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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROBERT A. BORISSOFF, as Executor, etc.,

Plaintiff and Appellant,

v.

TAYLOR & FAUST et al.,

Defendants and Respondents.

A093450 & A094395

(City & County of S.F. Super. Ct. No. 995058)

[**PUBLISHED PART**]

Robert A. Borissoff (Borissoff) is executor of the estate of decedent Veronica M. Smith. Following a will contest and related litigation during which the estate was in the hands of court-appointed special administrators, Borissoff brought this legal malpractice action against the law partnership of Taylor & Faust, partner Leland H. Faust (Faust), and Burton McGovern (McGovern) for claimed malpractice in tax matters while the administrators handled the estate.[1]

After a trial of designated issues on stipulated facts, the court gave judgment for all defendants, finding that the one-year statute of limitation (Code Civ. Proc., § 340.6, subd. (a); undesignated section references are to that code) had run before the May 1998 filing of this lawsuit and had not been tolled by lack of "actual injury" (*id*., subd. (a)(1)); such injury existed by September 1993 from either (1) loss of the right to amend a "Form 706" federal estate tax return to obtain a refund or (2) loss of the right to claim certain "pre-death" expenses as deductions. The court further found that Borissoff, a successor fiduciary to any fiduciary defendants had advised, lacked standing to sue for malpractice.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

Borissoff appeals the judgment (A093450), challenging the tolling and standing findings. He also claims the court exceeded the scope of stipulated issues by granting judgment based on the statute of limitation rather than ruling just on the tolling issue of actual injury. He claims this prejudicially foreclosed litigation of possible tolling due to legal disability (§ 340.6, subd. (a)(4)), and he requests judicial notice of certain probate proceedings to bolster his disability theory. He has separately appealed a post-judgment award of costs (A094395), challenging denial of his motion to tax costs. We ordered the appeals consolidated for decision.

We will find the issue of standing dispositive and thus not reach the tolling issues or find reason to grant Borissoff's related request for judicial notice.[2] We set out the stipulated facts and supporting documents, stressing the dispositive issue, and reserve discussion of the costs award for part II (*post*).

BACKGROUND

Decedent died in June 1989 and left conflicting wills, one from 1983 and another from 1987, and the latter designated Borissoff as executor. In September 1989, Mary O'Connor, decedent's grandniece, filed a probate action contesting the 1987 will, and the court appointed Clifton Ohman as special administrator. Ohman was removed four months later, and Springer, an attorney and former probate commissioner, was appointed to assume his duties, including marshalling the estate assets and preparing a federal estate tax return. Springer filed an application for extension of time to file the return, and in May 1990, O'Connor filed another action related to the will contest.

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[1] We refer to Faust and his firm collectively as the Faust defendants.

[2] McGovern notes in his respondent's brief that whether he ever acted as successor counsel to any administrator after the Faust defendants ceased representing special administrator Paul Springer was an issue not placed before the court by the parties' stipulation or addressed by the judgment. While, in theory, this lack of adjudication might have left open the door for some duty by McGovern toward Borissoff to support standing, we need not ponder this, for Borissoff's counsel clarified for the court below, at the hearing, that should the court "find there is no standing" as to the other defendants, "there is no standing to sue McGovern as a defendant also[.]"

The order appointing Springer provided that he could "be represented by legal counsel of his choice, in the event that [he] elect[ed] to be represented by counsel," and he did this in June 1990, engaging the Faust defendants "to assist him in filing the Estate's tax returns, to provide [him] with tax planning advice concerning the [estate], and to 'perform any other legal services which you [Springer] request."

Faust filed federal and state fiduciary income tax returns for the estate for fiscal year 1989-1990 and, in September 1990, filed the Internal Revenue Service (IRS) Form 706, and state, returns at issue in this malpractice action. The gross estate was valued at $1,831,000, and $344,897 was paid in state and federal estate taxes. Faust attached to the Form 706 a statement summarizing the will contest, stating that the parties had made no progress in resolving it, and saying the estate would "amend the Form 706, if necessary." A file memo by William McCullough of the firm noted that when the form was amended, real estate taxes and "other odds and ends" not originally deducted (some itemized with dollar amounts in the stipulated facts) should be reexamined regarding deductibility.

