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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JUANITA DENISE SCHMITTLE, Plaintiff and Respondent, v. BALDWIN PARK UNIFIED SCHOOL DISTRICT, Defendant and Appellant.	B282431 (Los Angeles County Super. Ct. No. BC595422)

APPEAL from an order of the Superior Court of Los Angeles County. Teresa A. Beaudet, Judge. Affirmed.

McCune & Harber, Stephen M. Harber and Dominic A. Quiller for Defendant and Appellant.

Gusdorff Law P.C., Janet R. Gusdorff; The Aarons Law Firm, Martin I. Aarons and Shannon Ward for Plaintiff and Respondent.

Defendant Baldwin Park Unified School District (the District) appeals an order imposing $9,835 in discovery sanctions after the trial court granted plaintiff Juanita Schmittle's motion to compel the deposition of the District's Director of Risk Management and Benefits Sergio Cazorla. In a reasoned order, the trial court found sanctions warranted because the District lacked "substantial justification" for refusing to produce Cazorla for the deposition. (Code Civ. Proc., § 2025.450, subd. (g)(1).)[1] We find no abuse of discretion and affirm the order.

Schmittle has also filed a motion to impose sanctions against the District for pursuing a frivolous appeal. We find this is one of the rare circumstances in which sanctions are warranted. We therefore grant the motion and award a sanction of $31,947.50 for Schmittle's attorney's fees on appeal.

BACKGROUND

In this employment case, Schmittle's underlying complaint alleged several disability-related claims against the District, which are not directly at issue here. On February 1, 2017, Schmittle noticed a deposition for Cazorla, the District's Director of Risk Management and Benefits. Two days later, the District informed Schmittle it would object to Cazorla's deposition for three reasons: (1) a court order was required because Cazorla was an "apex employee" pursuant to *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282 (*Liberty Mutual*); (2) he was a board member; and (3) any information he had was privileged.

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[1] All undesignated citations are to the Code of Civil Procedure unless otherwise indicated.

Schmittle responded in a letter pointing out Cazorla was not an "apex employee" as the term was used in *Liberty Mutual*, he was not a board member or other high-ranking employee, and he had non-privileged information within his personal knowledge regarding issues in the case. She also informed the District it would need to seek a protective order if it was not going to produce Cazorla for deposition.

The District did not directly respond to this letter or seek a protective order. Instead, it sent a formal written objection to Cazorla's deposition that essentially duplicated the substance of its letter to Schmittle.

Schmittle contacted the District several times in attempts to meet and confer. The District confirmed it would not produce Cazorla for his scheduled deposition but never responded in substance to Schmittle's reasons why its objections were invalid. Cazorla did not appear on the day set for his deposition.

Schmittle moved to compel Cazorla's deposition and for monetary sanctions against the District. Her counsel submitted a declaration pointing out Cazorla was not a high level executive, superintendent, assistant superintendent, or board member of the District under *Liberty Mutual*. He also noted the District did not object to the depositions of the District's superintendent and Director of Human Resources. And he explained that Cazorla was very involved in the case—he had sat in on numerous depositions and court hearings, and the District's counsel had indicated Cazorla was "very hands on," intending to attend all depositions.

The motion also listed five categories of relevant information within Cazorla's personal knowledge. As support, Schmittle submitted the District's discovery responses indicating

it would produce emails sent or received by Cazorla pertaining to Schmittle. Schmittle's counsel noted the District had informed him that Cazorla had actually located responsive emails and documents and were being held for a future motion to compel. Schmittle also submitted deposition testimony suggesting Cazorla was responsible for interacting with employees about disability accommodations and may have known Schmittle had contacted the District.

Schmittle sought a sanction of $8,830, comprised of $80 in costs and $8,750 in attorney's fees expended on the motion and anticipated reply (17.5 hours at $500 per hour).

