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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of RENEE AND
ALLISDAIR SUTHER.

RENEE SUTHER,

Respondent,

v.

ALLISDAIR SUTHER,

Appellant;

CLARK H. SUMMERS, JR.,

Objector and Appellant.

E051292

(Super.Ct.No. SWD012791)

OPINION

APPEAL from the Superior Court of Riverside County. Sherill A. Ellsworth and
Becky Dugan, Judges. Reversed.

Law Office of Clark H. Summers, Jr., and Clark H. Summers, Jr., for Appellants
and Objector.

Law Offices of Pittullo, Barker & Associates and P. Timothy Pittullo for
Respondent.

Appellant Allisdair Suther (Al) and respondent Renee Suther (Renee) were in the middle of divorce proceedings that were set for trial when Al's attorney, objector and appellant Clark H. Summers, Jr. (Summers), filed on behalf of Al a request for judicial officer recusal against the Honorable Sherrill A. Ellsworth. That motion was denied by Judge Ellsworth, and the trial date was taken off calendar. Subsequently, Renee filed an notice of intention to file a motion for sanctions pursuant to Code of Civil Procedure section 128.7,¹ claiming that the motion to recuse the trial judge was frivolous and demanding payment of \$40,000 to compensate Renee for the emotional damages, attorney fees, and costs incurred due to the delay in trial. Renee filed the motion for sanctions when no response was received from Al and Summers, and it was heard by the Honorable Becky Dugan. Judge Dugan granted the motion for sanctions, finding Summers and Al jointly and severally liable for \$35,000.

Al and Summers appeal the sanctions award pursuant to section 904.1, subdivision (a)(12) on the following grounds:

1. Renee's motion for sanctions filed under section 128.7 should have been denied as a matter of law, as the notice and intended motion were defective.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2. The motion for sanctions should not have been granted because the basis of the sanctions motion—the recusal motion—had already been decided prior to the filing of the safe harbor letter and could not be remedied by Al and Summers.

3. Judge Dugan abused her discretion in granting the motion for sanctions on the merits.

4. Judge Ellsworth acted improperly in striking the recusal motion.

5. If this court overrules the ruling on the sanctions motion, Al and Summers are entitled to a hearing on attorney fees and costs incurred in the trial court and should be awarded their costs on appeal.

We hold that Renee’s motion for sanctions was procedurally defective and that Judge Dugan erred by granting the \$35,000 sanctions award.

I

FACTUAL AND PROCEDURAL BACKGROUND

The facts are taken from the pleadings filed in the lower court, the hearing on the motion for recusal in front of Judge Ellsworth, and the hearing on the motion for sanctions before Judge Dugan.

Al and Renee filed for divorce on August 24, 2007. Litigation on the matter continued for several years. In the process of litigation, on October 23, 2009, Summers, who represented Al, filed a request for judicial officer recusal and reassignment of case for trial to a different judicial officer (the recusal motion).

According to the memorandum of points and authorities, Summers had entered the case in July 2009. At that time, the case was set for trial on November 2, 2009. Summers was awaiting an evaluation of the family business pursuant to Evidence Code section 730. A mandatory settlement conference was set for September 14, 2009, but the aforementioned report had not been received. Summers attempted to file a motion to continue the conference but claimed Judge Ellsworth refused to hear the motion. Further, motions to bifurcate trial and to change discovery cut-off dates were denied by Judge Ellsworth based on improper interpretations of the law. Summers also complained about Judge Ellsworth's appointment of counsel for the Suthers' children and improperly awarded sanctions unsupported by service of any written request by Renee for attorney fees connected with a domestic violence issue. Summers argued that "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

Attached to the recusal motion, Summers included a request for a continuance of the mandatory settlement conference, a request for bifurcation of the issues, and an application to depose a witness. Summers attached the transcript of the proceeding wherein his requests were denied.

On October 29, 2009, Judge Ellsworth filed an order striking the statement of disqualification, i.e., dismissing the recusal motion. Judge Ellsworth concluded: "The claims made by respondent and respondent's counsel are not sufficient grounds for disqualification of the court. [¶] Where, as in this case, the disqualification statement

does not reveal any grounds for disqualification on its face, the judge may strike the statement of disqualification. Code [of] Civ[il] Proc[edure section] 170.4[, subdivision] (b); *Neblett v. Pacific Mutual Life Ins. Co.* (1943) 22 Cal.2d 393, 401.” Further, Judge Ellsworth found that the reasons provided for disqualifying the trial court were mere allegations and dissatisfaction with the court’s rulings, which were not proper reasons for disqualification. Judge Ellsworth also pointed out that a party’s remedy for an erroneous ruling was by review on appeal or by a writ petition, not a disqualification motion. Judge Ellsworth concluded: “Accordingly, since the statement of disqualification on its face discloses no legal grounds for disqualification, it is ordered stricken pursuant to Code of Civil Procedure section 170.4, subdivision (b).” Judge Ellsworth admonished Al and Summers that review of the decision had to be filed in 10 days through a petition for writ of mandate.

