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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SHAWN AGNONE, Plaintiff and Respondent, v. FRANK CHARLES AGNONE II, Defendant; KENNETH MADICK, Appellant.	B321252 Los Angeles County Super. Ct. No. BD659645

APPEAL from an order of the Superior Court of Los Angeles County, Steve Cochran, Judge. Reversed.

Law Office of Jeff Katofsky, Jeff Katofsky and Michael Leff for Appellant.

Carroll, Kelly, Trotter & Franzen and David P. Pruett for Plaintiff and Respondent.

Shawn Agnone subpoenaed third-party witness Kenneth Madick in connection with a marital dissolution action against her former husband Frank Charles Agnone II.[1] After Madick's attorney refused to turn on his webcam or otherwise make himself visible to Shawn's counsel during Madick's deposition, Shawn filed a motion to compel compliance with the subpoena and accompanying request for sanctions under provisions of the Civil Discovery Act (Discovery Act; Code Civ. Proc., § 2016.010 et seq.) and other statutes governing third-party subpoenas.[2] Madick opposed the motion; however, before Shawn filed her reply brief, she and Frank settled the dissolution action, rendering the motion to compel moot. Shawn withdrew her motion, but the trial court nonetheless granted the request for sanctions in part, ordering Madick to pay Shawn $9,981. Madick contends the court lacked authority to award sanctions under the governing statutes after Shawn withdrew her motion. We agree and reverse.

BACKGROUND

At his deposition, Frank disclosed that he had placed thousands of dollars of sports bets with Madick during his marriage to Shawn, mainly in the last five years. Shawn subsequently served Madick with a deposition subpoena for personal appearance and the production of documents related to Frank's sports bets. The attached notice specified

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[1] For clarity we refer to Shawn and Frank by their first names.

[2] Statutory references are to the Code of Civil Procedure, unless otherwise designated.

that the deposition would be conducted "by way of a Virtual Conference Zoom link" and that Madick "and his counsel shall participate using their own computer equipped with a webcam, and with a stable land-line/wired ethernet connection to the Internet." Madick acknowledged receipt of the subpoena without objection.

Madick appeared for the deposition via webcam. His attorney, Jeffrey Katofsky, stated his appearance and confirmed he was in the same room as Madick, but refused to turn on his webcam. Shawn's attorney objected, explaining he could not tell if Katofsky was "making any visual signs" or otherwise coaching Madick "to answer one way or another." He then asked Katofsky either to turn on his webcam or to sit next to Madick where they could be seen on the same camera. Katofsky refused through repeated attempts to meet and confer, ultimately stating: "Your notice requires my computer to be equipped with a webcam. My computer is equipped with a webcam; so we complied with your notice." "I am not going to turn on my webcam because I don't need to have my webcam on." Shawn's attorney terminated the deposition.

Shawn moved to compel Madick's appearance in accordance with the terms of the deposition notice and requested sanctions against Madick and Katofsky, jointly and severally, in the sum of $12,904 under sections 1987.1, 1987.2, 2023.010, 2023.030, 2025.450, and 2025.480.

Madick opposed the motion and made his own request for sanctions. He argued Katofsky was not legally required to appear on webcam during his client's remote deposition and, thus, Shawn had brought the motion to compel in bad faith and without substantial justification.

Shawn filed a reply memorandum, notifying the court that she and Frank had settled their dissolution action. She withdrew her motion to compel Madick's deposition, but argued sanctions were nonetheless warranted for Madick's and Katofsky's defiance of the subpoena.

The trial court granted the sanctions request in part, ordering Madick alone to pay sanctions totaling $9,981. This timely appeal followed.

DISCUSSION

Madick contends the trial court had no discretion to award sanctions under the governing statutes because Shawn withdrew her motion to compel. While we generally review an order imposing discovery sanctions under the abuse of discretion standard, Madick's argument "involves the interpretation of a statute, a question of law that we review de novo." (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332; *Roe v. Halbig* (2018) 29 Cal.App.5th 286, 298 (*Halbig*); *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422 (*New Albertsons*); see also *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071 ["where the propriety of a discovery sanction turns on statutory interpretation, we review the issue de novo, as a question of law"].)[3]

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[3] Shawn emphasizes that Madick did not designate a reporter's transcript for inclusion in the appellate record. While this would have implications for our standard of review if factual determinations or a credibility finding were in issue (such as if we were reviewing the sufficiency of the evidence to support the court's implicit finding that Madick's counsel acted without substantial justification), the oral proceedings below have no bearing on the legal question presented by Madick's statutory

When we interpret a statute, our task " 'is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' " (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165–166.)

