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Supreme Court of California
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Case No. S277211

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES,
Plaintiff and Appellant,

v.

PRICEWATERHOUSECOOPERS, LLC,
Defendant and Respondent.

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division Five, Case No. B310118
On Appeal From the Superior Court for Los Angeles County
Case No. BC574690 • The Honorable Elihu M. Berle, Presiding

CITY OF LOS ANGELES' MOTION FOR JUDICIAL NOTICE; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KATHRYN L. McCANN; AND [PROPOSED] ORDER

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INTRODUCTION

The City of Los Angeles (the "City") respectfully requests that this Court take judicial notice, under Evidence Code sections 452 and 459 and California Rules of Court, rules 8.520, subdivision (g), and 8.252, subdivision (a), of the exhibit listed below, attached to the concurrently filed declaration in support of the City's Motion for Judicial Notice, and cited in the City's Answer Brief on the Merits:

1. **Exhibit A:** A true and correct copy of Appellants' Reply Brief filed by Manfred Muller and Rose Shoshana in *Muller v. Daniel Freeman Hospitals, Inc.*, 2nd Civil No. B199316, in the Court of Appeal of the State of California, Second Appellate District, Division Eight, on August 19, 2008.

The Court may take judicial notice of Exhibit A pursuant to California Rules of Court, rules 8.520, subdivision (g), and 8.252, subdivision (a). Exhibit A is relevant to the dispositive point on appeal that a court's authority to impose monetary sanctions for misuse of the discovery process is limited to circumstances expressly delineated in a method-specific provision of the Civil Discovery Act. Exhibit A shows that the same argument

PricewaterhouseCoopers LLP ("PwC") makes here has recently been made to and rejected by the Court of Appeal. (*Muller v. Fresno Cmty. Hosp. & Med. Ctr.* (2009) 172 Cal.App.4th 887, 906.)

Exhibit A was not presented to the trial court because it is in response to arguments raised first by the Court of Appeal, and then by PwC in its Opening Brief on the Merits – accordingly, the issue was not before the trial court. Exhibit A is subject to judicial notice pursuant to Evidence Code section 452, subdivision (d), because it is a "[r]ecord[ ] of . . . any court of this state," and the document is not offered for an impermissible purpose or for the truth of the matters asserted therein.

DATED: June 23, 2023

ANNAGUEY MCCANN LLP

By: _____
Kathryn L. McCann
Attorneys for City of
Los Angeles

MEMORANDUM OF POINTS AND AUTHORITIES

The Court should take judicial notice of Exhibit A: Appellants' Reply Brief filed by Manfred Muller and Rose Shoshana in *Muller v. Daniel Freeman Hospitals, Inc.*, 2nd Civil No. B199316, in the Court of Appeal of the State of California, Second Appellate District, Division Eight, on August 19, 2008. Judicial notice is appropriate because Exhibit A may be judicially noticed pursuant to Evidence Code section 452 and is relevant to the issue on appeal. There also can be no factual dispute that the document is genuine and accurate, and the information contained therein is not reasonably subject to dispute.

Evidence Code section 459 authorizes courts to "take judicial notice of any matter specified in Section 452." (Evid. Code § 459, subd. (a).) Evidence Code section 452 provides that "[j]udicial notice may be taken of . . . [r]ecords of . . . any court of this state . . . ." (Evid. Code § 452, subd. (d); see also *People v. Santa Ana* (2016) 247 Cal.App.4th 1123, 1126 fn. 2 ["tak[ing] judicial notice of the appellate record" in a different case]; *People v. Jurado* (1981) 115 Cal.App.3d 470, 482-483 [taking judicial notice of records in a different case].) Exhibit A is a record of a court of this state: it is a legal filing in the Court of Appeal of the

State of California, Second Appellate District, Division Eight, in *Muller v. Daniel Freeman Hospitals, Inc.*, 2nd Civil No. B199316.

