acts of incompetence," namely, "Defendant failed to obtain or recommend competitive bids for the DMMC expansion." [CT 492.] The trial court denied the motion. [CT 506.]

On August 27, 2012, the trial court issued a minute order containing its intended statement of decision issuing judgment in favor of Respondent Zwerdling [CT 508-510] ruling that the third amended complaint for professional negligence was time barred by C.C.P. Sec. 340.6 and that the statute of limitations was not tolled by continuous representation. [CT 508.]

On September 19, 2012, the trial court filed its Statement of Decision [CT 532-540] and its judgment in favor of Zwerdling. [CT 541-543.]

On October 11, 2012, Zwerdling filed a motion for cost of proof sanctions with respect to Singleton's responses to six (6) of Zwerdling's Requests for Admissions [CT 708-726; 559-707], Singleton filed an opposition [CT 746-787], and Zwerdling filed his reply. [CT 788-805.]

The trial court posting a tentative decision denying Zwerdling's motion for cost of proof sanctions. [*See* **Exhibit A** to Appellant's Application to Supplement the Record on Appeal, filed December 6, 2013.]1

The trial court heard oral argument on Respondent's motion on December 20, 2012, at which it denied the motion as to four of the RFA's (which are not at issue on this appeal) but took the motion under submission as to Requests for Admissions Nos. 1 and 2 (which are the focus of this appeal). [CT 834.]

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1 This Court reserved ruling on Appellant's Request to Supplement the Record to add the trial court's tentative ruling, indicating that it would be decided in conjunction with the decision on appeal.

See Order filed December 10, 2013.

Two months after oral argument, on February 26, 2012, the Court issued a minute order granting Zwerdling's motion for cost of proof sanctions as to RFA's 1 and 2 in the amount of $175,000. [CT 838.]

On April 22, 2013, the Court filed a supplemental judgment for cost of proof sanctions against Singleton in the amount of **$175,000**. [CT 860-862.]

On April 25, 2013, Singleton filed a notice of appeal with this Court [CT 863-866; 867-868] and on June 20, 2013, Singleton filed a supplemental notice of appeal. [Supplemental Clerk's Transcript ("SCT") 167-168.]

STATEMENT OF FACTS

A. The Underlying Dispute

Appellant Singleton is a physician who has served in the Navy and in private practice. [RT 414-415.] In 1998, he founded a community medical clinic in Los Angeles and named the clinic the Dorothy Mae Medical Clinic (hereinafter "DMMC") in honor of his mother. [CT 535.] He operated the DMMC along with Terry Hannah, a nurse with whom he had both a personal and professional relationship, with Singleton as president and Ms. Hannah as secretary of the DMMC, which was set up as a medical corporation. [CT 535.]

In 2003, Singleton and Hannah decided to expand the DMMC and were referred to Respondent Zwerdling, an attorney and CPA, for assistance in applying for construction loans and preparing corporate tax returns in connection with the loan applications, which Zwerdling agreed to do on a pro bono basis. [CT 535-536.]

Starting in 2003, and over the next several years, Zwerdling prepared DMMC's tax returns, and he also assisted Singleton, his partner Hannah, and DMMC in seeking construction loans (including assisting with loan applications, appraisals, contractors, etc.) for a proposed expansion of the DMMC, as well as

reviewing other financing proposals and engaging in community fundraising efforts, in part through his capacity as General Counsel of California Community Investors, Inc., a nonprofit corporation. [*See*, *e.g.*, CT at 349-350, 352-353, 355-357, 359-360, 362-364, 366-367, 369, 371-372, 376-377, 379, 394, 434-435.]

In the underlying case a good deal of evidence was adduced, and motion practice and trial testimony directed toward, details of construction loan applications, financing proposals, fundraising efforts, appraisals, contacts with contractors, and related issues. For purposes of this appeal, Appellant Singleton will focus on Zwerdling's statute of limitations defense that was ultimately successful at trial and the subsequent judgment for cost of proof sanctions that is the subject of this appeal.

Unbeknownst to Singleton at the time, in 2005 Zwerdling also assisted Singleton's personal and professional partner, Hannah, in drafting articles of incorporation and preparing other corporate filings for a new medical clinic founded by Hannah, the Leah and Michael Hannah Inner City Outreach, Inc. [CT 374, 537.] Thus began the troubles that ultimately came to fruition through the lawsuit.

In May 2006, a dispute arose over the DMMC 2005 corporate tax return prepared by Zwerdling, when Zwerdling refused Singleton's request to change DMMC's ownership percentages between Singleton and Hannah absent provision of additional information, because the requested changes were inconsistent with the ownership percentages reflected on prior years' tax returns [CT 536], which earlier returns Singleton testified had been prepared and signed in error in that respect. [RT 418-421, 423-426.]