Shawn brought her motion to compel compliance with the deposition subpoena and accompanying request for sanctions under sections 2023.010, 2023.030, 2025.450, and 2025.480 of the Discovery Act and sections 1987.1 and 1987.2, which separately govern third-party subpoenas.[4] (See § 2020.030 [except as

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construction argument. (See *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699 [no reporter's transcript required where "[n]one of the parties relies upon the oral argument before the trial court, and [reviewing court] decide[s] a purely legal issue based on the filings before the trial court"]; see also Cal. Rules of Court, rules 8.120(b) & 8.130(a)(4).)

[4] Shawn contends section 128, which generally describes the court's powers to command obedience to its orders, "includes the power to sanction attorneys for taking unreasonable positions." The argument has no merit. Shawn did not cite section 128 in her request for sanctions, the trial court did not

modified by Discovery Act, provisions "commencing with Section 1985 . . . apply to a deposition subpoena"].) We begin with the Discovery Act.

1. *Sanctions Were Not Authorized under the Discovery Act*

"The Discovery Act provides a self-executing process for litigants to obtain broad discovery with a minimum of judicial intervention." (*City of Los Angeles v. PricewaterhouseCoopers, LLC* (2022) 84 Cal.App.5th 466, 498 (*City of Los Angeles*), review granted Jan. 25, 2023, S277211.) To accomplish this arrangement, "the Discovery Act sets forth six methods of civil discovery in different chapters: depositions, interrogatories, inspections, medical examinations, requests for admission, and exchanges of expert witness information." (*Ibid*., citing § 2019.010.) "Each discovery method authorizes the court to impose specific types of sanctions under specific circumstances." (*City of Los Angeles,* at p. 498.) These "sanctions are intended to remedy discovery abuse, not to punish the offending party." (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 (*Williams*).) Accordingly, they "should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the

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sanction Madick's attorney, and, in any event, it is settled that "section 128 does not provide a court with the power to impose [monetary] sanctions." (*Hernandez v. Vitamin Shoppe Industries Inc.* (2009) 174 Cal.App.4th 1441, 1452, citing *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1711–1712, 1716–1717; *Clark v. Optical Coating Laboratory, Inc*. (2008) 165 Cal.App.4th 150, 164.)

requested discovery, and should be proportionate to the offending party's misconduct." (*Ibid.*)

Section 2023.010 describes general categories of discovery misconduct but, "[u]nlike provisions of the Discovery Act which expressly direct the court to impose specific types of sanctions under specific circumstances, there is no language in section 2023.010 stating that the court may impose a sanction under chapter 7 or stating the type of sanction to impose." (*City of Los Angeles, supra,* 84 Cal.App.5th at p. 500.) "Instead, each of the categories of misconduct listed in section 2023.010 are managed through the procedures set forth in the chapters governing the discovery methods, as well as the other provisions of the Discovery Act that regulate and sanction misconduct." (*Id.* at pp. 500–501 [cataloguing examples].)

"Section 2023.030 describes the types of sanctions available under the Discovery Act when another provision authorizes a particular sanction." (*City of Los Angeles, supra,* 84 Cal.App.5th at p. 502.) With respect to monetary sanctions, the statute provides: "To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, . . . [¶] . . . may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. . . . If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other

circumstances make the imposition of the sanction unjust." (§ 2023.030, subd. (a).)

Case law has long assumed a trial court has discretion to impose monetary sanctions under section 2023.030, without regard to the procedural requirements of other sections of the Discovery Act, when the sanctioned party has engaged in discovery abuses within the general categories described in section 2023.010. (See *City of Los Angeles, supra,* 84 Cal.App.5th at pp. 527–528, 530–535 (conc. & dis. opn. of Grimes, J.) [cataloguing cases].) Our colleagues in Division Five recently scrutinized this assumption and rejected it, concluding the "plain language of the statutory scheme does not provide for monetary sanctions to be imposed based solely on the definitional provisions of section 2023.010 or 2023.030, whether construed separately or together." (*City of Los Angeles,* at p. 475.) In reaching this conclusion, the *City of Los Angeles* majority recognized that " '[s]ection 2023.030 authorizes a court to impose the specified types of sanctions [only] "*[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title*." ' " (*Id*. at p. 503, emphasis added.) This, the majority observed, " 'means that the statutes governing the particular discovery methods limit the permissible sanctions to those sanctions provided under the applicable governing statutes.' " (*Ibid.*; *New Albertsons, supra,* 168 Cal.App.4th at pp. 1422–1423.) Because section 2023.010 merely "describes general categories of discovery misconduct, but does not contain any language that authorizes the court to impose sanctions for the conduct listed," the majority held it could not serve as the governing statute for purposes of imposing monetary sanctions as described in section 2023.030. (*City of Los Angeles,*

at pp. 500, 504.) We agree with the *City of Los Angeles* majority's reasoning and likewise conclude these provisions are not independent statutory authority to impose monetary sanctions. (See *id.* at pp. 509–510 [rejecting *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548 to the extent it suggests "courts may impose monetary sanctions [for coaching a witness] based solely on section 2023.030, alone or in conjunction with section 2023.010"].)[5]

