



# Appellate Reports

## FEHA attorney's fees; also, discovery abuse, and medical malpractice

By JEFFREY I. EHRLICH

**Torts; medical malpractice; moving party's conclusory declaration that defendant acted within the standard of care; failure to meet initial burden for summary judgment**

*Zavagoza v. Adam* (2025) 109 Cal.App.5th 113, 119 (First District, Div. 3)

Plaintiff was admitted to Mercy Medical Center, Merced complaining of abdominal pain. She was diagnosed with a bile leak and underwent several procedures for treatment, but all failed. She ultimately had to undergo multiple surgeries to treat the bile leak and related complications. She filed a medical-malpractice case against the hospital and two doctors, Dr. Adam and Dr. Uppal. Dr. Adam moved for summary judgment, supported by a declaration from Dr. Morse. The declaration detailed the procedures that Dr. Adam had performed and stated that, based on his review of plaintiff's medical records, that Dr. Adam performed the surgical procedure on plaintiff "within the standard of care expected of a general surgeon performing this surgery."

In opposing the motion, plaintiffs argued that Dr. Morse's declaration was inadmissible and insufficient to satisfy Dr. Adam's initial burden because Dr. Morse failed to provide a reasoned explanation for his opinions. Plaintiff did not submit an opposing medical expert declaration. The trial court granted the motion. Reversed.

The opinion of any expert is only as good as the facts and reasons on which it is based and the trial court properly acts as a gatekeeper to exclude speculative expert testimony. Dr. Adam argued on

appeal that Dr. Morse's declaration was properly admitted by the trial court. The appellate court responded that "we may accept for the sake of argument that Dr. Morse's declaration was properly admitted, but this is not dispositive of whether the declaration was sufficient to carry Dr. Adam's burden as the party moving for summary judgment."

The Court viewed Dr. Morse's explanation for the basis of his opinions as deficient, explaining, "did not explain what acts constitute due care when performing a cholecystectomy, particularly as they relate to avoiding or preventing a bile leak. Morse also concluded, without adequate explanation or elaboration, that plaintiff's bile leak 'was not due to any negligence or inappropriate surgical technique on the part of Dr. Adam.' To the extent Dr. Morse offered this conclusion based on the premise that a bile leak is a recognized and relatively minor complication of a cholecystectomy that can occur 'even when the procedure is performed with due care,' his conclusion 'does not follow' because he did not explain how he ruled out a negligent cause for the bile leak in this case."

Dr. Morse's attempt to blame Dr. Uppal's performance of a prior procedure on plaintiff as causing a bowel perforation and attendant complications did not tend to prove the absence of negligence by Dr. Adam in performing a procedure that led to the bile leak. Nor was there any reasoned explanation for the accusation that Dr. Uppal caused the bowel perforation.

"Strictly scrutinizing Dr. Adam's evidence, as we must, we conclude Dr. Morse failed to support his opinions with sufficient factual detail and reasoned explanation to show the absence of a triable issue of material fact."

**FEHA attorney's fees; across-the-board reductions; appropriate level of scrutiny; split of authority**

*Cash v. County of Los Angeles* (2025) \_ Cal.App.5th \_ (Second Dist., Div. 5.)

The trial court reduced the attorney fee award for a prevailing plaintiff by an "across-the-board" 30-percent cut based on "unreasonable padding," "duplicative" work, and unnecessary work by the plaintiff's attorneys. Historically, these findings would be sufficient to uphold a percentage reduction in a fee award. But recently, several California courts have employed "heightened scrutiny" – imported from federal cases interpreting a federal civil rights statute (namely, 42 U.S.C. § 1988) – and on that basis have demanded that a trial court articulate "case-specific reasons for [any] percentage reduction," including a "clear explanation" of its reasons for choosing the particular negative multiplier [or percentage] that it chose. (*Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 37, 41 (*Warren*); *Snoeck v. ExakTime Innovations, Inc.* (2023) 96 Cal.App.5th 908, 921 (*Snoeck*); see *Kerkeles v. City of San Jose* (2015) 243 Cal.App.4th 88, 101-104 (*Kerkeles*)).) Other courts have declined to employ this importation of federal law (*Morris v. Hyundai Motor America* (2019) 41 Cal.App.5th 24, 37 & fn. 6 (*Morris*)). In this case, in a 2-1 decision, the court declined to apply the heightened-scrutiny approach and affirmed the 30-percent reduction.