In an August 3, 2006 internal memo from Singleton to his partner Hannah, Singleton related several recent discoveries and accused Hannah of covertly signing documents, removing funds from DMMC accounts, and setting up a

competing medical nonprofit using DMMC resources. [CT 269; 536.] The memo noted that Hannah used Zwerdling's assistance to set up the new entity:

> In addition, you collaborated with DMMC tax preparer to create this non-profit organization and invited him and others as founding members of the board, putting DMMC in a compromised position. The events described amount to conspiracy, conflict of interest and insider trading, since as owner I was misled and not properly informed by you or the tax preparer acting as agent for DMMC Inc.
>
> I am deeply saddened to write this memo, and I hope the issues identified can be resolved quickly. I hope you understand my position. . . .
>
> During the upcoming month, I will have a payroll done by an outsider, and have billing function also given to an outsider. You will still have limited access to DMMC accounts. [CT 269-270.]

The August 3, 2006 memo was referencing Singleton's recent Discovery that Zwerdling (the "tax preparer") had assisted Hannah in drafting articles of incorporation for the Leah and Michael Hannah Inner City Outreach, Inc. [CT 537.]

Soon after the August 6 memo was sent, and unbeknownst to Singleton, on September 19, 2006 Zwerdling prepared and filed articles of incorporation on behalf of Hannah to create yet another new entity, a corporation named All Family Medical and Wellness Center. [CT 384, 414-416, 537.]

In January 2007, Hannah had announced to Singleton that she was scaling back her duties at DMMC from full-time to part-time (without specifying her other endeavors). [CT 381-382.]

In March 2007, Ms. Hannah called Singleton and advised him that she had left the DMMC. [CT 439.] Singleton wrote an email to Hannah referencing her "abrupt resignation" and stating in part: "I discovered on 19 March 2007, from Dorothy Mae Medical Clinic Patients, that you had been secretly planning your departure for months by setting up a clinic . . . All Family Neighborhood Medical Clinic while you were employed at and a [corporate] officer of DMMC . . . ."

[CT 386; *see also* CT 537 (trial court noted that on or about March 12, 2007, Singleton learned that Ms. Hannah had quit DMMC to open the All Family Medical and Wellness Center).]

In addition to Singleton's discovery that Zwerdling had, in Singleton's view, been conflicted and disloyal to DMMC by his assisting Hannah's setting up other medical clinics, Singleton later came to believe that Zwerdling had an ulterior motive for his work with DMMC, namely, to financially assist another company with which Zwerdling had an ongoing business relationship. A company called Golden Hands Construction, Inc. had provided DMMC a bid for expansion of the clinic. [CT 172, 434.] DMMC had paid $35,000 to Golden Hands in March 2005 toward the expansion project. [CT 436.] Copies of the contracts and related documents between DMMC and Golden Hands are at CT 304-318. Singleton later learned that Zwerdling had a long standing business and personal relationship with Sheldon Baer, the principal of Golden hands. [CT 435.] Singleton asserted that, because of this, there were no competitive bid, and the prices proposed by Golden Hands were excessive. [CT 436.]2 The trial court found insufficient proof of a profit motive on the part of Zwerdling through his relationship with Golden Hands and Baer or through the proposed expansion of the DMMC. [CT 309.]

Singleton's and Hannah's parting of ways, both professional and personal, appears to have stemmed from difficulties she experienced dealing with Singleton since his return from deployment in Iraq. [CT 403 (according to Zwerdling, "Singleton had changed considerably since he came back from Iraq, and not for the good."); *see also* CT 263, 172.]

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2 Many issues relevant to the underlying dispute, including as the nature and timing of Zwerdling's services and the potential triggering of the statute of limitations, are addressed in the Declaration of Michael Singleton in Opposition to Motion to Bifurcate. [CT 434-441.]

In any event, ultimately the contemplated construction loan and the DMMC expansion never materialized, and the project was abandoned.

B. The Litigation and the Bifurcated Judgment for Respondents on the Statute of Limitations Defense

A bench trial was held on the bifurcated statute of limitations defense. [CT 480-489; 497-498; 506-507.] Singleton' operative complaint included claims for 1) professional negligence (legal malpractice) and 2) breach of fiduciary duty. [CT 130.] The issue at trial was whether Singleton's claims were time-barred by the one year statute of limitations of C.C.P. Sec. 340.6 for legal professional negligence.3

Following trial, the trial court ruled that Singleton's claims were time-barred by C.C.P. Sec. 340 because they were not filed within one year of when he discovered or should have discovered the facts constituting the wrongful act or omission. [CT 535-539.] The trial court found that "Dr. Singleton had sufficient facts confronting him that by March 20, 2007, the statute of limitations began to run (absent any tolling)." [CT 537.]