Shawn argues the sanctions award in this case is consistent with *City of Los Angeles* because sections 2025.450 and 2025.480 authorize monetary sanctions for the discovery misconduct that Madick and his counsel committed. The argument misunderstands the *City of Los Angeles* holding. As discussed, the *City of Los Angeles* majority recognized "the categories of misconduct listed in section 2023.010 are managed through *the procedures* set forth in the chapters governing the discovery methods" and those procedures " 'limit the permissible sanctions' " under the governing statutes. (*City of Los Angeles, supra,* 84 Cal.App.5th at pp. 500, 503, italics added.) The record establishes the procedural requirements of sections 2025.450 and 2025.480 were not met here. Shawn does not attempt to argue otherwise.

Under section 2025.450, subdivision (a), "[i]f, after service of a deposition notice, *a party to the action* or an officer, director, managing agent, or employee *of a party*, or a person designated by an organization *that is a party* . . . without having served a

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[5] Shawn relies on the *Tucker* opinion but does not challenge the *City of Los Angeles* majority's reasoning or holding rejecting it.

valid objection . . . , fails to appear for examination, or to proceed with it, . . . the party giving the notice may move for an order compelling the deponent's attendance and testimony." (§ 2025.450, subd. (a), italics added.) Subdivision (g)(1) mandates an award of sanctions in favor of the party who noticed the deposition and against the deponent or the party with whom the deponent is affiliated "[i]f a motion under subdivision (a) is *granted* . . . , unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (§ 2025.450, subd. (g)(1), italics added.) Because Madick was not "a party to the action" or otherwise affiliated with a party as described in subdivision (a), and because Shawn's motion was not "granted" as specified in subdivision (g)(1), sanctions were not available under section 2025.450.

Under section 2025.480, subdivision (a), "[i]f a deponent fails to answer any question or to produce any document . . . or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production." Subdivision (j) requires the court to "impose a monetary sanction . . . against any party, person, or attorney who *unsuccessfully makes or opposes a motion to compel* an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (§ 2025.480, subd. (j), italics added.) The italicized text unambiguously predicates the availability of sanctions on a judicial ruling against the sanctioned party on the underlying motion to compel. (Cf. *London v. Dri-Honing Corp.* (2004) 117

Cal.App.4th 999, 1009 [sanctioned party could not show sanctions were unauthorized due to "mixed result on the motion" where "trial court explicitly found that [sanctioned party] unsuccessfully opposed [moving party's] motion to compel further response"].)

Madick did not "unsuccessfully" oppose Shawn's motion to compel. (§ 2025.480, subd. (j).) After settling her marital dissolution case, Shawn acknowledged she no longer needed Madick's deposition testimony and withdrew her motion. Because the trial court did not enter an order against Madick compelling him to testify, it had no authority to impose sanctions under section 2025.480, subdivision (j). (Cf. *Williams, supra,* 167 Cal.App.4th at p. 1223 [discovery sanctions "should be tailored to serve [their] remedial purpose [and] should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery"].)

2. *Sanctions Were Not Authorized Under Section 1987.2*

Subject to an exception not applicable here, section 1987.2, subdivision (a) provides that, "in making an order pursuant to motion made . . . under Section 1987.1, the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive." Section 1987.1, subdivision (a) specifies the orders a court can make when presented with a motion under the statute. It provides, in relevant part: "If a subpoena requires the attendance of a witness . . . at the taking of a deposition, the court, upon motion reasonably made by [a party or the witness] . . . may make an order quashing the subpoena entirely,

modifying it, or directing compliance with it upon those terms or conditions as the court shall declare . . . . In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." (§ 1987.1, subd. (a).)

Madick argues Shawn's withdrawal of her motion to compel precluded the trial court from "making an order pursuant to motion made . . . under Section 1987.1" (§ 1987.2, subd. (a)) and, hence, divested the court of authority to award sanctions under section 1987.2. We are compelled to agree.