Exhibit A is relevant to this appeal and to the issues before this Court because it further confirms that the authority of courts to impose monetary discovery sanctions is limited to method-specific provisions of the Civil Discovery Act. The document shows that the argument PwC makes regarding Code of Civil Procedure sections 2023.010 and 2023.030 has recently been made to and rejected by the Court of Appeal. (*Muller*, *supra*, 172 Cal.App.4th at p. 906.)

Moreover, there can be no factual dispute that Exhibit A is genuine and accurate – it was retrieved from Westlaw on June 19, 2023, which is a reliable source. (See also Appellants' Reply Brief, *Muller v. Daniel Freedman Hosps., Inc.* (Cal.App.Ct. Aug. 19, 2008) No. B199316, 2008 WL 5232053.) Finally, the City does not offer Exhibit A for an impermissible purpose, including for the truth of the matters asserted therein. Rather, Exhibit A is proffered to show the Court of Appeal's treatment of an argument identical to PwC's argument here.

Accordingly, the City respectfully requests that the Court grant its motion and take judicial notice of the document attached as Exhibit A.

DATED: June 23, 2023

ANNAGUEY MCCANN LLP

By: _____
Kathryn L. McCann
Attorneys for City of
Los Angeles

DECLARATION OF KATHRYN L. MCCANN

I, Kathryn L. McCann, declare:

1. I am an attorney licensed to practice law in the State of California. I am a partner in the law firm of Annaguey McCann LLP and counsel of record for City of Los Angeles (the "City") in this case. I have personal knowledge of the facts addressed in this declaration unless the context indicates otherwise, and, if called and sworn as a witness, I could and would testify competently about them.

2. Attached to this declaration as Exhibit A is a true and correct copy of Appellants' Reply Brief filed by Manfred Muller and Rose Shoshana in *Muller v. Daniel Freeman Hospitals, Inc.*, 2nd Civil No. B199316, in the Court of Appeal of the State of California, Second Appellate District, Division Eight, on August 19, 2008.

3. Exhibit A was retrieved at my direction by my partner, Jason Y. Kelly, from Westlaw, on June 19, 2023.

Executed this 23rd day of June 2023, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Kathryn L. McCann

EXHIBIT A

2nd Civil No. B199316

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MANFRED MULLER and ROSE SHOSHANA,

Plaintiffs/Appellants,

vs.

DANIEL FREEMAN HOSPITALS, INC., JEFFREY BOGOSIAN, M.D., SANGARAM SHANTHARAM, M.D., JAMES W. DAVIS, M.D., and UNIVERSITY MEDICAL CENTER FRESNO,

Defendants/Appellees.

Appeal from the Superior Court of Los Angeles County
Case No. SC065146
The Honorable Cesar C. Sarmiento
(Notice of Appeal Filed: May 3, 2007)

APPELLANTS' REPLY BRIEF

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I.

INTRODUCTION

"No one can take advantage of his own wrong."

CAL. CIV. PROC. CODE § 3517.

That is exactly what Defendants Shantharam and University Medical Center Fresno ("UMC") did during the retrial of this case. They were wrong in failing to fully disclose the expert opinions they intended to offer through retained expert Dr. Michael Kulick and nonretained, treating physicians Dr. James Davis and Dr. Sanagaram Shantharam. In addition, Defendants were wrong in citing the Court to a statute to exclude expert rebuttal testimony which, on its face, had no application.[1] In its order granting a new trial, the trial court confirmed that Defendants had committed these two acts which necessitated the granting of a new, third trial. [App. 207–209.]

"No one should suffer by the act of another."

CAL. CIV. PROC. CODE § 3520.