The genesis of the heightened-scrutiny standard is a desire to err on the side of overinclusive fee awards to incentivize lawyers to litigate federal civil rights cases; this rationale does not justify the spread of heightened scrutiny to every fee award for every employment, consumer



protection, or other civil case arising in California. The court reads *Warren* and *Snoeck* as resting – not, as the dissent suggests, on any “core insight” about the need for greater scrutiny of across-the-board, “meat cleaver”-esque reductions in fee awards – but rather as resting on the policy of encouraging greater fee awards in certain types of cases based on their substantive value.

The majority was concerned that, if applied faithfully, the heightened-scrutiny standard would all but eliminate any across-the-board percentage reductions because trial courts would be hard pressed to justify a “particular” percentage – why 30 percent instead of 29 or 31 percent? Although the dissent disagrees with our concern on the ground that heightened scrutiny would not demand “a perfect correlation” between the trial court’s concerns and the percentage reduction “down to the last decimal point,” our concern derives from the requirement – set forth in the cases themselves – that the court must justify “the *particular* negative multiplier that it chose.” (*Warren*, at p. 41; *Kerkeles, supra*, 243 Cal.App.4th at p. 102). And heightened scrutiny is fundamentally inconsistent with the deference that California courts have granted to trial courts as the percipient witnesses to the quality of representation and hence the amount of fees that representation justifies.

Under the traditional California standard, across-the-board, percentage-based reductions to a lodestar figure are appropriate so long as the trial court articulates a justifiable reason for the reduction. Here, the trial court imposed the 30-percent reduction due to padding as a result of the attorneys’ excessive and duplicative billing. Overstaffing and excessive hours are justifiable and the unusually high number of billed hours, as summarized in the County’s opposition, provided substantial evidence of such excess.

In dissent, Justice Baker stated, “Concerned that a busy trial court confronted with a voluminous fee request will find it hard to resist the attractiveness

of a non-specific, across-the-board reduction to fees, the *Warren* group of cases says appellate courts should more carefully scrutinize the propriety of such across-the-board reductions, which inevitably reduce compensation for billed time that is undisputedly reasonable. *Morris* (and now the opinion for the court today) disagrees with this approach because it reads the reference to “heightened scrutiny” in *Warren* (*Snoeck* does not use the term) to import federal court standards for California fee awards. That is not how I read the case, however. The “heightened scrutiny” terminology does unfortunately call to mind the sort of formalism seen in the context of equal protection tiers of review, but I read *Warren* (and *Snoeck*) to import the common sense *logic* found in federal authority and *Kerkeles* (to wit, strong medicine requires stronger justification) not federal substantive law foreign to California jurisprudence. Put more concretely, the cases recognize appellate courts that must decide whether there has been an abuse of discretion should look more closely at the justification given for across-the-board fee reductions to make sure the discretionary choice of this inherently imprecise method was made for good reason, rather than just because it is faster and easier.”

The dissent further argued that neither the County nor the trial court tethered the 30% reduction to what it believed would have been a reasonable amount of time to bill. Rather, it appears that this figure was chosen because the *Morris* court approved that amount in that case.

### **Discovery abuse; sanctions for “unusual forms of discovery abuse”**

*Agnone v. Agnone* (2025) \_Cal.App.5th \_ (Second District, Div. 3.)

Shawn Agnone subpoenaed third-party witness Kenneth Madick in connection with a marital dissolution action against her former husband Frank Agnone II. After Madick’s attorney

refused to turn on his webcam or otherwise make himself visible to Shawn’s counsel during Madick’s remote deposition, Shawn filed a motion to compel compliance with the subpoena and a request for sanctions under provisions of the Civil Discovery Act and other statutes governing third-party subpoenas. 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 to compel, but argued sanctions were nonetheless warranted to reimburse her for the expenses incurred due to Madick’s and his counsel’s “gamesmanship during the deposition.” The trial court granted the request for sanctions in part, ordering Madick to pay Shawn \$9,981.