A timely amendment had to be filed by September 14, 1993, three years after the original filing, but this never occurred. By then, Faust had resigned as counsel, Springer had died, no extension of time (a federal Form 843) had been sought as to that particular filing, and the estate had undergone a period of months without an administrator. During the representation, Faust had filed later tax returns and extension requests, and Springer sought and obtained court approval of attorney fees for the work. Springer's petition of December 1990 to approve first report, settling first account, and for instructions, shows his retention of Faust as tax consultant and request for approval of payment of $6,470 for work detailed in a declaration by Faust, which notes that Faust had "acted as tax counsel to Paul E. Springer, Special Administrator of this Estate." Springer, himself an attorney, stated in the petition that he "waive[d] any employment of a[n] estate attorney." The court ultimately approved the attorney fees.

Springer found himself in trouble for having misused estate funds and turned to the Faust defendants for legal advice in that regard as well. In early November 1992, he wrote to Steven Kravitz of the firm to explain, despondent and worried, that he had

"'borrowed'" from the estate during a sale of one home and purchase of another and that the estate now had "an interest of $115,933" in the matter. An ensuing exchange of letters, and a meeting with Faust, were addressed to the problem and an unsuccessful effort to have Springer borrow replacement money from a financier client. Then, in early February 1993, Faust wrote to inform Springer that the firm had decided not to represent him any longer.

Springer died in late May 1993, and the estate files were eventually turned over to McGovern. In July, Borissoff moved to have a particular person appointed successor to Springer, but that person was not appointed. The time for filing the amended return or a time extension passed without action in September. Pacific Bank was appointed special administrator in February 1994, and the bank retained McGovern as counsel.

In September 1995, a judgment in the probate litigation resulted in the 1987 will being admitted to probate; the next month the court issued letters testamentary and appointed Borissoff executor.

In January 1997, Borissoff filed a petition to surcharge the Springer estate and Pacific Bank for Springer's embezzlement, documenting $178,000 as missing from the estate. He filed the instant malpractice action in May 1998, but was aware since April 1996 of the failure to timely file a Form 843 to extend the time.

As already noted, the court in this action held that Borissoff lacked standing to maintain the action against attorneys to the predecessor estate administrator, Springer. The tolling issue we do not reach is whether, as Borissoff contends, there was no actual injury until December 1997, when a judgment settling his second and final account and report awarded attorney fees for the underlying action.

DISCUSSION

I. *Standing*

The court's standing ruling rested primarily on *Goldberg v. Frye* (1990) 217 Cal.App.3d 1258 (*Goldberg*), which examined at length and rejected possible bases for granting beneficiaries under a will standing to sue an estate administrator's attorney for malpractice allegedly harming the estate. Borissoff does not directly challenge *Goldberg*

but tries to distinguish it as limited to the standing of beneficiaries, not successor estate fiduciaries (administrators or executors), and he urges that provisions of the Probate Code, as well as reasoning in *Moeller v. Superior Court* (1997) 16 Cal.4th 1124 (*Moeller*), support successor standing.

To frame the issue in a broader context: "An attorney generally will not be held liable to a third person not in privity of contract with him since he owes no duty to anyone other than his client. The question of whether an attorney may, under certain circumstances, owe a duty to some third party is essentially one of law and, as such, involves 'a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances. [Citation.]'" (*Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1329.) It is a policy matter involving the balancing of various factors. (*Id.* at pp. 1329-1330, citing *Lucas v. Hamm* (1961) 56 Cal.2d 583, 588, and *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.) "The imposition of a duty of professional care toward third persons generally has been limited to those situations wherein the nonclient was an intended beneficiary of the attorney's services to the client, or where the foreseeability of harm to the nonclient as a consequence of professional negligence was not outweighed by other policy considerations." (*Schick v. Lerner*, *supra*, at p. 1330.)

Goldberg, in finding lack of standing for an estate beneficiary, outlined many of the considerations pertinent here, for a successor representative of the estate, beginning with lack of privity. "[I]t is well established that the attorney for the administrator of an estate represents the administrator, and not the estate. [Citations.] A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence. [Citations.] By assuming a duty to the administrator of an estate, an attorney undertakes to perform services which may benefit legatees of the estate, but he has no contractual privity with the beneficiaries of the estate." (*Goldberg*, *supra*, 217 Cal.App.3d at p. 1267, italics added.) Also, while it was "conceivable" in *Goldberg* that the attorney might have "undertake[n] to perform legal services at the behest of, and as attorney for, a beneficiary of the estate," there was no supporting evidence of any "direct contacts" between attorney

and beneficiary (*ibid*.), and thus any grounds for a malpractice action depended on circumstances and principles "from which a duty may arise absent privity of contract, and not based upon an attorney-client relationship." (Id. at pp. 1267-1268.)