Plaintiffs Manfred Müller and Rose Shoshana, as well as their attorneys, have and will continue to suffer by the wrongful acts of the Defendants. In the first instance, Manfred Müller lost his arm as a result of these Defendants' malpractice according to at least ten (10) doctors who either treated Manfred Müller or examined his case after the fact on behalf of Plaintiffs and former Defendants. In addition, Plaintiffs and their

---

[1] See C.C.P. § 2034.310(b).

attorneys have suffered through almost seven and a half years of litigation and two trials, together with the substantial time and expense involved, all of which has been for naught, due to these Defendants' conduct in both the first and the second trials.

"For every wrong there is a remedy."

CAL. CIV. PROC. CODE § 3523.

The trial court acknowledged that the Defendants' conduct in the second trial deprived Plaintiffs of a fair trial, warranting a new, third trial. However, that is only a partial remedy. Given the economic limits in place under MICRA,[2] that partial remedy is, in reality, a severe penalty against Plaintiffs and their counsel who have incurred the time and expense of two lengthy trials and will now have to incur the time and expense of a third. The only way to provide a full remedy to Plaintiffs and their attorneys, and to deter further wrongful conduct by the Defendants is to order the trial court to award Plaintiffs' their reasonable attorneys fees', expert fees and costs for the trial and retrial which will now have to be redone.

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[2] The Medical Injury Compensation Reform Act.

II.

ARGUMENTS IN REPLY

A. DEFENDANTS INTENTIONALLY FAILED TO DISCLOSE EXPERT OPINIONS

1. The Location of The Amputation Opinions Were Not Disclosed Before Trial.

In their oppositions, the Defendants claim that full disclosure of the above-elbow amputation versus below-elbow amputation opinions were made by them prior to the last full day of trial testimony. Defendants do not cite to a specific page and line number in retained expert Dr. Kulick's deposition testimony to support this claim. Defendants do not cite to a specific page and line number in Defendant Shantharam's deposition testimony or his testimony at the original trial to support this claim. Defendants do not cite to any page and line number in former Defendant Dr. Davis' deposition testimony or his testimony at the original trial to support this claim. Finally, Defendants do not cite to any other disclosure in writing, verbally, or by any other means about the location of Manfred Müller's amputation prior to presenting that opinion testimony on the last full day of trial testimony. No such disclosure was ever made before those opinions were presented to the jury in the retrial of the case.

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2. Defendants Had A Legal Duty to Disclose All Expert Opinions Prior to Trial.

Defendants have cited to many of the same key cases cited by Plaintiffs in their opening brief, cases such as Bonds v. Roy, 20 Cal. 4th 140, 83 Cal. Rptr. 2d 289 (1999) and Jones v. Moore, 80 Cal. App. 4th 557, 95 Cal. Rptr. 2d 216 (2000). These cases stand for the proposition that expert discovery is not a game and that full disclosure of expert witnesses' opinions is critical to a party's ability to prepare for trial.

> **The need for pretrial discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses [because] . . . the other parties must prepare to cope with witnesses possessed of specialized knowledge in some scientific or technical field. They must gear up to cross-examine them effectively, and they must marshal the evidence to rebut their opinions.** [Emphasis added.]

Jones v. Moore, 80 Cal. App. 4th at 565, 95 Cal. Rptr. at 221, quoting from ONE HOGAN & WEBER, CAL. CIV. DISC. CODE (1997) EXPERT WITNESS DISCLOSURE, § 10.1, p. 525.

Defendants knew that their failure to disclose expert opinions during discovery could lead to a number of sanctions including the exclusion of those opinions at trial and, therefore, knew the importance of fully disclosing all expert opinions prior to trial. Nevertheless, Defendants did nothing to disclose the new above-elbow versus below-elbow amputation opinions of Dr. Kulick, Dr. Davis or Dr. Shantharam and, instead, surprised Plaintiffs on the last full day of trial testimony.