The trial court based its ruling on the following facts: Zwerdling's refusal

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3 Code Civ. Proc., § 340.6 provides in relevant part:

(a) An action against an attorney for a wrongful act or omission other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission . . . . except that the period shall be tolled during the time that any of the following exist:
(1) The plaintiff has not sustained actual injury.
(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.
(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.
(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

to change the clinic ownership percentages on the 2005 corporate tax return; Singleton's discovery that Zwerdling assisted Singleton's business partner Hannah with setting up a new medical clinic; Singleton's memo suggesting that Zwerdling (the "tax preparer") had been disloyal; Zwerdling's filing articles of incorporation on behalf of Ms. Hannah to create the Leah and Michael Hannah Inner City Outreach, Inc. and the All Family Medical and Wellness Center; and Ms. Hannah's quitting DMMC to open the All Family Medical and Wellness Center. [CT 535-537.]4 The trial court also noted:

> [Singleton's] delay, although understandable given his conflicting feelings and conduct towards his former intimate friend and business partner, do [sic] not excuse the requirements of Code Civ. Proc., § 340.6 that any misconduct must be claimed within one year of when it is discovered or should have been discovered. Based on the above, it is clear to the court that plaintiffs discovered or should have discovered the alleged disloyalty of their attorney Mr. Zwerdling no earlier than August of 2006 or no later than March 20, 2007. Accordingly, absent any tolling, plaintiff's complaint is time barred under Code Civ. Proc., § 340.6. [CT 537-538.]

The trial court next addressed the issue of whether the statute of limitations was tolled by continuous representation by Mr. Zwerdling [CT 534, 538-539], framing the issue as follows:

> Mr. Zwerdling testified that, in May of 2006, he terminated his relationship with DMMC. To toll the statute of limitations, based on continued representation, plaintiffs must refuse Mr. Zwerdling's evidence. This must be done by establishing that, factually, Mr. Zwerdling did not terminate his representation, or that Dr. Singleton and DMMC had a reasonable expectation of continued representation. (*See, e.g.*,Gonzalez v. Kalu (2006) 140 Cal.App.4th 21, 31 [43 Cal.Rptr.3d 866], 31.) [CT 538.]

The trial court concluded that "the statute of limitations was not tolled by the continuous representation of defendant Paul S. Zwerdling or by any other subsection under Code Civ. Proc., § 340.6(a)." [CT 539.]

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4 Zwerdling had testified in his deposition that he saw no conflict in his setting up the All Family Medical and Wellness Center for Hannah because it was a spa and weight loss clinic and not a primary medical clinic. [CT 401-402.]

The trial court based its ruling of no tolling on some of the same information supporting its ruling that Singleton had sufficient facts confronting him by March 20, 2007 such that the statute of limitations began to run at that time, including Zwerdling's refusal to modify DMMC's tax returns despite Singleton's request and Singleton's August 2006 memo accusing Zwerdling of disloyalty. [CT 538.]

The trial court also based its conclusion of no tolling on the fact that Zwerdling sent a letter in May 2006 to Hannah terminating his tax preparing services to DMMC, and on the fact that there was no contact between Singleton individually, or DMMC, on the one hand, and Zwerdling, on the other hand, after May 2006. [CT 538.]

The trial court concluded that Zwerdling terminated his representation and that Singleton and DMMC did not have a reasonable expectation of continued representation by Zwerdling:

> Dr. Singleton's testimony that he continued to consider Mr. Zwerdling to be DMMC's attorney after August of 2006 is not credible. Certainly, his confidence in Mr. Zwerdling was shattered and this supports the reasonable conclusion that the reason why there was no further contact with Mr. Zwerdling was that the representation had ended and that there was no reasonable expectation that Mr. Zwerdling was continuing to represent the clinic. [CT 539.]

The trial court entered judgment in favor of Respondent. [CT 541-543.]

C. The Judgment Awarding $175,000 in Cost of Proof Sanctions

Zwerdling's motion for cost of proof sanctions sought recovery of $195,000 in legal fees for Singleton's failure to admit the truth of six (6) RFAs. [CT 708-726; 559-707.] The trial court posted a tentative decision denying Zwerdling's motion. [*See* **Exhibit A** to Appellant's Application to Supplement the Record on Appeal, filed December 6, 2013.] The trial court heard oral

argument on December 20, 2012, after which it denied the motion as to four of the RFA's (which are not at issue on this appeal) but took the motion under submission as to Requests for Admissions Nos. 1 and 2 (which are the focus of this appeal). [CT 834.]

RFA Nos. 1 and 2 and the responses thereto were as follows:

Request for Admission No. 1:

Admit that the last time Paul S. Zwerdling provided any legal services to you was in May 2006.

Response to Request for Admission No. 1:
Denied.

Request for Admission No. 2:
Admit that the last time Paul S. Zwerdling provided any legal services to the DMM Clinic was in May 2006.

Response to Request for Admission No. 2:
Denied.

Two months after oral argument, on February 26, 2012, the Court issued a minute order reversing its tentative ruling and granting Zwerdling's motion for cost of proof sanctions as to RFA's 1 and 2, in the amount of **$175,000**. [CT 838.] The Court filed a supplemental judgment for cost of proof sanctions against Singleton in the amount of $175,000. [CT 860-862.] This was in addition to the Court's award of $23,459.80 in litigation costs to Respondent. [CT 835-836.]