Goldberg's observation that an administrator's attorney represents the administrator, and not the estate, applies here as well. Also, Springer's petition seeking approval for fees paid to Faust specified that he "waive[d] any employment of a[n] estate attorney," which we take to mean that he was going to rely on his own expertise—as an attorney and a longtime probate commissioner—for matters of the estate other than taxes. Indeed: "There is no such office or position known to the law as 'Attorney of an Estate.' When an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as the attorney of the executor, and not of the estate, and for his services the executor is personally responsible." (*In re Ogier* (1894) 101 Cal. 381, 385; *Estate of Kruger* (1904) 143 Cal. 141, 145.) The estate itself is not a legal entity capable of being a client. (See Ross & Moore, Cal. Practice Guide: Probate (The Rutter Group 2001) ¶¶ 1:14 to 1:15.) We have no evidence here of direct contact between the Faust defendants and Borissoff, as successor representative, to support an attorney-client relationship between them having been created through an undertaking.

Goldberg continued: "The determination of duty rests upon the assessment of six considerations: '(1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.'" (*Goldberg*, *supra*, 217 Cal.App.3d at p. 1268.) *Goldberg* acknowledged case precedent finding a duty on the part of will-drafting attorneys toward third party legatees (*Biakanja v. Irving*, *supra*, 49 Cal.2d at p. 650; *Garcia v. Borelli* (1982) 129 Cal.App.3d 24, 32), but found it "impossible" in that case "to conclude that the parties to the attorney's contract . . . entered into same for the principal purpose of providing benefit to the legatees. We find nothing to indicate that this attorney's retention was in any respect different from the

typical retention of counsel by the fiduciary of a decedent's estate. As noted above, such retention constitutes the counselor the attorney for the fiduciary, and not the attorney for the estate, its beneficiaries, its creditors or others who may be interest therein." (*Ibid.*) "Innumerable instances in modern practice are encountered in which services performed by an attorney will benefit others besides his client. . . . The fact that third parties are thus benefited, or damaged, by the attorney's performance does not give rise to a duty by the attorney to such third parties, and hence cannot be the basis for a cause of action by the third parties for the attorney's negligence. In these cases the third parties are incidental beneficiaries, and '[a]n incidental benefit does not suffice to impose a duty upon the attorney.' [Citations.]" (*Id.* at pp. 1268-1269.)

Similarly here, nothing out of the ordinary appears from Springer's retention of the Faust defendants to help him carry out his settled and routine fiduciary duties to see that estate taxes were filed and paid. (See, e.g. *Estate of Harvey* (1964) 224 Cal.App.2d 555, 557-558.) This was certainly meant to preserve and thus benefit the estate, but it is the very essence of an administrator's duties to preserve the estate. Nothing unusual appears to indicate a *principal* purpose to benefit the estate as opposed to Springer, the one charged with that duty. Indeed, the stipulated facts show that Springer waived counsel for the estate and that a highly personalized attorney-client relationship evolved in which he sought legal advice from the Faust defendants about the delicate matter of personal risk for embezzling estate funds.

Goldberg also saw dire professional burdens should attorneys for administrators be liable to legatees. "Particularly in the case of services rendered for the fiduciary of a decedent's estate, we would apprehend great danger in finding stray duties in favor of beneficiaries. Typically in estate administration conflicting interests vie for recognition. The very purpose of the fiduciary is to serve the interests of the estate, not to promote the objectives of one group of legatees over the interests of conflicting claimants. [Citation.] The fiduciary's attorney, as his legal adviser, is faced with the same task of disposition of conflicts. It is of course the purpose and obligation of both the fiduciary and his attorney to serve the estate. In such capacity they are obligated to communicate with, and to

arbitrate conflicting claims among, those interested in the estate. While the fiduciary in the performance of this service may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is complete), the attorney by definition represents only one party: the fiduciary. It would be very dangerous to conclude that the attorney, through performance of his service to the administrator and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to evenhanded and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney. [Citation.]" (*Goldberg*, *supra*, 217 Cal.App.3d at p. 1269.)

