

Appellate Reports and Cases in Brief

U.S. v. Moser

Holds that the reasons relied on by the district judge to cut the prevailing party's fee award constituted an abuse of discretion

U.S. v. Moser

(9th Cir. 2015) __ F.3d __

Who needs to know about this case? Lawyers who litigate fee awards in federal court.

Why it's important: Holds that the reasons relied on by the district judge to cut the prevailing party's fee award constituted an abuse of discretion. Restates important rules that district judges often ignore in ruling on fee awards.

Synopsis: During a search of Moser's house in San Diego for marijuana cultivation, federal agents seized $28,000 in cash. The U.S. then instituted civil forfeiture proceedings on those funds. Moser retained Richard Barnett, an experienced asset-forfeiture specialist in San Diego, to oppose the government's case. Their fee agreement provided that Barnett would receive the greater of one-third of the recovery or any statutory fee award. Barnett successfully moved to suppress all the evidence relating to the seized currency based on clear constitutional violations during the warrantless search. Although the violations were not contested, the district court noted that the government "obstinately opposed" Moser's claim, and "aggressively litigated the case." The district court ultimately granted summary judgment for Moser and ordered the funds to be returned to him.

As the prevailing party, Moser moved for a fee award under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 28 U.S.C. § 2464(b)(1)(A). He sought an award of $50,775, based on an hourly rate for Barnett of $500, and 101.55 hours spent on the case. The fee motion was supported by several declarations from attorneys knowledgeable about the market for attorneys' fees in San Diego, including several who specialized in asset-forfeiture litigation. Barnett provided a detailed accounting of his hours, and eliminated 29.95 hours from his fee request for time he deemed "fruitless or unnecessary." The government's opposition contained no evidence, and was limited to its contention that the contingency agreement should cap the award.

The district judge (the Hon. Larry Burns) awarded only $14,000 in fees. Reversed. The Ninth Circuit found that he committed the following errors:

• He disregarded the declarations from the three asset-forfeiture specialists, two of whom were sole practitioners who charged $600 to $650 per hour. He erroneously stated that Moser's declarations did not accurately reflect the forfeiture rate because they discussed only general litigation.

• He failed to accord the unopposed $500 per hour rate a presumption of reasonableness.

• He awarded a rate of only $300. This was based on his own knowledge of the San Diego legal market; a nine-year old award to one of Moser's declarants; the fact that as a sole practitioner, Barnett could not delegate work to less-expensive junior lawyers; and the $125 per hour rate paid to panel attorneys under the Criminal Justice Act. This was error because courts must rely on the current legal market for comparable work, sole practitioner rates are already generally lower than "big firm rates" for the reason that the lawyer does all the work; and civil forfeiture cases are not criminal-defense cases.

• He cut Barnett's hours by 40 percent, but only identified 6.75 hours as objectionable.

• He found that Barnett had spent too much time on the case because he "gave the government's litigation work more respect than it deserved."

• He cut the lodestar amount because of the contingency fee. While a contingency fee may be relevant to determine the reasonable hourly rate, or the reasonable number of hours, it cannot be used to raise or lower the lodestar (in federal court).

Grace v. Mansourian

(2015) __ Cal.App.4th __ (4th Dist., Div.3.)

Who needs to know about this case? All attorneys who take cases to trial in the California Superior Courts.

Why it's important: Reverses trial court for refusing to award plaintiff $200,000 in cost-of-proof sanctions under Code of Civil Procedure section 2033.420, where defendant refused to admit in response to plaintiffs' RFAs that he had run the red light, and that his conduct was a substantial factor in causing both the traffic accident and the

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plaintiff's injuries. The court found that the defendant had no reasonable basis to deny the RFAs, *even though he subjectively believed* that he had not run the red light, and based his denial on that basis.

Synopsis: Mansourian collided with a car driven by the plaintiff at an intersection. Plaintiff and his wife prevailed at trial, winning a judgment in excess of $800,000. At the scene, Mansourian told the investigating police officer that he entered the intersection when the light was yellow and that he thought he could make it through before the light turned red. An eyewitness told the officer that he had run the red light. Plaintiff's accident-reconstruction expert concluded that Mansourian was at fault. The defense did not retain their own accident-reconstruction expert or depose the plaintiff's expert.

In discovery, plaintiffs served RFAs on Mansourian, asking him to admit he failed to stop at the red light, that he was negligent, that his failure was the actual and legal cause of the collision, and of plaintiff's damages. He was also asked to admit that plaintiff was injured in the accident, and needed medical treatment as a result, and that the cost of plaintiff's medical treatment was reasonable. Defendant denied all the RFAs.