The District filed a late opposition. It did not respond to any of Schmittle's evidence. Instead, it primarily argued Schmittle would likely harass Cazorla at his deposition. As support, the District submitted (1) a protective order issued by a worker's compensation judge directing that all communications between Schmittle and the District be made only through counsel; and (2) a single-count misdemeanor complaint against Schmittle for allegedly violating the protective order. The District further claimed Schmittle was involved in a criminal matter for insurance fraud, and she had claimed Cazorla had "spearheaded" the criminal proceedings.

The District reiterated its argument that Cazorla's position as Director made him a "high ranking governmental official" not required to attend a deposition pursuant to *Liberty Mutual*, and it argued Cazorla had no relevant non-privileged information because he started working for the district two years after Schmittle's last day of work. It provided no evidence or declarations to support these claims. Finally, the District

claimed sanctions were not warranted, and if they were, the amount requested was unjustified.

In reply, Schmittle pointed out the District's failure to submit evidence to support its arguments. Her counsel submitted a second declaration explaining that the District had actually produced emails sent or received by Cazorla, undermining the District's position that he had no nonprivileged knowledge of the case. Schmittle's counsel also submitted a police report related to the misdemeanor complaint against Schmittle. In it, the investigating officer noted Cazorla had said he was a witness in Schmittle's "two worker's compensation cases being litigated as well as a lawsuit against [the District] for disability discrimination."

Schmittle's counsel increased the requested sanctions to $9,835 based on additional work done responding to the District's opposition.

The trial court held a hearing and issued a detailed order granting the motion and imposing sanctions. The court found the District provided "no facts or evidence whatsoever to demonstrate Mr. Cazorla is an apex employee" under *Liberty Mutual*; it credited Schmittle's evidence that Cazorla likely had personal knowledge of relevant facts; and it found the District's privilege claims premature.

The court imposed $9,835 in sanctions jointly and severally on the District and its counsel, explaining that the District "has presented no basis to support a finding that Mr. Cazorla is an apex employee that is immune from deposition. Moreover, [the District's] privilege-based objections are premature and do not constitute substantial justification for [the District's] outright refusal to produce Mr. Cazorla for deposition." Citing the

Schmittle's counsel's reply declaration, it found the amount of sanctions reasonable.

The District timely appealed the order.[2]

DISCUSSION

1. Sanctions Order

Once a motion to compel the deposition of a party witness is granted, "the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of the party who noticed the deposition and against the deponent or the party with whom the deponent is affiliated, 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).) " 'Substantial justification' " means a position that is "clearly reasonable because it is well grounded in both law and fact." (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1434.) The burden is on the party opposing the motion to compel to show it acted with substantial justification. (*Id.* at p. 1435.)

The trial court has broad discretion in imposing sanctions, and we will not disturb the court's determination absent an abuse of discretion. (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604.) We defer to the court's credibility decisions and draw all reasonable inferences in support of the court's ruling. (*Ibid.*)

The court acted well within its discretion in finding no substantial justification for the District to oppose Cazorla's deposition. On appeal, the District primarily contends it was

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[2] An order imposing monetary sanctions over $5,000 is appealable. (§ 904.1, subd. (12).)

justified in withholding Cazorla for a deposition because Schmittle was going to harass him. Its argument is based on four "exhibits" attached to its opening brief on appeal and a fifth exhibit attached to its reply brief. Three of these exhibits were not presented to the trial court: (1) excerpts from Cazorla's deposition that was taken after the motion to compel was granted; (2) a trial court order in this case issued after the motion to compel was granted; and (3) a motion before the Workers' Compensation Appeals Board for a protective order. Because they were not part of the trial record, we will not consider them or the District's contentions based on them. (*Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 882.) Additionally, for the two exhibits that did not exist at the time the motion to compel was granted, we generally disregard matters that occur after the order appealed. (*Ibid.*)

The remaining two exhibits were the Workers' Compensation Appeals Board protective order and the misdemeanor complaint against Schmittle for violating the protective order. Neither document showed Schmittle would *actually* harass Cazorla at a deposition (at which the parties' counsel would undoubtedly be present), let alone that the harassment would be so severe that the District was justified in preventing Cazorla from sitting for a deposition *at all*. If the District was truly concerned about harassment, it could have sought a protective order to prevent it. (§ 2025.420, subds. (a)—(b) [a party may move for a protective order for a deposition, and "[t]he court, for good cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden or expense"].)

