

*20 Cal. App. 4th 256, \*; 24 Cal. Rptr. 2d 501, \*\*;  
1993 Cal. App. LEXIS 1169, \*\*\*; 93 Cal. Daily Op. Service 8641*

DALIA **GHANOONI**, Plaintiff and Appellant, v. **SUPER SHUTTLE OF LOS ANGELES** et al.,  
Defendants and Respondents; ROBERT L. ESENSTEN, Objector and Appellant.

No. B071720.

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SEVEN.

20 Cal. App. 4th 256; 24 Cal. Rptr. 2d 501; 1993 Cal. App. LEXIS 1169; 93 Cal. Daily Op.  
Service 8641; 93 Daily Journal DAR 14757

November 22, 1993, Decided

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Los Angeles County, No. WEC123158,  
Lawrence C. Waddington, Judge.

**DISPOSITION:** The order imposing monetary sanctions is reversed as to plaintiff's counsel.  
As to plaintiff, the order is modified by reducing the amount of sanctions to \$2,100 and is  
affirmed as modified. In all other respects the order is affirmed. Appellants to recover costs  
on appeal.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff challenged an award of discovery sanctions in favor of  
defendant, from the Superior Court of Los Angeles County (California), stemming from  
plaintiff's personal injury suit against defendant whereby she refused to submit to x-rays  
of the injuries she allegedly sustained, arguing that such x-rays were unnecessary and  
that she had a general fear of x-rays.

**OVERVIEW:** Plaintiff sought review of an award of discovery sanctions to defendant  
airport shuttle service, emanating from plaintiff's refusal to submit to x-rays of injuries she  
allegedly sustained from an accident while riding in one of defendant's shuttles,  
contending that the x-rays were both unnecessary and that her refusal was based on her  
general fear of x-rays. On appeal, the award of sanctions against plaintiff was affirmed but  
reduced, while the award against plaintiff's counsel was reversed. In support of its ruling,  
the court held that plaintiff failed to provide substantial justification for her refusal to  
submit to x-rays. The court further held that the lower court's order imposing the  
sanctions was not defective because it failed to specify the basis for the sanctions with  
particularity. The court further held, however, that the sanctions imposed on plaintiff's  
counsel were improper as there was no evidence that they advised disobedience of the  
order to submit to the x-rays. Finally, the court found that the award against plaintiff  
should be reduced as a portion of it was arbitrary and unrelated to defendant's expenses  
incurred in filing its motion to compel.

**OUTCOME:** Discovery sanctions were affirmed as to plaintiff, as she failed to provide  
substantial justification for her refusal to submit to the x-rays, but reversed as to plaintiff's  
counsel because there was no evidence that they advised disobedience of the order to  
submit to the x-rays.

**CORE TERMS:** x-rays, monetary sanction, discovery, physical examination, declaration,

discovery process, misuse, van, reasonable expenses, substantial justification, awarding, shuttle, discovery sanctions, preparation, discovery statutes, refusal to submit, attorney fees, attorney fees, oral argument, passenger, present case, unsuccessfully, disobedience, authorize, opposes, unjust, tissue, elbow, soft, neck

### LEXISNEXIS(R) HEADNOTES

Civil Procedure > Discovery > Misconduct

**HN1** See Cal. Civ. Proc. Code § 2032(c)(6).

Civil Procedure > Discovery > Misconduct

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees

**HN2** See Cal. Civ. Proc. Code § 2032(b).

Civil Procedure > Discovery > Methods > Mental & Physical Examinations

Civil Procedure > Discovery > Misconduct

**HN3** A monetary sanction must be imposed against any party or attorney who unsuccessfully opposes a motion to compel compliance with a demand for a physical examination unless the court finds the party or attorney acted with substantial justification or a sanction would be unjust for some other reason. It is no longer required that the misuse of the discovery process be willful.

Civil Procedure > Discovery > Misconduct

**HN4** The discovery statutes do not require the court's order to recite in detail the circumstances justifying the award. Indeed, the trial court is not required to make findings at all.

Civil Procedure > Discovery > Misconduct

**HN5** Cal. Civ. Proc. § 2023(b)(1) authorizes the court to order one who has engaged in the misuse of the discovery process to pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct.