The plain language of section 1987.2, subdivision (a) unambiguously conditions the award of sanctions on a party making a motion under section 1987.1 and the court "making an order pursuant to" that motion. (§ 1987.2, subd. (a); see also Black's Law Dict. (11th ed. 2019) ["pursuant to" defined to mean "[a]s authorized by; under"].) As Madick correctly emphasizes, when a party makes a motion to compel compliance with a subpoena, section 1987.1 specifies only two orders that may be made pursuant to the motion: the court may either make an order "directing compliance with [the subpoena] upon those terms or conditions as the court shall declare" or it may deny the requested relief and make an order "to protect the person [subject to the subpoena] from unreasonable or oppressive demands." (§ 1987.1, subd. (a).) Due to Shawn's withdrawal of her motion to compel, the trial court entered neither order. It therefore had no discretion to award sanctions under the plain language of section 1987.2, subdivision (a).

We acknowledge the reviewing court in *Evilsizor v. Sweeney* (2014) 230 Cal.App.4th 1304 (*Evilsizor*) reached a

conclusion at odds with this statutory construction. The appeal in that case arose from a divorce proceeding in which the husband had issued a subpoena for bank records from his wife's accounts. Those records, however, included financial information about the wife's father, who moved to quash the subpoena. (*Id.* at p. 1306.) The husband agreed to amend the subpoena to exclude information about the father's activities, but the father delayed in withdrawing the motion to quash until after the husband filed his opposition. (*Id.* at pp. 1306, 1308.) Although the trial court recognized the "motion to quash was withdrawn and deemed moot," it nonetheless ordered the father to pay half of the husband's requested attorney fees under section 1987.2, subdivision (a). (*Evilsizor*, at p. 1309.)

The *Evilsizor* court affirmed the award without considering the statutory language requiring "an order pursuant to motion made . . . under Section 1987.1." (§ 1987.2, subd. (a).) Instead, the reviewing court focused on whether the phrase "motion was made . . . in bad faith or without substantial justification" (*ibid.*) could be construed to encompass "pursuing a pending motion to quash after it becomes clear that it is unjustified." (*Evilsizor, supra,* 230 Cal.App.4th at p. 1311.) The *Evilsizor* court concluded the statute could be "interpreted broadly" to include such conduct where the party that had incurred costs to oppose the motion effectively prevailed in forcing the moving party to withdraw it. (*Ibid.*; cf. *Halbig*, *supra*, 29 Cal.App.5th at pp. 304–305 [" '[i]f a motion [to quash a subpoena] is filed under Section 1987.1,' 'the moving party' can 'prevail[ ]' under section 1987.2, subdivision (c) even if the respondent has dismissed the subpoena prior to judicial determination of the motion to quash"].) Because it is " 'axiomatic that cases are not authority for propositions

not considered,' " *Evilsizor* gives us no reason to ignore what is plainly required by the statutory text. (*Howard Jarvis Taxpayers Assn. v. Newsom* (2019) 39 Cal.App.5th 158, 169.)

For her part, Shawn does not address the statutory language requiring the court to make an order under section 1987.1 as a condition to awarding sanctions under section 1987.2, subdivision (a). Instead, she selectively quotes a practice guide in flatly declaring "the mootness of the discovery issue 'does not eliminate the right to sanctions.' " (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) ¶ 8:904.) Shawn appears to have taken the partial quotation from a chapter discussing written interrogatories, in which the practice guide's authors address "the problem" of dilatory tactics in relation to a motion to compel, while warning that "some parties do not oppose the motion to compel but instead file supplemental responses just before the hearing." (*Ibid.*) As the authors explain, "[w]hile doing so may moot the motion, it does not eliminate the right to sanctions." (*Ibid.*) This observation is consistent with rule 3.1348 of the California Rules of Court; however, it has no application to sanctions that are not authorized *under the Discovery Act*, like those provided for in section 1987.2. (See Cal. Rules of Court, rule 3.1348(a) ["The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed."]; *First City Properties, Inc. v. MacAdam* (1996) 49 Cal.App.4th 507, 515 [sanctions under section 1987.2 do not fall "within the same purview as issuance of discovery sanctions"].)

Because the trial court did not "mak[e] an order pursuant to [a] motion made . . . under Section 1987.1" (§ 1987.2, subd. (a)), it had no discretion to award sanctions under section 1987.2, subdivision (a).

DISPOSITION

The order imposing monetary sanctions against Madick is reversed. Madick is entitled to his costs on appeal.

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EGERTON, J.

We concur:

EDMON, P. J.

ADAMS, J.