STANDARD OF REVIEW

The determination of whether a party is entitled to expenses under C.C.P. Section 2033.420 is subject to review under the abuse of discretion standard. Laabs v. City of Victorville (2008) 163 Cal.App.4th 1242 [78 Cal.Rptr.3d 372]. "[O]ne of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice . . . ." Dorman v. DWLC Corp. (1995) 35 Cal.App.4th 1808, 1815 [42 Cal.Rptr.2d 459]2d 459. The proper amount, if any, of expenses

awarded would be governed by the abuse of discretion standard and the substantial evidence standard.

LEGAL DISCUSSION

A. APPELLANT HAD "REASONABLE GROUND TO BELIEVE" HE WOULD PREVAIL ON THE SUBJECT MATTER OF RFA NOS. 1 AND 2

The trial court's conclusion that Appellant had no reasonable ground to deny RFAs Nos. 1 and 2 (*i.e.*, for not admitting that Respondent had not provided legal services to Appellants after May 2006) was an abuse of discretion.

Code Civ. Proc., § 2033.420 provides:

> (a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.
>
> (b) The court shall make this order unless it finds any of the following:
>
> (1) An objection to the request was sustained or a response to it was waived under Section 2033.290.
>
> (2) The admission sought was of no substantial importance.
>
> (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter.
>
> (4) There was other good reason for the failure to admit.

"Code of Civil Procedure Code Civ. Proc., § 340.6 does not expressly state a standard to determine when an attorney's representation of a client regarding a specific subject matter continues or when the representation ends, and the legislative history does not explicitly address this question." Nielsen v. Beck (2007) 157 Cal.App.4th 1041, 1048-49 [69 Cal.Rptr.3d 435, 440]35, 440 (2007)(citation omitted).

> In evaluating whether a "good reason" exists for denying a request to admit, "a court may properly consider whether at the time the denial was made the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial." (Brooks v. American Broadcasting Co. (1986) 179 Cal.App.3d 500, 511 [224 Cal.Rptr. 838] [interpreting former Code of Civil Procedure section 2034].)

Laabs, supra, 163 Cal.App.4th 1242, 1276 401 (2008).

The discussion below necessarily examines tolling issues on a statute of limitations argument that Appellant already lost at trial. Appellant addresses these issues not to show that the representation in fact continued – the trial court found that it did not, and Appellant does not appeal that portion of the judgment – but rather to show that Singleton "had reasonable ground to believe that the party would prevail on the matter" (C.C.P. Code Civ. Proc., § 2033.420(b)(3)).

> Absent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of ... section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.* [Citations.] That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude,* a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services,* however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective ....*"

Gonzalez, supra, 140 Cal.App.4th 21, 30-31 (2006) italics added, fns. omitted.)

> In our recent case of Gonzalez, supra, 140 Cal.App.4th 21, an attorney abandoned a client. We held that in such situations,

> "continuous representation should be viewed objectively from the client's perspective...." (Gonzalez, supra, 140 Cal.App.4th 213d 866.) This objective standard examines the evidence through the eyes of the client and is appropriate because otherwise an attorney could abandon a client without the client's knowledge, and yet escape a legal malpractice lawsuit. In abandonment cases, the purpose of the rule would be obliterated. Thus, the crucial inquiry in abandonment cases is "when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. [Citation.]" (Gonzalez, supra, 140 Cal.App.4th 213d 866.)

Nielsen, supra, 157 Cal.App.4th 1041, 1049-5035, 441 (2007).

As the court noted in Truong v. Glasser (2009) 181 Cal.App.4th 102, 116,

103 [103 Cal.Rptr.3d 811], 116, 103

Cal. Rptr. 3d 811, 822 (2009):

> [T]he application of the continuing-representation tolling provision is rooted in two considerations: it prevents the attorney from defeating a malpractice action by continuing to represent the client until the statute of limitations has run; and it avoids forcing the client to file a lawsuit that would disrupt the ongoing attorney-client relationship, which would prevent the negligent attorney from attempting to correct or minimize the error. [citation omitted]

The court in *Truong* continued:

> The attorney's representation is completed when the agreed tasks or events have occurred, the client consents to termination, or (in the context of litigation) when a court grants an application by counsel for withdrawal. (Nielsen, supra, 157 Cal.App.4th 1041, 10493d 435.) For purposes of the statute of limitations, the attorney's representation is concluded as to the specific subject matter when the parties agree, and does not depend on a formal termination like withdrawing as counsel of record. (See, e.g., Shapero v. Fliegel (1987) 191 Cal.App.3d 842, 848 [236 Cal.Rptr. 696]. 696 [the failure to formally withdraw as attorney of record, standing alone, will not toll the statute of limitations under the rubric of continued representation]; Hensley v. Caietti (1993) 13 Cal.App.4th 1165, 1173 [16 Cal.Rptr.2d 837]2d 837 ["[t]he period of tolling should not turn upon the fortuity of the time of delivery of notice of discharge to counsel"].) The continuous representation tolling provisions "ultimately [depend], not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (Worthington v. Rusconi (1994) 29 Cal.App.4th 1488, 1498 [35 Cal.Rptr.2d 169]2d 169, fn. omitted.)