### SUMMARY:

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiff brought an action against a shuttle passenger van company and others for injuries she suffered on board one of the company's vans. Defendants served plaintiff with a demand she submit to a medical examination. She appeared and submitted to part of the examination, but she refused to submit to X-rays of certain portions of her body even though she complained to the examining physician of pain in those areas. Defendants moved for an order to compel plaintiff to submit to the X-rays and for sanctions against plaintiff and her attorney. The trial court ordered plaintiff to submit to the X-rays and imposed monetary sanctions against plaintiff and her attorney jointly in the sum of \$ 3,100. (Superior Court of Los Angeles County, No. WEC123158, Lawrence C. Waddington, Judge.)

The Court of Appeal reversed the order imposing monetary sanctions as to plaintiff's counsel, and, as to plaintiff, modified the order by reducing the amount of sanctions to \$ 2,100; the court affirmed the order in all other respects. The court held that, since the

argument of plaintiff's attorney in response to defendants' motion to compel, that the X-rays were unnecessary because the case involved soft tissue injuries, was not supported by any expert medical opinion and, indeed, was contradicted by plaintiff's treating physician, the trial court properly imposed monetary sanctions against plaintiff. However, the trial court erred in imposing the sanctions jointly against both plaintiff and her attorney. Unlike monetary sanctions against a party, which are based on the party's misuse of the discovery process, monetary sanctions against the party's attorney require a finding the attorney advised the conduct (Code Civ. Proc., § 2023, subd. (b)(1)). The court held that the un rebutted declarations of plaintiff's counsel were sufficient to establish that plaintiff's refusal to submit to X-rays was not based on advice from her attorneys. The court further held that that portion of the sanctions representing a penalty (\$ 1,000) was not authorized by the discovery statutes. Code Civ. Proc., § 2023, subd. (b)(1), only authorizes the payment of reasonable expenses, including attorney fees. The \$ 1,000 was unrelated to the expenses defendants incurred in compelling plaintiff to submit to X-rays; it was simply an arbitrary amount defendants selected and the trial court awarded in order to punish plaintiff for her disobedience. (Opinion by Johnson, J., with Lillie, P. J., and Woods (Fred), J., concurring.)

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

**CA(1) (1) Discovery and Depositions § 31--Enforcement of Right to Discovery--Sanctions of Trial Court--Monetary Sanctions for Refusal to Submit to Physical Examination.** --Under Code Civ. Proc., § 2032, subd. (c)(6) (motion for order compelling compliance with demand for physical examination), and Code Civ. Proc., § 2023, subd. (b) (monetary sanction for misuse of discovery process), a monetary sanction must be imposed against any party or attorney who unsuccessfully opposes a motion to compel compliance with a demand for a physical examination unless the court finds the party or attorney acted with "substantial justification" or a sanction would be unjust for some other reason. It is no longer required that the misuse of the discovery process be willful.

[See 2 **Witkin**, Cal. Evidence (3d ed. 1986) §§ 1580A, 1580B.]

**CA(2a) (2a) CA(2a) (2b) Discovery and Depositions § 31--Enforcement of Right to Discovery--Sanctions of Trial Court--Monetary Sanctions for Refusal to Submit to Physical Examination--Liability of Attorney.** --In a personal injury action against a shuttle passenger van company and others for injuries suffered by plaintiff on board one of the company's vans, the trial court properly imposed monetary sanctions against plaintiff after she refused to submit to defendants' demand for X-rays, where she failed to provide substantial justification for her refusal, and where her attorney's argument in response to defendants' motion to compel, that the X-rays were unnecessary because the case involved soft tissue injuries, was not supported by any expert medical opinion and, indeed, was contradicted by plaintiff's treating physician. However, the court erred in imposing the sanctions jointly against both plaintiff and her attorney. Unlike monetary sanctions against a party, which are based on the party's misuse of the discovery process, monetary sanctions against the party's attorney require a finding the attorney advised the conduct (Code Civ. Proc., § 2023, subd. (b)(1)). The un rebutted declarations of plaintiff's counsel were sufficient to establish that plaintiff's refusal to submit to X-rays was not based on advice from her attorneys.