The District's other positions it took in the trial court were meritless. *Liberty Mutual* clearly did not apply to preclude Cazorla's deposition. In *Liberty Mutual*, the plaintiff sought to depose Liberty Mutual's president and chief executive officer as part of her initial discovery demands, even though he had no connection to or information about the case. The court noted that allowing a party to depose a corporate officer at the "apex" of the corporate hierarchy before less intrusive discovery has been conducted raises a "tremendous potential for discovery abuse and harassment." (*Liberty Mutual, supra,* 10 Cal.App.4th at p. 1287.) Thus, "it amounts to an abuse of discretion to withhold a protective order when a plaintiff seeks to depose a corporate president, or corporate officer at the apex of a corporate hierarchy, absent a reasonable indication of the officer's personal knowledge of the case and absent exhaustion of less intrusive discovery methods." (*Ibid.*)

The District provided no evidence to show Cazorla's position as Director of Risk Management and Benefits was the equivalent of a CEO, president, or other "corporate officer at the apex of a corporate hierarchy," as in *Liberty Mutual*. Its only argument—which it briefly advances again on appeal—was that his Director title alone was sufficient. There was nothing inherent in his title to suggest he was a high-level executive unconnected to the case. To the contrary, the District produced its superintendent and Director of Human Resources for depositions, undermining the suggestion Cazorla's position alone made him an "apex" employee under *Liberty Mutual*. Schmittle also presented evidence that Cazorla was "very hands on," attending numerous depositions and court hearings and planning

to attend more, hardly the kind of disassociated "apex"-level executive like the CEO in *Liberty Mutual*.

Even if Cazorla could be deemed an apex-level executive, *Liberty Mutual* protected the executive in that case from sitting for a deposition because he had no personal knowledge about the case. (*Liberty Mutual, supra,* 10 Cal.App.4th at p. 1287.) Schmittle presented convincing, unrebutted evidence that Cazorla most likely had discoverable information related to this case. The District was not justified in claiming otherwise simply because he started working with the District two years after Schmittle's last day.[3]

The amount of sanctions also fell within the trial court's discretion. The trial court credited Schmittle's counsel's declarations and found the time and expense incurred in bringing the motion was reasonable. The District's only argument is that the time was excessive for a "simple motion to compel deposition," which it contends "should take three hours." As support, it claims its opposition to the motion took only 2.2 hours. We decline to judge the propriety of the time spent on the motion to compel by the District's response to it. Had the District spent

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[3] The District also cites *Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465 (*Nagle*). As in *Liberty Mutual*, the court granted a protective order against deposing the Director of the California Employment Development Department and former Director of the California Department of Health Services because "the heads of agencies and other top government executives are normally not subject to depositions" unless they have direct personal factual information about the issues. (*Nagle,* at pp. 1467–1468.) For the reasons discussed, the District had made no showing whatsoever that Cazorla falls into that category.

more time in writing its opposition, it might have been supported by evidence. We will not disturb the court's finding that $9,835 was reasonable.

2. Sanctions on Appeal

Schmittle seeks $31,947.50 in appellate attorney's fees as a sanction for the District pursuing a frivolous appeal. We grant the request.

Sanctions should be imposed sparingly, but "[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (§ 907.) The Rules of Court similarly enable us to impose sanctions on an attorney or party for "[t]aking a frivolous appeal or appealing solely to cause delay" or "[c]omitting any other unreasonable violation of these rules." (Cal. Rules of Court, rule 8.276(a).)