///

3. Defendants Cannot Blame Plaintiffs for Their Non-Disclosure.

Defendants' fallback position is that any failure to fully disclose expert opinions was the fault of Plaintiffs' counsel who either did not ask the right questions of Dr. Kulick at his deposition or did not understand Dr. Kulick's answers. Defendant UMC cites the case of Meyer v. Cooper, 233 Cal. App. 2d 750 (1965) for the proposition that California law "does not obligate the witness to volunteer . . . information when it is not called for by the deposing counsel." [Respondent's Brief of Fresno Community Hospital & Medical Center at p. 34.] Defendant UMC goes on to quote at length from the Meyer decision to support its argument that Plaintiffs' counsel is to blame for Dr. Kulick's and the Defendants' failure to disclose the above-elbow versus below-elbow amputation opinion. However, Defendants' citation to the Meyer case is clearly erroneous and unsupportable.

Shepardizing the Meyer case leads directly to the California Appellate Court decision in Kennemur v. State, 133 Cal. App. 3d 907, 184 Cal. Rptr. 393 (1982).[3] In it, the Court held that the Meyer decision does not apply to expert discovery.

> Appellant cites *Meyer v. Cooper* [citation omitted] for the proposition that the only duty imposed upon the party whose witness is being deposed is to make the witness and his

[3] In fact, Defendant UMC was aware of the Kennemur case because it cited it in support of its own appeal of the new trial order. See Appellant's Opening Brief in Case No. B196684 at pp. 44–45.

> reports available for examination; the witness is under no obligation to volunteer information or to disclose relevant and material matters not requested . . . .
>
> Although the principles articulated in *Meyer v. Cooper* are sound, they do not govern a party's duty of disclosure under section 2037.3. The legislature has singled out the pretrial discovery of expert opinions for special treatment. When appropriate demand is made for exchange of expert witness lists, the party is required to disclose not only the name, address and qualifications of the witness, but the *general substance* of the testimony the witness is expected to give at trial. (§ 2037.3.) In our view, this means the party must disclose either in his witness exchange list or at his expert's deposition, if the expert is asked, the substance of the facts and the opinions which the expert will testify to at trial. Only by such a disclosure will the opposing party have reasonable notice of the specific areas of investigation by the expert, the opinions he has reached, and the reasons supporting the opinions, to the end the opposing party can prepare for cross-examination and rebuttal of the expert's testimony. Only by such a disclosure will the possibility of a reasonable settlement of the case before trial be encouraged.

Kennemur, 133 Cal. App. 3d 918, 184 Cal. Rptr. at 399.

Defendants also blame Plaintiffs' counsel for Defendants' failure to disclose Dr. Davis' and Dr. Shantharam's new opinions that the location of Manfred Müller's amputation was significant in ruling out a compartment syndrome. Defendants argue that Plaintiffs should have redeposed both doctors prior to the retrial to learn of their new opinions. However, Dr. Shantharam had already been deposed without rendering such an opinion and had already testified in the original trial without rendering such an opinion. Similarly, Dr. Davis had already been deposed without rendering such an opinion and had also testified at the first trial without doing so. At no time prior to the last full day of trial testimony in the retrial

of the case did Defendants ever disclose that Dr. Shantharam and Dr. Davis intended to offer any new, previously undisclosed opinions. As a result, Plaintiffs' counsel did not have any reason to redepose them prior to the retrial.

B. DEFENDANTS INTENTIONALLY MISREPRESENTED THE FACTS AND THE LAW TO THE TRIAL COURT

Plaintiffs attempted to counter the previously undisclosed expert opinions presented by Dr. Kulick, Dr. Davis and Dr. Shantharam by calling Dr. James London back to court in rebuttal. To prevent this, the Defendants misrepresented the facts and the law to the trial court.

First, Defendants represented to the Court, both orally and in writing, that the above-elbow versus below-elbow opinion had been disclosed in discovery and was known to Plaintiffs and their experts, including Dr. London, prior to trial. (10 RT 3301–3310.) Upon further review of the record after trial, the court concluded that this representation by Defendants was not true.