The Court of Appeal originally reversed, concluding that sections 2023.010 and 2023.030 did not independently authorize the trial court to impose monetary sanctions for discovery misuses like those at issue here. But the Supreme Court remanded with directions to consider the case in light of its recent decision in *City of Los Angeles v. PricewaterhouseCoopers, LLP* (2024) 17 Cal.5th 46 (*PwC*), which held that a trial court may invoke its independent authority to impose monetary sanctions under sections 2023.010 and 2023.030 when confronted with an “unusual form of discovery abuse” not already addressed by the method-specific sanctions provisions of the Civil Discovery Act. On remand, the court concluded that the trial court had authority to impose sanctions against Madick, notwithstanding Shawn’s withdrawal of her motion to compel, and affirmed the sanction award.

During Madick’s deposition, 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 counsel objected, explaining he could not tell if Katofsky was “making any visual signs” or otherwise coaching Madick “to answer one way or another.” He repeatedly 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 each request, stating only, “I am not doing that.”; “No. You can go forward with the deposition. We are ready to go forward.”; and “Do you have a question for my client?”

Shawn’s counsel began asking Madick preliminary questions about documents requested in the subpoena. Counsel observed Madick look away from the camera before answering each question. He again conferred with Katofsky, stating his concern that, “every time that I ask a question, your client is looking upward to you for feedback.” Shawn’s counsel asked Katofsky once again if he would turn on his webcam. Katofsky refused, 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.... Take your deposition. I don’t understand it. You know, a normal confident lawyer would go forward and take questions and answers today rather than continue to interrupt counsel and argue with me now for 25 minutes.... I am not going to turn on my webcam because I don’t need to have my webcam on.” Shawn’s counsel 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.

*PwC* holds that a trial court “may invoke its independent authority to impose sanctions under sections 2023.010 and 2023.030 only when confronted with an

unusual form of discovery abuse, or a pattern of abuse, not already addressed by a relevant sanctions provision.” Madick argued that *PwC* is not controlling because, in his telling, the case “deals solely” with whether sections 2023.010 and 2023.030 allow for monetary sanctions “in extreme circumstances.” In contrast to the “extreme” conduct of the sanctioned party in *PwC*, Madick insists he “did nothing wrong.” He argues his counsel “correctly” exercised the “right not to be on camera during the remote deposition,” and this conduct “did not reach the level required” under *PwC* to authorize the imposition of sanctions.

The court rejected these arguments. First, although the misconduct in *PwC* was extreme, nothing in the decision suggests it is limited to extreme misconduct or the pattern of discovery abuse perpetrated by the sanctioned party there. On the contrary, *PwC* holds a trial court may invoke its independent authority to impose monetary sanctions under the statutes whenever “confronted with an unusual form of discovery abuse, *or* a pattern of abuse, not already addressed by a relevant sanctions provision.”

Second, Madick’s contention that he “did nothing wrong” is also unpersuasive. He insists his attorney, Katofsky, had the right to refuse to appear on camera under California Rules of Court, rule 3.1010, because the rule authorizes anyone other than the deponent, including an “attorney of record,” to “appear and participate in an oral deposition by telephone, videoconference, or other remote electronic means,” provided certain conditions are met. Contrary to Madick’s

contention, the rule cannot reasonably be read as a blanket authorization for a deponent’s attorney to participate by audio-only means while physically present with his client under circumstances where the attorney could surreptitiously coach the deponent outside opposing counsel’s view.

Coaching a deponent is, of course, a misuse of the discovery process as defined in section 2023.010 that authorizes the imposition of sanctions under section 2023.030. Madick does not dispute this, but he argues there was “no such evidence” of coaching in this case.

Madick’s argument misses the point. Shawn moved for sanctions on the ground that Madick’s and Katofsky’s “gamesmanship” made it impossible to tell – and thus impossible to develop evidence of – whether Katofsky was attempting to coach Madick during the remote deposition. Based on this record, we have no trouble concluding the trial court reasonably exercised its discretion to impose sanctions for this “unusual form of discovery abuse” that plainly frustrated the deposition’s “truth-seeking function.”

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