**CA(3) (3) Discovery and Depositions § 31--Enforcement of Right to Discovery--Sanctions of Trial Court--Monetary Sanctions for Refusal to Submit to Physical Examination--Specification of Reasons for Award.** --In a personal injury action against a shuttle passenger van company and others for injuries suffered by plaintiff on board one of the company's vans, the trial court's order imposing monetary sanctions against plaintiff and her attorney for plaintiff's failure to submit to X-rays demanded by defendants was not defective for failing to specify with particularity the basis for awarding the sanctions. Unlike other statutes authorizing sanctions, the discovery statutes do not require that the court's order recite in detail the circumstances justifying the award. Indeed, the trial court is not required to make findings at all. The record showed that the trial court read the moving and responding papers, listened to oral argument, reread the papers, and concluded it could find no reason why the X-rays should not be taken. There was no error in this procedure.

**CA(4) (4) Discovery and Depositions § 31--Enforcement of Right to Discovery--Sanctions of Trial Court--Monetary Sanctions for Refusal to Submit to Physical Examination--Inclusion of Penalty in Award.** --In a personal injury action against a shuttle passenger van company and others for injuries suffered by plaintiff on board one of the company's vans, the trial court, in imposing monetary sanctions based on plaintiff's refusal to submit to X-rays demanded by defendants, properly awarded \$ 2,100 based on attorney fees and costs incurred by defendants in the preparation and argument of the motion to compel, but erred in awarding an additional \$ 1,000 as a penalty. Defendants' counsel submitted a declaration stating his office had expended 11 hours of attorney time in research and preparation of the motion to compel and would spend additional time in travel and court time in connection with the motion. Plaintiff produced no counterdeclaration supporting her argument that 11 hours was an unreasonable amount of attorney time. However, the \$ 1,000 penalty was not authorized by the discovery statutes. Code Civ. Proc., § 2023, subd. (b)(1), only authorizes the payment of reasonable expenses, including attorney fees, and the \$ 1,000 was simply an arbitrary amount defendants selected and the trial court awarded in order to punish plaintiff for her disobedience.

**COUNSEL:** Robert L. Esensten, in pro. per., and Robert Pine for Plaintiff and Appellant and for Objector and Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker and Rene J. Molligan for Defendants and Respondents.

**JUDGES:** Opinion by Johnson, J., with Lillie, P. J., and Woods Fred, J., concurring.

**OPINION BY:** JOHNSON, J.

## OPINION

[\*259] [\*\*503] Plaintiff and her attorney appeal from an order awarding \$3,100 in discovery sanctions to defendants. We modify and affirm the order as to the plaintiff. We reverse as to her attorney. <sup>1</sup>

## FOOTNOTES

<sup>1</sup> In *Ghanooni v. Super Shuttle* (1992) 2 Cal.App.4th 380 [3 Cal.Rptr.2d 43] we held this sanction order was not separately appealable but could be raised in an appeal following a final judgment in the case. A final judgment having been entered, the appeal is now properly before us.

**[\*\*\*2]** FACTS AND PROCEEDINGS BELOW

Plaintiff, Dalia Ghanooni, sued defendant Super Shuttle and others for personal injuries she suffered on board a Super Shuttle passenger van. Defendants served plaintiff with a demand she submit to a medical examination. ( Code Civ. Proc. § 2032, subds. (a), (c).) <sup>2</sup> Plaintiff appeared and submitted to part of the examination. Plaintiff refused to submit to X-rays of her back, neck, right elbow, right knee and left ankle even though she complained to the examining physician of pain in those areas. The examining physician later obtained X-rays of plaintiff's ankle and knee.

**FOOTNOTES**

<sup>2</sup> All statutory references are to the Code of Civil Procedure unless otherwise noted.

Defendants moved for an order compelling plaintiff to submit to X-rays of her back, neck and right elbow and for sanctions against plaintiff and her attorney. Plaintiff responded through a declaration of her attorney who claimed the requested X-rays were unnecessary because the injuries to plaintiff's back, neck and elbow **[\*\*\*3]** were soft tissue injuries. Plaintiff's counsel also contended plaintiff had a fear of radiation exposure from X-rays. Plaintiff's attorney advised defendants, however, "my client would agree to undergo x-rays taken by her own physician."