Id. at p. 1488

In the instant case, the "agreed tasks or events" (Truong, supra, 181 Cal.App.4th 102) did not occur, as those tasks and events in Zwerdling's representation were the next year's tax returns. Moreover, in the instant case, the "tasks and events" associated with a central aspect of Zwerdling's representation (preparing DMMC's tax returns) were inherently sporadic – i.e., annual – and thus the lack of contact did not implicitly or inherently suggest termination of representation. *See, e.g.*, Laclette v. Galindo (2010) 184 Cal.App.4th 919, 928-29 [109 Cal.Rptr.3d 660, 666]0, 666 (2010) (fact that "there had been no contact between [attorney] and [client] between January 25, 2005 . . . and February 9, 2007" did not establish lack of continuous representation as a matter of law). As the trial court aptly noted in its tentative decision denying the motion for cost of proof sanctions: "But the fact that plaintiff could not prove tolling does not mean that plaintiff did not have a reasonable basis ground to believe that Zwerdling was continuing to represent plaintiffs, especially where Zwerdling was providing tax services that occur only once a year." *See* **Exhibit A** to Appellant's Application to Supplement the Record on Appeal, filed December 6, 2013.]

As noted above, the trial court based its conclusion of no tolling on the fact that Zwerdling sent a letter in May 2006 to Hannah terminating his tax preparing services to DMMC and the fact that there was no contact between Singleton individually, or DMMC, on the one hand, and Zwerdling, on the other hand, after May 2006. [CT 538.] The letter was dated May 10, 2006 from Zwerdling to Hannah as "Secretary of Corporation" and "Director of Accounting Dept." and addressed to DMMC's offices, and it stated, in its entirety:

> Dear Terri:
>
> Thank you for letting me be of service to Dorothy Mae Medical Inc. by preparing the 2005 Corporate tax returns. Since the building expansion program efforts have ceased, which was the original reason for me to prepare Dorothy Mae Medical Inc. corporate tax returns, (due to the problems with your previous tax preparer), I have

> chosen not to prepare tax returns for Dorothy Mae Medical Inc. for 2006 and in the future.
>
> Sincerely,
> Paul Zwerdling, Esq. [CT 179.]

The Zwerdling letter gave notice of termination of Zwerdling's services as tax preparer only [CT 179] but did not address Zwerdling's legal or other services. [*See* CT at 349-350, 352-353, 355-357, 359-360, 362-364, 366-367, 369, 371-372, 394.]

Moreover, there was a dispute as to this letter. The letter was addressed to Ms. Hannah at DMMC, not to Singleton. [CT 179.] Other significant correspondence had been sent to both Hannah and Singleton. [*See, e.g.,* CT 394.] Further, Zwerdling testified that the letter confirmed prior oral conversations with Hannah, but not with Singleton, in which Zwerdling had stated his intentions to terminate his tax preparation services for DMMC. [CT 397.] At trial, Singleton denied receiving the termination letter or being aware of it at the time. [RT 426, 431; CT 538.] Singleton asserted that the letter was fabricated. [CT 436-437.]

As the trial court aptly noted in its tentative decision:

> Further, no evidence was offered that Singleton was on clear notice that Zwerdling was no longer representing plaintiffs before this action was filed. All that was presented at trial w[as] that Hannah as agent for Zwerdling accepted the termination letter. But it was never proved that the termination letter was addressed to, sent to, or received by Singleton, who then ignored the letter when responding to the RFAs.

[*See* **Exhibit A** to Appellant's Application to Supplement the Record on Appeal, filed December 6, 2013.]

Singleton's lack of receipt of Zwerdling's termination letter to Hannah meant that Singleton had no expectation that the counsel's "agreed tasks and events" would not occur and also that the client did not "consent[] to termination." Truong, supra, 181 Cal.App.4th 102, 116.

Inexplicably, however, the trial court in its statement of decision [CT 533-540] recanted its finding in the tentative ruling that "[a]ll that was presented at trial w[as] that Hannah as agent for Zwerdling accepted the termination letter" and "[b]ut it was never proved that the termination letter was addressed to, sent to, or received by Singleton . . . ." [*See* **Exhibit A** to Appellant's Application to Supplement the Record on Appeal, filed December 6, 2013.]

Instead, in its statement of decision, the trial court found dispositive as to Singleton's knowledge and notice the fact that that "Mr. Zwerdling sent a letter terminating his services as attorney for the Clinic in May of 2006." [CT 538.] The trial court's explanation for this "about-face" is opaque, at best:

> These facts point to the following: (1) plaintiff's denial that Mr. Zwerdling sent the termination letter is not credible because it is clear that after Mr. Zwerdling's refusal to change the tax returns, and Dr. Singleton's August 2006 accusations, Dr. Singleton continued with his relationship with Ms. Hannah. This is significant because Ms. Hannah had acknowledged to Dr. Singleton that Mr. Zwerdling had performed legal work on her behalf to establish the non profit entity known as the Leah and Michael Hannah Inner City Outreach Inc. and (2) Dr. Singleton was aware that his relationship with Ms. Hannah was deteriorating. The reasonable inference is that the attorney for the clinic can offer no more service and, in fact, is working at cross purposes. The above leads this court to conclude that Dr. Singleton's testimony that he continued to consider Mr. Zwerdling to be DMMC's attorney after August of 2006 is not credible.