At trial, in opening statement Mansourian's lawyer acknowledged that an eyewitness said that the defendant ran the light, but that the defendant believes, "in his own mind," that the light was yellow. "If that's a mistake on his part, then that's a mistake on his part, but that's what he believes. He's not going to testify differently."

After trial, the plaintiffs moved for cost-of-proof sanctions, which the trial court denied. The Court of Appeal reversed and remanded for the trial court to determine the appropriate cost-of-proof sanctions concerning proof of liability, injury to the plaintiff's ankle, the ankle surgery and associated cost of treatment.

A trial court is required to award cost-of-proof sanctions under section 2033.420 *unless* it determines that the party who denied the RFA had a reasonable ground to believe he or she would prevail on the matter referenced in the RFA. Here, Mansourian's belief that he had not run the red light, no matter how firmly held, was not reasonable in light of the other evidence in the case. "The question is not whether defendant reasonably believed he did not run the red light but whether he reasonably believed that he would prevail on that issue at trial. In light of the substantial evidence defendant ran the red light, it was not reasonable for him to believe that he would." In denying an RFA, a party must have a reasonable ground to believe it will prevail. "That means more than a hope or a roll of the dice." (*Ed. Note*: a request for depublication of this case is pending in the Supreme Court.)

Short(er) takes

Fed. Arbitration Act preemption; PAGA claims: *Sakkab v. Luxottica Retail N. Am.* (9th Cir. 2015) __ F.3d __: In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the California Supreme Court held that waivers of claims under the Private Attorney Generals Act (PAGA) were unenforceable under California law. The court had to consider whether the rule announced in *Iskanian* is preempted by the Federal Arbitration Act (FAA), as construed by the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740. Held: because the *Iskanian* rule does not stand as an obstacle to the FAA's objectives, it is not preempted.

Under the FAA, an agreement to arbitrate can be invalidated by a generally applicable contract defense, but not by defenses that apply only to arbitration agreements. Because California bars the waiver of PAGA claims in both arbitration and non-arbitration agreements, it is aligned with the FAA's saving clause. The *Iskanian* rule prevents the waiver of PAGA claims in pre-dispute agreements. This is a prohibition on parties opting out of a key feature of the PAGA enforcement provisions, not of arbitration.

Unfair Competition Law (UCL), Bus. & Prof. Code § 17200, restitution; costs: *In re Tobacco Cases II* (2015) __ Cal.App.4th __ (4th Dist., Div.1).

Plaintiffs filed a UCL class action against tobacco companies alleging that they falsely advertised light cigarettes as being less harmful than regular cigarettes. At trial against the lone remaining defendant, Philip Morris, the trial court found that Philip Morris's advertising was deceptive under the UCL. But the court denied the plaintiffs' request for restitution based on the total amount that the plaintiff class paid for the cigarettes. Relying on a prior UCL restitution case, *In re Vioxx Class of Cases*, the court held that the measure of restitution was the difference between what the plaintiffs paid for the deceptively advertised product and what they received. Since the evidence showed that many plaintiffs continued to purchase light cigarettes even after they were aware that they had no health benefits, it was not appropriate to award the class the entire price of the cigarettes, because that would suggest that they received nothing of value for their money. The court rejected the plaintiffs' claims that the measure of restitution could be based solely on the need to deter a defendant's wrongful conduct. Since the plaintiffs failed to present evidence to support a proper measure of restitution, the trial court properly declined to award any amount in restitution. Philip Morris was therefore the prevailing party under section 1032 of the Code of Civil Procedure, and was entitled to a cost award in excess of $700,000 against the named plaintiff.

Admissibility of plaintiff's sexual history; emotional distress damages: *S.M. v. Los Angeles Unified School District* (2015) __ Cal.App.4th __ (2d Dist., Div.5.)

Thirteen-year-old SM was a student at an LA Unified middle school. Her math teacher began to text and phone her, and their relationship ultimately

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became sexual. The teacher's acts were discovered, and he pled guilty to committing lewd acts upon a minor, serving prison time. SM sued the district for negligent supervision. Her claim included a claim for emotional distress. SM moved to exclude evidence of her sexual history at trial, but her motion was denied. The trial court ruled that the evidence was relevant to her emotional distress damages. At trial, the district prevailed on a defense verdict. Reversed.

Section 2017.220, subd. (a) requires a party seeking discovery of another party's sexual history to establish specific facts that demonstrate good cause for the discovery, and Evidence Code section 1106, subd. (a) bars admission of specific instances of the plaintiff's sexual conduct to prove that the plaintiff was not injured, unless the injury is loss of consortium. Absent extraordinary circumstances, inquiry into the plaintiff's sexual history should not be allowed. The fact that the plaintiff was making a claim for emotional-distress damages did not qualify as the type of "extraordinary circumstance" that would make this evidence admissible.


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