> The Defendants presented no evidence to this Court to show that they had at any time before this trial informed the Plaintiff that they would be presenting expert testimony showing that the location of the amputation was a factor in determining the existence of a compartment syndrome.

(App. 207–209.)

///

Second, Defendants cited to California Code of Civil Procedure section 2034.310(b), claiming that it severely limited the scope of expert rebuttal testimony and precluded Dr. London from testifying in rebuttal.

> Thus, an expert called for impeachment purposes may not offer a new or different opinion to "impeach" another expert witness. He may only call into question a [sic] the existence or nonexistence of a foundational fact relied upon by the opposing expert . . . .
>
> Based upon the foregoing, it is well-established that an expert called in rebuttal to impeach an opposing party's expert may testify only to the falsity or nonexistence of any foundational *fact* upon which the opposing expert relied. Such an expert may not offer general rebuttal of *opinion* of the expert being impeached.

(See App. 35–40 at pp. 38 and 40, Defendant Shantharam's Bench Brief Re: Expert Rebuttal.) Upon further review of the law after trial, the trial court concluded that California Rules of Civil Procedure section 2034.310(b) cited by Defendants was not applicable at all since Dr. London had been a disclosed and deposed expert.

> Dr. London's rebuttal testimony was improperly excluded. He should have been permitted to testify on the issue of whether the below-elbow amputation ruled out the existence of the compartment syndrome. The Court's ruling was based upon CCP section 2034.[3]10(b). This section applies only to a non-designated expert witness. Dr. London was a properly-designated expert; therefore, this section did not apply to his proposed rebuttal testimony.

(App. 207–209.)

As officers of the court, the Defendants' attorneys had a legal, ethical and moral duty not to misrepresent the facts or the law to the court. For example, California Code of Civil Procedure section 128.7 provides:

> (b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, and attorney . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a opportunity for further investigation or discovery.

Under California Code of Civil Procedure section 128.7, monetary sanctions, including an award of attorneys' fees and costs, are appropriate where an attorney fails to follow the requirements set forth above.

California Business and Professions Code section 6068 similarly provides:

> It is the duty of an attorney to do all of the following:
>
> . . . (d) to employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

The California Rules of Professional Conduct, Rule 3-200 also states:

> Prohibited Objectives of Employment
>
> A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:
>
> . . . (B) to present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

In this case, the Defendants' counsel violated all three of the quoted statutes/rules as the trial court clearly concluded in granting a new trial.

C. SANCTIONS ARE AUTHORIZED BY CALIFORNIA LAW FOR DEFENDANTS' CONDUCT

The California Civil Code provides, "For every wrong there is a remedy." CAL. CIV. CODE § 3523. The Defendants' contention here is that "for every wrong, there is only a remedy if the legislature specifically anticipated that wrong, specifically identified that wrong in legislation, and specifically provided the courts with the authority to impose a specific sanction for that wrong." Defendants assert that they are free to violate the expert disclosure requirements in the Civil Discovery Act and are free to mis-cite the law to the Court during trial and on appeal with impunity because there is no statutory authority authorizing sanctions for those precise misdeeds. This assertion is wrong, both legally and equitably.

California Code of Civil Procedure section 2023 and its subparts specifically provide for sanctions, including monetary sanctions, for the misuse of the discovery process. In this case, the trial court found that Defendants had not disclosed the expert opinions of Dr. Kulick, Dr. Davis or Dr. Shantharam concerning the location of the amputation at any time prior to those witnesses testifying at trial, which is a violation of the Discovery Act. See Bonds v. Roy, 20 Cal. 4th 140, 83 Cal. Rptr. 2d 289, 973, P2d 66 (1999); Jones v. Moore, 80 Cal. App. 4th 557, 95 Cal. Rptr. 2d

216 (2000); and Kennemur v. State, 133 Cal. App. 3d 907, 184 Cal. Rptr. 393 (1982).