[CT 538-539.] The trial court's analysis of why Singleton's denial of receipt of the Zwerdling termination letter was not credible did not address the letter at all. Instead, the court discussed other facts supporting inferences as to why Singleton's belief that Zwerdling still represented DMMC was unreasonable, having nothing to do with whether Singleton received the letter – the issue on which the trial court flip-flopped from its tentative decision. The departure of the factual findings from the tentative decision to the statement of decision indicates and abuse of discretion and a lack of substantial evidence in the statement of decision.

B. APPELLANT HAD "GOOD REASON FOR REFUSING TO ADMIT" RFA NOS. 1 AND 2

In addition to having "reasonable ground to believe [he] would prevail on the matter, there was "other good reason for the failure to admit" RFAs 1 and 2. C.C.P. Code Civ. Proc., § 2033.420(b)(4). While the "reasonable ground" prong Code Civ. Proc., § 2033.420(b)(3) had to do with issues of evidence as they related to continuous representation for tolling the statute of limitations, the "good reason" prong of Code Civ. Proc., § 2033.420(b)(4) relates, in this case, to the phrasing of the particular RFAs at issue. Analysis of the wording of the RFAs demonstrates the reasonableness of Singleton's responses thereto and the abuse of discretion of the trial court's awarding cost of proof sanctions.

The RFAs might have been drafted so as to trigger admissions of facts that by definition had to be in Singleton's personal knowledge for him to either deny or admit. A potential example would be "Admit that you are not aware of any legal services performed by Paul S. Zwerdling to you [or the DMMC] after May 2006." In response, Zwerdling either would have received an admission or, if he received a denial, he could have asked in a companion interrogatory: "Please identify all legal services performed by Paul S. Zwerdling to you [or the DMMC] after May 2006." The phrasing of such a question would be personal to the responding party's knowledge and does not leave it to speculation or lack of personal knowledge as to what legal services Zwerdling might have performed outside of Singleton's presence or personal knowledge.

Instead, Zwerdling asked a different question: "Admit that the last time Paul S. Zwerdling provided any legal services to you was in May 2006." Unless Singleton had personal knowledge of what legal services Zwerdling performed and when, he might not be able to admit to the requests – and in fact he was unable to do so and he denied the requests. The phrasing of RFAs 1 and 2 was

not personal to responding party Singleton's knowledge, leaving him to speculate at best as to what legal services if any Zwerdling might have performed after May 2006, outside of Singleton's presence or personal knowledge. This is especially the case as Zwerdling interfaced with Hannah rather than Singleton and Singleton relied on Hannah for day-to-day operations at the DMMC. [*See* CT 765 (Singleton declaration in opposition to cost of proof sanctions motion, stating that "Ms. Hannah did run the day to day operations of the clinic and was authorized to communicate with Mr. Zwerdling."); CT 172 (Zwerdling testified that "Hannah was my primary contact at The Clinic" and "Singleton worked as a full time Navy physician in San Diego"); CT 211 (Singleton testified in deposition that "Terri [Hannah] was the primary provider at the clinic" and that "I worked . . . at the Naval Hospital Camp Pendleton").]

Because of the phrasing of the RFAs, Singleton's denials pointed to a lack of information about Zwerdling's legal services, more than information about a lack of Zwerdling's legal services. As a result, there was "other good reason for the failure to admit" RFAs 1 and 2, C.C.P. Code Civ. Proc., § 2033.420(b)(4) -- regardless of whether or not Singleton had reasonable ground to believe he would prevail on the matter requested.

In hindsight, Singleton might have answered the actual RFAs ("Admit that the last time Paul S. Zwerdling provided any legal services to you [or the DMMC] was in May 2006") with an explanatory objection, along the lines of "Responding Party has insufficient facts and information to admit or deny the request," rather than a denial. In that case, Zwerdling still would not have gotten the admission he was groping for, but Singleton would have escaped any potentially punitive results under Code Civ. Proc., § 2033.420 having objected to rather than denied the request. *See* Wimberly v. Derby Cycle Corp. (1997) 56 Cal.App.4th 618, 636 [65 Cal.Rptr.2d 532]1997)("We agree Wimberly is not

entitled to costs associated with the medical care issue, because he made no motion to compel a further response after Derby objected to the request for admission.").

Based on the phrasing of these particular RFAs, it is manifestly unjust for Singleton to be saddled with a $175,000 bill for legal fees. Such a result not only "appears to effect injustice," but actually does so. *See* Dorman, supra, 35 Cal.App.4th 1808, 1815 ("[O]ne of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice . . . .").