The trial court ordered plaintiff to submit to the X-rays demanded by defendants and imposed monetary sanctions against plaintiff and her attorney jointly in the sum of \$3,100.

**[\*260]** DISCUSSION

*I. The Trial Court Properly Awarded Monetary Sanctions Against Plaintiff but Erred in Awarding Such Sanctions Against Plaintiff's Counsel.*

Section 2032, subdivision (c)(6) provides in relevant part: "<sup>HN1</sup> The defendant may move for an order compelling . . . compliance with a demand for a physical examination. The court *shall* impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel response and compliance with a demand for a physical examination, *unless* it finds that the one subject to sanction acted with substantial justification or that other circumstances make the **[\*\*\*4]** imposition of the sanction unjust." (Italics added.)

Section 2023, subdivision (b) provides in relevant part: "<sup>HN2</sup> To the extent authorized by the section governing any particular discovery method . . . (1) The court 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."

<sup>CA(1)</sup> (1) Under this legislative scheme, <sup>HN3</sup> a monetary sanction must be imposed against any party or attorney who unsuccessfully opposes a motion to compel compliance with a demand for a physical examination unless the court finds the party or attorney acted with "substantial justification" or a sanction would be unjust for **[\*\*\*504]** some other reason. It is no longer required that the misuse of the discovery process be willful. ( *Kohan v. Cohan* (1991) 229 Cal.App.3d 967, 971 [280 Cal.Rptr. 474]; cf. former § 2034, subd. (d); *Midwife v. Bernal* (1988) 203 Cal.App.3d 57, 63 [249 Cal.Rptr. 708].) **[\*\*\*5]**

**CA(2a)** **(2a)** In the present case, plaintiff failed to provide substantial justification for her refusal to submit to X-rays. Her principal justification appears to have been her generalized fear of exposure to radiation. There was no evidence, however, plaintiff had previously been exposed to such an amount of X-ray radiation that the additional X-rays sought by defendants would expose plaintiff to risk. On the contrary, plaintiff's personal physician filed a declaration stating in his view plaintiff should submit to the X-rays and he had so advised her. Moreover, plaintiff's purported fear of X-rays is inconsistent with her agreement to have the X-rays taken by her own physician but not the physician retained by defendants.

Her attorney's argument in response to the motion to compel, that X-rays were unnecessary because the case involved soft tissue injuries, was not **[\*261]** supported by any expert medical opinion and, indeed, was contradicted by plaintiff's treating physician. (Cf. *Abex Corp. v. Superior Court* (1989) 209 Cal.App.3d 755, 759 [257 Cal.Rptr. 498].)

**CA(3)** **(3)** Finally, the court's order imposing sanctions was not defective for failing to specify with particularity **[\*\*\*6]** the basis for awarding sanctions. Unlike other statutes authorizing sanctions (e.g., § 128.5, subd. (c), 177.5) **HN4** the discovery statutes do not require the court's order to "recite in detail" the circumstances justifying the award. ( *Ghanooni v. Super Shuttle*, *supra*, 2 Cal.App.4th at p. 382, fn. 3.) Indeed, the trial court is not required to make findings at all. ( *Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1603 [16 Cal.Rptr.2d 151].) Here, the record shows the court read the moving and responding papers, listened to oral argument, reread the papers and concluded it could find "no reason why these x-rays should not be taken." We find no error in the manner in which the court proceeded.

**CA(2b)** **(2b)** Unlike monetary sanctions against a party, which are based on the party's misuse of the discovery process, monetary sanctions against the party's attorney require a finding the "attorney advis[ed] that conduct." (§ 2023, subd. (b)(1); *Corns v. Miller* (1986) 181 Cal.App.3d 195, 200 [226 Cal.Rptr. 247], [construing similar language in former § **[\*\*\*7]** 2034, subd. (b)(2)(D)].) In *Corns v. Miller*, the court held the burden was on the attorney to prove he or she had *not* advised the client to engage in the conduct resulting in sanctions. (181 Cal.App.3d at pp. 200-201.)