However, Defendants argue that California Code of Civil Procedure section 2023 sanctions are only applicable if there is a specific provision elsewhere in the Civil Discovery Act which expressly allows for such an award for their specific misdeeds, such as a specific provision in California Code of Civil Procedure section 2034 relating to expert disclosures and discovery.

It is self-evident from a reading of the Civil Discovery Act, and, in particular, California Code of Civil Procedure section 2023 that the legislature did not intend to identify every misuse of discovery which creative lawyers and their clients might come up with. The legislature made this clear in California Code of Civil Procedure section 2023.010, which states:

> "Misuses of the discovery process include, **but are not limited to**, the following:"

By using the highlighted language in the statute, the legislature gave to the trial court authority to award sanctions, including monetary sanctions, for discovery abuses which were not specifically described in the Discovery Act itself. Furthermore, California Code of Civil Procedure section 2023.030 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 the

following sanctions against anyone engaging in conduct that is a misuse of the discovery process: . . . ."

Section 2023.030 goes on to itself provide authority for sanctions, including monetary sanctions, for the misuse of the discovery process.

The fact that the trial courts have broader authority than that claimed by Defendants here was recognized in the case of Mattco Forge, Inc. v. Arthur Young & Co., 223 Cal. App. 3d 1429, 273 Cal. Rptr. 262 (1990). In it, the plaintiff moved to compel the production of documents from the defendant and for sanctions. The trial court granted the motion to compel and granted sanctions against the defendant. The defendant then moved for reconsideration, which the trial court denied. The trial court found that the motion for reconsideration had been frivolous and awarded additional sanctions against the defendant. The defendant then sought a writ from the appellate court arguing, as the defendants do here, that there is no specific provision in the Discovery Act which allows for an award of sanctions in for a frivolous motion for reconsideration. The appellate court rejected the defendants' position on two grounds. First, the motion for reconsideration was a continuation of the motion to compel under California Code of Civil Procedure section 2031(l), even though reconsideration is not specifically identified in that Section of the code. Second, and more pertinent to this case, the Court concluded that California Code of Civil Procedure section 2023 itself was broad enough to encompass the defendant's motion for reconsideration.

> [Defendant] Arthur Young contends that the award cannot stand under the Discovery Act because the section relied on by [plaintiff] Mattco, 2023, does not include a motion for reconsideration in its list of discovery abuses.
>
> . . .
>
> The other answer to this argument is that a motion for reconsideration of a discovery order is directly within the operation of section 2023. Subdivision (a) of section 2023 says "[m]isuses of the discovery process include, but are not limited to" the nine listed abuses. The Reporter's Note to section 2023 persuades that the statute means what it says: "Although the commission has tried to make this list a comprehensive one, it recognizes that other categories of abuse may develop. Accordingly, this list of abuses is illustrative, not exhaustive [citation omitted].
>
> We see no reason why a motion for reconsideration of a discovery sanction award, made without substantial justification and in the absence of other circumstances making an award of sanctions unjust, should not be viewed as an abuse of the discovery process within the meaning of subdivision (a) of section 2023. Any other result would be inconsistent with the Civil Discovery Act of 1986 and would defeat the legislative intent to shift fees and costs to the party who has failed to comply with the Act. ...if the sanction provisions of the Discovery Act are to be a credible deterrent to discovery abuses, they must be applied to prevent a losing party from accomplishing indirectly that which it is expressly prohibited from doing directly -- forcing a party who deals fairly to pay for the abusive tactics of one who does not.
>
> *(Fred Howland Co. v. Superior Court (1966) 244 Cal. App. 2d 605, 610 [53 Cal. Rptr. 341]).* ["'One of the principal purposes of the Discovery Act...is to enable a party to obtain evidence in the control of his adversary in order to further the efficient, *economical* disposition of cases according to right and justice *on the merits.*'" 223 Cal. App. 3rd at 1440-1442, 273 Cal. Rptr. at 268-269.