C. THE $175,000 AMOUNT OF LEGAL FEES AWARDED WAS AN ABUSE OF DISCRETION AND WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Assuming, *arguendo*, that cost of proof sanctions were appropriate, which Appellant disputes, the $175,000 amount of the cost of proof sanctions was an abuse of discretion and was not supported by substantial evidence, for several reasons.

First, Respondent did not need a trial to prove the requested fact that Zwerdling did not provide legal services after May 2006. Respondent obtained in Appellant's deposition the information that they sought to obtain through RFAs 1 and 2. In Singleton's deposition, Zwerdling asked: "Do you know of any services that Mr. Zwerdling provided to the clinic after May 10 of 2006?" [CT 212]; "What did he do, specifically?" [CT 212]; "I'm asking you about services he provided to the clinic, the Dorothy Mae Clinic, after May 2006; not services he might have provided to anybody else . . . ." [CT 212-213]; "Can you tell me whether you have any facts that Mr. Zwerdling provided legal services to the clinic after May of 2006?" [CT 213.]; and "[W]hat services did he provide to Dorothy Mae Medical Clinic for the benefit of Dorothy Mae Clinic after . . . May 10, 2006? [CT 214.] No substantive responses were forthcoming. [CT 212-216.] Singleton did not identify any services provided to the DMMC (as opposed

to the other entities that Zwerdling and Hannah had surreptitiously formed). Id. at p. 1808

The deposition testimony appears definitive on the issue. This deposition was taken on June 21, 2011, Id. at p. 1808 five weeks after Appellant had served his RFA responses on May 14, 2011 [CT 572] and over a year prior to the August 2012 trial. Respondents had the requisite evidence from the deposition and, along with a declaration from Zwerdling, could have used it to file a summary judgment motion based on the deposition testimony they elicited. Had they done so, a trial would have been unnecessary, and the massive legal fees claimed for proving this point at trial also would have been unnecessary. The award of $175,000 in costs sanctions was therefore an abuse of discretion.

Second, the amount awarded was an abuse of discretion. As an initial matter, although Zwerdling's motion for cost of proof sanctions sought recovery of $195,000 in legal fees for Singleton's failure to admit the truth of six (6) RFAs [CT 708-726; 559-707], the trial court awarded cost of proof sanctions of $175,000 as to only 2 of those 6 RFA's [CT 838] – and those two being essentially one RFA, as RFAs 1 and 2 asked the same question (Did Zwerdling provide legal services after May 2006?) as to Singleton and DMMC.

Further, Respondents took the position that they are entitled to legal fees for **every minute of attorney time after May 2011**, when Singleton denied RFAs 1 and 2 [*See* Motion for Cost of Proof Sanctions, at CT 714, line 21-28], rather than, as compensable under C.C.P. Code Civ. Proc., § 2033.420, the fees needed to prove the matter that was not admitted, namely, that Zwerdling did not provide legal services after May 2006. Respondent in his cost motion justified this approach by contending that "Since all the facts surrounding tolling and statute of limitations issues were completely intertwined, all fees incurred defending this case since May 2006 are connected with proving up this defense."

[CT 725.] Respondent further contended in his reply brief below that "[t]he specificity of identifying specific costs with specific tasks related to the identified Requests for Admissions is impossible to do for many reasons." [CT 796 (emphasis added).]

But it was not "impossible," and it was an abuse of discretion for the trial court to have issued this gargantuan award of $175,000 without putting Zwerdling to the reasonable test of tying the legal work his lawyers did to proving the matter denied in the RFA responses. Respondent's unduly broad – indeed, unlimited -- concept of allowable fees is contrary to the letter and the spirit of C.C.P. Code Civ. Proc., § 2033.420, which specifies liability only for "the reasonable expenses incurred in making that proof" of the matter denied. (Emphasis added.) It is improper and incorrect to compensate Respondent for every minute billed after May 2011 (when Singleton denied RFAs 1 and 2) or to assume or conclude that every minute billed after May 2011 was devoted to proving that Zwerdling did not provide legal services after May 2006.

Indeed, a review of Respondent's September 13, 2012 invoice for $99,847.20 [CT 591-601], as well as its prior invoices dating back to June 2011 [CT 602-663], indicates numerous fees billed not related to proving the matter that was not admitted, and includes numerous tasks (related to discovery, third party discovery, experts, case management, and many other issues) that would have been done regardless of how the RFAs were answered.

Third, the "calculation" of the cost of proof sanctions awarded is a complete mystery. Respondent had requested $195,000 in its cost of proof sanctions motion but then backtracked, stating in his counsel's reply declaration that "Of the $195,000 in attorneys' fees requested as cost of proof sanctions, I calculated that at least $170,000 was incurred as a direct consequence of plaintiffs' responses to the subject RFAs." [CT 800.] The trial court

subsequently denied the cost of proof motion as to 4 of the 6 RFAs that respondent had requested. [CT 834.] So the $170,000 figure (as ill-defined and overbroad as it was) was rendered suspect and unreliable. The trial court's cost of proof award does not answer any of these questions, because it fails to state the basis for awarding $175,000 – **more** than Respondent sought, and for only two of the six RFAs -- in sanctions. [CT 838.] It is difficult to imagine an award that inspires less confidence or that constitutes more of an abuse of discretion and a lack of substantial evidence.