The professional burdens would be potentially magnified were liability extended to successor fiduciaries, for each fiduciary necessarily guides an estate—already steeped in potential conflict among beneficiaries, creditors and others—at times when different parties and interests exist. Here, for example, three successive special administrators (Ohman, Springer and Pacific Bank) guided the estate through a long period of litigation before Borissoff assumed control as executor under one of two competing wills, having failed in an attempt to have a special administrator of his choosing appointed. The record is rife with *potential* conflict and crowned with Springer *actually* soliciting and receiving confidential advice from the Faust defendants about his exposure for embezzlement. This case classically illustrates why, for policy reasons, an attorney to one fiduciary should not be subject to malpractice liability claimed by a successor fiduciary.

Borissoff argues, however, that whatever case-law policy considerations might arise, the matter is controlled by statute. He reasons: (1) Springer, as the client, could have sued Faust; (2) as the "personal representative" of the estate, Springer could have done so under his authority to "[c]ommence and maintain actions . . . for the benefit of the estate" (Prob. Code, § 9820, subd. (a); *id.*, § 8544, subd. (a)(3) [power likewise exists for special administrator except as limited by appointing order]); (3) a "successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had" (*id.*, § 8524, subd.

(c)); therefore (4) Borissoff, as a successor, had power to sue Springer's counsel for malpractice. The Faust defendants do not address this reasoning, but it is easily refuted.

First, Borissoff cites no authority for his linchpin premise that a malpractice action brought by an administrator against his attorney is an action "for the benefit of the estate" (Prob. Code, § 9820, subd. (a)), and we find contrary authority in *Estate of Lagios* (1981) 118 Cal.App.3d 459 (*Lagios*), where our own Division One reviewed a probate court order charging an executor and his attorneys for losses to the estate. The surcharge against the attorneys was held in excess of jurisdiction, for these reasons: "The statutory jurisdiction of the probate court expressly includes the power to impose surcharges upon the executor or administrator for any losses in chargeable accounts. [Citations.] [¶] However, while the estate representative is empowered to employ an attorney to act in behalf of the estate (see [Prob. Code,] §§ 902, 910-911), no similar statutory authority exists to surcharge such attorney for estate losses due to negligence or misconduct for which the duly appointed representative is held exclusively accountable to the estate. [Citations.] Moreover, strong policy considerations require rejection of any claim of surcharge liability based upon a theory of an implied duty owed to the probate court. [Citation.]" (*Id.* at p. 463.) Obviously, if a surcharge against an administrator's attorney for legal malpractice is unauthorized, then such a suit is not one the administrator has power to bring in the probate court "for the benefit of the estate" (Prob. Code, § 9820, subd. (a)). Such an action, rather, is for the benefit of the administrator personally.[3]

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[3] Borissoff relies on an implied contrary assumption made in *Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419 (*Saks*), which rejected standing in a nonprobate action for beneficiaries of a testamentary trust to sue a trustee and two agents (a real estate broker and an attorney) on behalf of the trust, stating: "Under both the common law and the provisions of the Probate Code governing the administration of trusts, [plaintiffs'] only proper course was to proceed against the trustee in the probate department, seeking either to compel [the trustee] to proceed against [the agents], or to remove it and to *appoint a trustee ad litem to sue the third parties*." (*Id.* at p. 430, italics added.) However, the case authority cited for that statement had to do with the propriety of having trustees ad litem (*Getty v. Getty* (1988) 205 Cal.App.3d 134, 140-142; *Powers v. Ashton* (1975) 45 Cal.App.3d 783), not a probate action against an administrator's negligent "third party"

This result accords with the statutory scheme in ways implicit but not detailed in *Lagios*. Estate administrators have long had broad authority and duties. (*Hill v. Superior Court* (1940) 16 Cal.2d 527, 531.) Those duties are generally nondelegable, and thus while an administrator may employ attorneys or agents, he or she is bonded for the protection of the estate and remains responsible. (*Estate of Spirtos* (1973) 34 Cal.App.3d 479, 488; see also *United States v. Boyle* (1985) 469 U.S. 241, 249-250.) He or she cannot avoid surcharge by claiming reliance on an attorney's negligence, even though he or she may not have selected the attorney negligently. (*In re Estate of Guiol* (1972) 28 Cal.App.3d 818, 824-826.) The rare exception is where, without imprudence or fault by the administrator, the attorney commits misconduct like embezzlement. (*Estate of Barbikas* (1959) 171 Cal.App.2d 452, 458-459; see Ross & Moore, Cal. Practice Guide: Probate, *supra*, ¶ 16:200.) And of course: "A representative who is surcharged for acts performed in reliance on legal counsel or the conduct or neglect of probate counsel is not left without recourse. His or her remedy lies *against the attorney* in a suit for malpractice." (Ross & Moore, *supra*, ¶ 16:201.)