The same logic can be applied to this case. The granting of sanctions can and should be considered a continuation of the Defendants' failure to comply with the expert disclosure requirements set forth in

California Code of Civil Procedure section 2034 and its subparts, many of which authorize an award of monetary sanctions. See C.C.P. §§ 2034.250, 2034.470, 2034.630 and 2034.730.

D. DEFENDANTS' CONDUCT WARRANTS THE IMPOSITION OF SANCTIONS

The trial court found, as a matter of fact, that the Defendants did not disclose the expert opinions at any time prior to presenting those opinions to the jury on the last full day of trial testimony. In addition, the trial court found that the Defendants' citation to California Code of Civil Procedure section 2034.310(b) to exclude the rebuttal testimony of Dr. James London was not applicable. These two actions combined deprived the Plaintiffs of a fair retrial necessitating a new, third trial. Under these circumstances, the failure to award monetary sanctions was an abuse of discretion for a number of reasons and warrants a reversal by this Court.

First, the trial court applied the wrong legal standard and burden of proof in deciding the motion for sanctions. It is clear from the court's Order denying the motion for sanctions that the trial court believed that an award of sanctions could only be justified if the Defendants' were guilty of "sandbagging" or that their conduct was intentional, "disgraceful," and "conspiratorial." (App. 460–461.) The trial judge denied the motion for sanctions on the grounds that Plaintiffs had not met the burden of establishing those facts. However, California Code of Civil Procedure section 2023 does not require proof of intentional, "disgraceful," or

"conspiratorial" conduct for an award of sanctions. To the contrary, a review of California Code of Civil Procedure section 2023.010 demonstrates that there is no *mens rea* requirement in the statute at all. As a result, the trial court erroneously held Plaintiffs to a higher standard than that set forth in the discovery act itself. It should also be noted here that the damage done to the Plaintiffs is the same regardless of whether the Defendants' actions were intentional, grossly negligent, negligent, or even inadvertent.

Second, the evidence is overwhelming that the Defendants conduct was, in fact, intentional. There can be no other explanation for the Defendants saving the above-elbow versus below-elbow amputation testimony until the last full day of trial testimony and then presenting the same opinion through three separate witnesses, none of whom had ever disclosed this opinion before. Add to that the fact that defense counsel attempted to have Plaintiffs agree that they would not call any other witnesses to the stand before Defendants presented Dr. Kulick's testimony. (App. 285–293, ¶ 5.) By waiting until the last full day of trial testimony to present this new expert opinion, Defendants knew that Plaintiffs would be deprived of the opportunity to question their own experts during Plaintiffs' case in chief about this opinion, and, more importantly, Defendants knew that Plaintiffs would be unable to cross-examine the Defendants' other expert witness, Dr. Botte, about this new opinion. The latter was critical because Dr. Botte's own text book contained a study which directly

contradicted the new opinion presented by Dr. Kulick, Dr. Davis and Dr. Shantharam.

Third, the Court's denial of Plaintiffs' motion for sanctions did not take into consideration Defendants' frivolous, but successful, objections to Dr. James London being called back to the stand as a rebuttal witness. The trial court granted a new trial based, in large part, upon its erroneous exclusion of Dr. London on rebuttal, an exclusion which was based upon the Defendants' erroneous citation to California Code of Civil Procedure section 2034.310(b) which, on its face, had no application whatsoever to Dr. London as a disclosed and deposed expert. (App. 207–208.) Plaintiffs' motion for sanctions was based, in large part, upon a combination of Defendants' failure to disclose the new expert opinions presented at trial and the Defendants' erroneous, yet successful, citation to California Code of Civil Procedure section 2034.310(b) to exclude Dr. London's rebuttal testimony. However, the trial Court did not address or consider the latter at all in denying the motion for sanctions.

Finally, the Court did not take into consideration the fact that these same Defendants were responsible not just for one retrial, but two retrials of this case.