Fourth, no one can credibly claim that had Appellant admitted RFAs 1 and 2 the case would have been over immediately or even soon. Indeed, Respondent conceded as much at oral argument in contending that "[i]f [Singleton] had admitted that there was no continuing relationship, that would have **at least limited the scope of the case**." [RT 679 (emphasis added).] *See also* RT 680 ("**Quite a substantial amount of** the costs [would have been unnecessary] and **we could have brought a summary motion [sic] or summary adjudication** back then.")(emphasis added.)

Assuming Appellant should have admitted the RFAs, then Respondent likely would have filed a summary judgment motion on the statute of limitations defense. Having decided to prepare a summary judgment motion, Respondent would have included all potentially feasible issues in that motion, not necessarily merely issue of the affirmative defense of statute of limitations. Like all summary judgment motions, that motion would have been labor intensive. It would have been thoroughly prepared by extremely able trial counsel for Respondent with commensurate market rates. It would have led to substantial legal fees. Yet, the trial court failed to account for the necessary offset to Respondent's legal fees from estimated fees needed for the summary judgment

motion. This is not hypothetical or speculation, but is the likely course the litigation would have taken had Appellant admitted RFAs 1 and 2.

Finally, there is no evidence in the record that the fees awarded for the cost of proof sanctions were actually charged to or paid by the client. The declarations filed in support thereof state only that the time was incurred and was billed. *See* Declaration of Sindee Smolowitz [CT at 561 ("Mr. Zwerdling incurred $59,045.00 in fees for my time" preparing for trial and trying the case, and "Mr. Zwerdling was billed for my time")]; Declaration of John Blumberg [CT at 700.] Zwerdling would only be entitled to recovery of sums charged not merely theoretically billed.5

In the event that the Court determines that the imposition of cost-of-proof sanctions was legally proper but that the amount of sanctions imposed was an abuse of discretion or not supported by substantial evidence, the Court should reverse the judgment and the order awarding cost-of-proof sanctions and remand the cause with directions to the Superior Court to hold further proceedings consistent with this Court's ruling. *See* Wimberly, supra, 56 Cal.App.4th 618, 6381997) ("Because Wimberly's request appears to include fees incurred before Derby denied his requests for admissions, however, which are disallowed (Garcia v. Hyster Co. (1994) 28 Cal.App.4th 724, 736-737 [34 Cal.Rptr.2d 283]r.2d 283]), we remand the matter to the trial court for its determination of an appropriate cost award."); Smith v. Circle P Ranch Co. (1978) 87 Cal.App.3d 267, 280 [150 Cal.Rptr. 828]. 828 ("The order imposing sanctions is reversed and the case is remanded with instructions for the trial court to further consider and determine those responses for which sanctions are mandatory and to further

5 The Blumberg Declaration does not specify the amount of fees he is seeking or the number of hours devoted to proving the admissions but merely references the firm's invoices.

permit the trial court to reconsider the evidence or take further evidence on the issue of the expenses and attorney's fees necessarily incurred by plaintiff Smith and reasonably related to proving matters wrongfully denied.").

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment and the order awarding cost-of-proof sanctions and remand the cause with directions to the Superior Court to enter judgment for Plaintiffs-Appellants.

Respectfully submitted,

Dated: December 24, 2013

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Attorney for Appellant

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 8,665 words as counted by the Microsoft Word, Version 2013 word-processing program used to generate the brief.

Dated: December 24, 2013

Thomas D. Mauriello

CERTIFICATE OF SERVICE

I declare: That I am, and was at the time of service of the papers herein referred to, over age eighteen, and not a party to the action; and I am employed in the County of Orange, California. My business address is 1181 Puerta Del Sol, Ste. 120, San Clemente, CA 92673. On December 24, 2013 I served **APPELLANTS' OPENING BRIEF** on the following parties:

SEE EXHIBIT A ATTACHED

1. **By United States mail.** I am readily familiar with the firm's practice of collection and processing with respect to the United States Mails. Under that practice it would be deposited with the United States Postal Service on that same day thereon with postage fully prepaid at San Clemente, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on that date following ordinary business practices.

2. **By Overnight mail (to those parties, if any, identified with a double asterisk ** above).** I am readily familiar with the firm's practice of collection and processing with respect to Federal Express overnight delivery. Under that practice it would be deposited with Federal Express Delivery on that same day thereon with postage fully prepaid at San Clemente, California in the ordinary course of business. The envelope was sealed and placed for collection and overnight mailing on that date following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 24, 2013 at San Clemente, California.

Thomas D. Mauriello

EXHIBIT A

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