Because duties remain so firmly with the administrator, surcharging the administrator is an effective remedy, and one readily invoked through objections to accountings (*Estate of Fain* (1999) 75 Cal.App.4th 973, 991). The remedy passes to a successor representative, who "may bring an action on the bond of any former personal representative of the same estate, for the use and benefit of all interested persons" (Prob. Code, § 9822). "[T]he purpose of bonding the estate representative [is] to assure administrative integrity" (*Estate of Spirtos*, *supra*, 34 Cal.App.3d at p. 489), and if malpractice suits by an administrator or executor against a predecessor's attorney were contemplated, then "both the estate representative *and* the attorney would have to be bonded to give adequate safeguard to distributees" (*ibid.*).

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attorney, and a cited statute specially limited trustee liability for acts of agents (Prob. Code, § 16401). The case is not on point, and for decedent's estate purposes, we reject the assumption *Saks* made.

Here Borissoff petitioned, as successor representative, to surcharge Springer's estate for losses from Springer's embezzlement of estate funds. That was an opportunity to seek further surcharge for any mishandling of estate taxes, and leave recourse for legal malpractice up to the surcharged estate, but this was apparently not done. We hold, as the trial court did, that Borissoff had no standing to sue a predecessor administrator's attorneys in the present action.

Contrary to Borissoff's urging, no authority for successor standing exists in the Supreme Court's *Moeller* decision. The issue there was not successor standing to sue but whether a successor—a trustee—held the attorney-client privilege as to communications made by a predecessor trustee. A four-member majority held that the successor, not the predecessor, held the privilege, although only as to confidential communications made in a fiduciary capacity—i.e., on the subject of trust administration—as opposed to personal capacity. Since the privilege passed to the successor, the predecessor could not assert it and prevent discovery by the successor in ongoing trust administration. (*Moeller*, *supra*, 16 Cal.4th at pp. 1127, 1134-1135, 1139.) *Moeller*'s distinction between consultations for personal and fiduciary purposes suggests that Springer, by not retaining separate counsel for his embezzlement problem, risked loss of confidentiality should a successor fiduciary seek discovery, but it did not mean a successor would gain the right to sue his attorneys for malpractice. This limited reading of *Moeller* accords with the high court's own reading, when it later denied discovery to trust beneficiaries as opposed to successor trustees. "In *Moeller*, we did not suggest that anyone other than the current holder of the privilege might be entitled to inspect privileged communications. Nor did we create or recognize any exceptions to the privilege. Instead, without questioning that the communications at issue were privileged, we merely identified the current holder of the privilege." (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 209.)

Defendants cite out-of-state cases reaching the conclusion we reach. (E.g., *Trask v. Butler* (Wash. 1994) 872 P.2d 1080, 1083-1085 [using California test and relying in part on *Goldberg*, no duty found to run from estate personal representative's attorney to the estate or estate beneficiaries, as they were incidental beneficiaries, a direct cause of

action for breach of fiduciary duty was available against the personal representative, and an unresolvable conflict of interest unduly burdened the legal profession]; *Roberts v. Fearey* (Or.App. 1999) 986 P.2d 690, 693-696 & fn. 3 [same result under Oregon law, distinguishing *Moeller*].) Their policy analyses are instructive and, to the extent premised on similar statutory law, consistent with California law.

[**UNPUBLISHED PART**]

II. *Costs*

The Faust defendants and McGovern each submitted verified costs memoranda, and Borissoff filed a motion to tax (§ 1033.5). His supporting memorandum of points and authorities and counsel declaration are not included in our record, but defendants' opposition papers are. The motion to tax was denied for the most part, after a hearing, and the court by order of February 15, 2001, awarded Faust $8,517 and McGovern $2,316.15. Borissoff's appeal challenges, apparently, only some costs awarded to the Faust defendants.