///

E. THE TRIAL COURT'S DENIAL OF PLAINTIFFS' POST-JUDGMENT MOTION FOR SANCTIONS IS APPEALABLE

Just as Defendants claim that there is no remedy available for their misuse of the discovery process and their misrepresentations to the trial Court about the applicability of a statute, they now claim that no remedy is available for the erroneous denial of a motion for sanctions if that denial occurs after trial. To the extent there is a remedy available, Defendants argue that appellate review will only be available to these Plaintiffs after a third trial of the case is concluded years from now, even though the sanctions sought are directly related to the misconduct of the Defendants during the second trial. The absurdity of that proposition is self-evident. Nevertheless, Defendants persist in raising the issue of this Court's jurisdiction, yet again, requiring Plaintiffs to incur additional attorneys' fees, costs and time to respond.

Rather than respond at length here, Plaintiffs refer the Court back to Appellants' Opposition to Motion to Dismiss Appeal in this regard and, specifically, to the cases of Shelton v. Rancho Mortgage & Investment Corp., 94 Cal. App. 4th 1337 (2002); In re Marriage of Dupre, 127 Cal. App. 4th 328 (2005); and Lakins v. Watkins Associated Industries, 6 Cal. 4th 644 (1993), all of which support this Court's jurisdiction to hear and decide this appeal.

III.

CONCLUSION

Based on the briefs submitted on behalf of Plaintiffs/Appellants Manfred Mueller and Rose Shoshana, Plaintiffs request that this course reverse the trial court's order denying their motion for sanctions and remand the issue with instructions for the trial court to award Plaintiffs their reasonable attorneys fees, expert fees and costs against the Defendants and their attorneys, jointly and severally, for both the original trial and the retrial.

Dated: August 19, 2008

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MANFRED MÜLLER and
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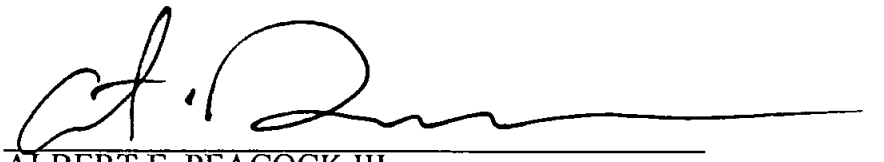
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c))

The text of this brief consists of 4,281 words as counted by the Microsoft Word 2003 version SP3, a word-processing program used to generate the brief.



DATED: August 18, 2008

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Keesal, Young & Logan, 400 Oceangate, P.O. Box 1730, Long Beach, California 90801-1730.

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I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Laurie Hlista

No. S277211

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES,
Plaintiff and Appellant,

vs.

PRICEWATERHOUSECOOPERS, LLC,
Defendant and Respondent.

[PROPOSED] ORDER GRANTING CITY OF LOS ANGELES' MOTION FOR JUDICIAL NOTICE

The Court grants City of Los Angeles' motion and takes judicial notice of the following document identified as Exhibit A to the Declaration of Kathryn L. McCann:

A. Appellants' Reply Brief filed by Manfred Muller and Rose Shoshana in *Muller v. Daniel Freeman Hospitals, Inc.*, 2nd Civil No. B199316, in the Court of Appeal of the State of California, Second Appellate District, Division Eight, on August 19, 2008.

IT IS SO ORDERED.

DATED: _____, 2023 _____

The Honorable Patricia Guerrero
Chief Justice

State of California)
County of Los Angeles)
)

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I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017; ca@counselpress.com

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Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 6/23/2023 by Florentino Jimenez, Deputy

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **LOS ANGELES, CITY OF v. PRICEWATERHOUSECOOPERS**
Case Number: **S277211**
Lower Court Case Number: **B310118**

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6/23/2023

Date

/s/Kathryn McCann

Signature

McCann, Kathryn (245198)

Last Name, First Name (PNum)

Browne George Ross LLP

Law Firm