An appeal may be frivolous based upon either subjective or objective criteria. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649.) We can look to the appellant's subjective motive to determine whether the appeal was pursued in good faith or solely to delay. (*Ibid.*) We can also examine the merits of the appeal from a reasonable person's perspective to determine whether any reasonable person would agree that the appeal is totally devoid of merit. (*Ibid.*) The standards are independent but often considered together, so the total lack of merit of an appeal can be evidence of intent solely to delay. (*Ibid.*) "Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Id.* at p. 650.)

For the reasons we have already discussed, the District's appeal was indisputably without merit. Its opposition to the motion to compel lacked supporting evidence and its legal arguments were demonstrably at odds with the law (specifically *Liberty Mutual*) and the unrebutted evidence presented by Schmittle. The District's only plausible position—that it feared Cazorla would be harassed—did not justify a blanket refusal to produce him at his deposition. As we noted, the District could have sought a protective order instead of refusing to produce Cazorla at all. On this record, no reasonable attorney could have believed an appeal had merit.

To underscore the frivolousness of this appeal, the District violated numerous appellate rules, which suggested a lack of good faith and an intent to delay. The District belatedly filed its designation of the record—it was due within 10 days of filing the notice of appeal and it was filed 48 days after the notice. (Cal. Rules of Court, rule 8.121(a).) On the designation of record, it failed to designate the date of the notice of appeal. (Cal. Rules of Court, rule 8.122(a)(1), (b)(1)(A), (b)(2).) The record the District did designate was incomplete and inadequate to show the trial court abused its discretion. The record contained the reporter's transcript for the hearing on the motion to compel and only five documents: (1) the case summary; (2) the court's order granting the motion to compel; (3) the corresponding minute order; (4) the notice of appeal; and (5) the District's designation of the record on appeal. Without the motion to compel, opposition, reply, and supporting evidence, we had no way to review the basis for the trial court's order. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [appellant "has an affirmative obligation to provide an adequate record so that we may assess

whether the trial court abused its discretion"].) Schmittle had to augment the record with those documents to enable our review.

Perhaps most troubling, the District's briefs on appeal *do not once cite the record it provided.* (Cal. Rules of Court, rule 8.204(a)(1)(C) [briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"].) Instead, as noted above, the District attached five "exhibits" directly to its opening and reply briefs, amounting to about 50 pages of material not in the record. This was itself improper. (See Cal. Rules of Court, rule 8.204(d) [party limited to attaching 10 pages of material in the appellate record to brief without permission].) Three of these exhibits were not presented to the trial court and two of them post-dated the order appealed. As explained above, we generally do not consider these matters. (*Truong, supra,* 156 Cal.App.4th at p. 882.) The District did not acknowledge these rules, let alone ask us to grant exceptions. It simply attached the documents and relied on them. The other two exhibits it attached *were* part of the trial record. Yet, the District inexplicably omitted them from the clerk's transcript.

Schmittle's appellate counsel points out the District's attorneys are experienced appellate counsel, so inexperience does not explain the District's actions. This record demonstrates the District must have had only one real purpose in pursuing this appeal: to impose a costly delay. This appeal postponed the District from having to pay nearly $10,000 in sanctions while burdening Schmittle with having to pay her attorneys *three times that amount* in order to defend it. Given the frivolousness of the District's legal arguments, we must infer it was not seeking to attack the sanctions order with any reasonable hope of

prevailing, but instead seeking to place the burdens of cost and delay on Schmittle. The District's claims to the contrary are simply not credible.

Schmittle seeks $31,947.50 in attorney's fees as a sanction, which includes 54.1 hours by appellate counsel at $475 per hour (a total of $25,697.50), and 12.5 hours at $500 per hour for trial counsel's work on appeal (a total of $6,250). We find these amounts supported and reasonable, so we will impose a sanction of $31,947.50 on the District and counsel jointly and severally, to be paid to Schmittle. (§ 907; Cal. Rules of Court, rule 8.276(a).)

DISPOSITION

The order is affirmed. Respondent is awarded costs on appeal. Appellant and its counsel are jointly and severally ordered to pay a sanction of $31,947.50 to Schmittle.

BIGELOW, P.J.

We concur:

GRIMES, J.

ROGAN, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.