Borissoff challenges the costs as unnecessary or unreasonably expensive; but the court found them necessary and reasonable under the statute, determinations we reverse only for abuse of discretion (*Brake v. Beech Aircraft Corp.* (1986) 184 Cal.App.3d 930, 939; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1298). Absence from the record of Borissoff's supporting papers is problematic for him. "[T]he mere filing of a motion to tax costs may be a 'proper objection' to an item, the necessity of which appears doubtful, or which does not appear to be proper on its face. [Citation.] However, '[i]f the items appear to be proper charges the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant [citation], and the burden of showing that an item is not properly chargeable or is unreasonable is upon the [objecting party].'" (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131; accord *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) Thus a court's first determination "is whether the statute expressly allows the particular item, and whether it appears proper on its face. [Citation.] If so, the burden is on the

objecting party to show them to be unnecessary or unreasonable." (*Nelson v. Anderson*, *supra*, at p. 131.)

The bulk of the challenge here is to discovery, including depositions of expert and nonexpert witnesses, which Borissoff complains were "on the merits of the case" (apparently meaning malpractice and damages) and had little or no bearing on the "standing and statute of limitations" issues ultimately found dispositive in the judgment. But such costs were allowed under the statute (§ 1033.5, subd. (a)(3)) so long as "reasonably necessary" (*id*., subd. (c)(2)) and "reasonable in amount" (*id*., subd. (c)(3)), and as far as our record reveals, Borissoff did not demonstrate that either condition was lacking. His complaint about irrelevance to ultimately dispositive issues fails because the need for a deposition "must be viewed from the pretrial vantage point" of a litigant who does not yet know whether to oppose an expert's opinions (*Brake v. Beech Aircraft Corp*., *supra*, 184 Cal.App.3d at p. 940) or forego a percipient witness's testimony. Borissoff's position below that the whole case could have been resolved by "competent demurrer or motion for summary adjudication" was disingenuous; he had successfully resisted both pretrial procedures before submitting his issues on stipulated facts. It is doubly disingenuous now on appeal, where he vigorously contends that neither ground for the judgment had merit. As for a disputed $418 incurred to videotape the first of two days of deposition testimony by McGovern, Borissoff's only argument below was that this must not have been necessary because defendants themselves, "[f]or whatever reasons," had decided not to videotape the second day. However, the *reasons* showing the initial videotaping unnecessary, were *Borissoff*'s to establish, and our record contains no such showing—just his speculation. Abuse of discretion is not shown.

Borissoff specially attacks the need to depose Frederick Sroka, who had given Borissoff tax advice about the estate. The Faust defendants maintain without evident dispute that Sroka had information pertinent to establishing when the alleged malpractice was discovered, but Borissoff calls the deposition a "useless act" in that Sroka refused to answer many questions, based on attorney-client privilege, and says defendants should have anticipated this. The problem for Borissoff, however, is that the record does not

contain his attorney's declaration, which evidently outlined the nature of the questioning and what answers the witness did give. Abuse of discretion is not shown.

Nor is it shown for allowing, as Borissoff puts it, "expensive messenger services rather than service by mail." Personal service is authorized by code (§ 1011), and while courier and messenger costs are not expressly listed, case law allows them in the court's discretion under section 1033.5, subdivision (c)(4) (*Ladas v. California State Auto. Assn.*, *supra*, 19 Cal.App.4th at p. 776). The total service costs listed in the costs memorandum was $818, with a cost breakdown for each of 12 witnesses/addresses. There is little in the record—beyond some discussion of service difficulties with one witness—to show why the mail was not satisfactory. What Borissoff does not show, however, is which of the 12 cost items involved service by messenger and, crucial to calculating any harm, how much more expensive this was. His motion papers are not in the record; he complained orally at the hearing only of charges in the "$63 to almost $200" range, which affected just six of the witnesses (only one with a cost exceeding $102); comments on the record show disagreement whether the cost for "run-of-the-mill service of process" was "50 bucks" or "35 bucks"; and the court in any event disallowed the entire $65 charge for one of the six witnesses. In short, Borissoff does not carry his burden of showing reversible error by an adequate record (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575), i.e., by showing which parts of the costs might be unreasonable and what part of the apparently disputed $728 should be stricken.

[**PUBLISHED PART**]

DISPOSITION

The judgment and the costs award are affirmed.

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Lambden, J.

We concur:

_____
Haerle, Acting P. J.

_____
Ruvolo, J.

Trial Court: Superior Court of the City and County of San Francisco

Trial Judge: Honorable Paul H. Alvarado

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