In the present case, the unrebutted declarations of plaintiff's counsel, together with accompanying documents and the declaration of defense counsel were sufficient to establish plaintiff's refusal to submit to X-rays was not based on advice of her attorneys. On the contrary, these declarations and letters show counsel for plaintiff attempted to convince her to submit to the X-rays requested by defendants and that counsel made substantial efforts to try to reach some compromise between their client and defendants which would allow the X-rays to go forward. The fact plaintiff's counsel opposed the motion to compel X-rays does not give rise to an inference they advised disobedience in the first instance. ( *Corns v. Miller*, *supra*, 181 Cal.App.3d at p. 200.) They were simply doing their job as advocates to try to protect their client from sanctions. For these reasons, we conclude, as counsel for defendant conceded at oral argument, **[\*\*\*8]** there was no evidentiary basis for imposing sanctions on counsel for plaintiff. <sup>3</sup>

#### FOOTNOTES

<sup>3</sup> Plaintiff also contends the court erred in barring her from conducting discovery until the sanctions were paid. The record does not show if or when the sanctions were paid; nor has plaintiff attempted to show how this order prejudiced her case. Therefore we will not address this issue further.

**[\*262]** **[\*\*505]** II. *The Trial Court Erred in Adding a \$1,000 "Penalty" to the Sanction Award.*

CA(4) ¶(4) The trial court awarded \$3,100 in sanctions for plaintiff's failure to submit to X-rays. Of this amount, \$2,100 was based on attorney fees and costs defendants incurred in the preparation and argument of the motion to compel; the remaining \$1,000 was imposed as a penalty on plaintiff for failing to comply with her discovery obligations. Plaintiff contends both amounts are unreasonable and excessive and the \$1,000 penalty is not authorized by the discovery statutes. We reject plaintiff's first argument but accept her second [\*\*\*9] point. In support of the request for sanctions, defendants' counsel submitted a declaration stating his office had expended 11 hours of attorney time in research and preparation of the motion to compel, at a billing rate of \$150 per hour, and would spend at least 3 additional hours in travel and court time in connection with the motion. This results in total attorney fees and costs of \$2,100. Plaintiff argues 11 hours is an unreasonable amount of time to have spent on the research and preparation of the motion to compel. However, she produced no counterdeclaration supporting this argument. Therefore, the court's finding as to reasonable expenses is supported by the uncontradicted evidence.

In addition to the reasonable expenses incurred in moving to compel discovery, the trial court awarded defendants the sum of \$1,000 for plaintiff's failure to cooperate with defendants' discovery. This was error.

HN5 ¶ Section 2023, subdivision (b)(1) authorizes the court to order one who has engaged in the misuse of the discovery process to "pay the reasonable expenses, including attorney's fees, incurred [\*\*\*10] by anyone as a result of that conduct." In construing former section 2034, which had a similar provision, <sup>4</sup> our Supreme Court stated ". . . the provisions of the statute contemplate only that a defaulting party may be assessed the costs of bringing the motion, including attorneys' fees." ( *Lund v. Superior Court* (1964) 61 Cal.2d 698, 715 [39 Cal.Rptr. 891, 394 P.2d 707].) Thus, the court held the trial judge erred in imposing what was in effect a fine of \$1,100 payable to a party to that action. "[T]he code does not authorize payment of that type of cost as a sanction for refusal to make discovery" and furthermore "\$1,100 is an arbitrary figure . . ." (*Ibid.*)

#### FOOTNOTES

<sup>4</sup> Former section 2034, subdivision (b)(2)(D) authorized the court to award "the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees."

In the present case, the record shows the additional \$1,000 the trial court awarded was unrelated to the expenses defendants incurred in compelling [\*\*\*263] [\*\*\*11] plaintiff to submit to X-rays. It was simply an arbitrary amount defendants selected and the trial court awarded in order to punish plaintiff for her disobedience. As such, it cannot stand. <sup>5</sup>

#### FOOTNOTES

<sup>5</sup> At oral argument, counsel for defendant conceded there is no authority under the discovery statutes for the fine imposed by the trial court.

#### DISPOSITION

The order imposing monetary sanctions is reversed as to plaintiff's counsel. As to plaintiff, the order is modified by reducing the amount of sanctions to \$2,100 and is affirmed as modified. In all other respects the order is affirmed. Appellants to recover costs on appeal.

Lillie, P. J., and Woods Fred, J., concurred.

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