Judge Ellsworth issued a minute order on November 2, 2009, stating that the proceedings were suspended due to the recusal motion filed by Summers and Al. A mandatory settlement conference and trial setting were rescheduled for January 25, 2010.

On November 10, 2009, Renee filed an ex parte application to shorten time in order to restore the trial dates. Renee asked that the trial dates be set for late November or early December. Al and Summers filed a response of unavailability during those times and agreed with the setting date of January 25. At a hearing on the matter on November 30, 2009, Judge Ellsworth admitted that once the recusal motion was denied, the trial dates should have been restored to the calendar, but they had not been. However, Judge

Ellsworth was no longer available to try the matter. Judge Dugan was appointed to try the matter, and the parties were to appear before her on January 25, 2010. Judge Ellsworth noted: “It is also a travesty and unfair to the parties in this case that from a perspective of the Court’s error, clerically and resetting dates, that we have now lost those dates.” It was impossible to set an early date.

On December 7, 2009, Renee filed her motion for sanctions pursuant to section 128.7 (the sanctions motion). In her pleading, Renee requested \$100,000 for the filing of the bad faith and frivolous recusal motion. The amount was intended to compensate Renee for the added expenses she had incurred and to sanction Al and Summers.

Renee’s attorney, P. Timothy Pittullo, filed a declaration in support of the sanctions motion. Pittullo declared that he charged \$500 per hour. Renee had been billed \$3,312.50 for preparation of the sanctions motion. She would likely be billed another \$1,000 for the appearance and hearing on the motion. A detailed billing statement was attached.

Also attached was a “safe harbor” letter sent to Summers dated November 9, 2009. The first paragraph stated that Pittullo and Renee had received the recusal motion. It further stated: “I cannot understate the degree of concern I have about the propriety of your filing of this document, both in terms of the lack of evidentiary basis for making the request, and also in terms of the timing of the request itself. Attached is a motion for sanctions under [section] 128.7 against both [Al] and yourself, personally, in the amount of \$100,000. This letter is intended to constitute a ‘safe harbor’ letter, as is required

pursuant to [section] 128.7.” The letter further stated: “Your actions cannot be undone, and we have lost the trial dates which we had reserved for several months. I am demanding that within the ‘safe harbor’ period allowed by statute you cooperate in immediately taking all necessary steps to restore this matter to the calendar and pick immediate trial dates. In addition, unless my office receives a payment of \$40,000 to compensate my client for the bad faith and litigious actions conducted on behalf of [AI], I will file the Motion for Sanctions contained herein.” No date for when the sanctions motion would be filed was included in the safe harbor letter.

Opposition to the sanctions motion was filed by AI’s new counsel, Andrew F. Linehan, on March 29, 2010. According to the pleading, trial had been set for May 17, 2010. Linehan objected that the safe harbor letter failed to include a date that the sanctions motion would be filed and heard as required. Since such date was not in Pittullo’s letter, proper notice had not been given. Linehan also cited to *Li v. Majestic Industrial Hills LLC* (2009) 177 Cal.App.4th 585, 591 (*Li*) for the proposition that a party upon which a safe harbor letter is served for filing a nonmeritorious pleading is entitled to 21 days to withdraw the offending pleading. Neither AI nor Summers could comply with the safe harbor letter because the recusal motion had already been decided; it was the only act upon which sanctions could have been imposed.

Pittullo filed a reply to the opposition. He stated that it was impossible to set a date in Riverside County for a sanctions motion because the court does not allow a party to set a date prior to filing a motion. Further, AI and Summers could comply with the

safe harbor letter. Pittullo suggested that Al and Summers could have filed a request to restore the trial dates in order to comply with the safe harbor letter.

On April 6, 2010, the parties appeared before Judge Dugan. Linehan advised Judge Dugan that the only decision to be made at that time was whether the sanctions motion was procedurally defective. Linehan reiterated that Al and Summers could not have complied with the safe harbor letter, as the issue had already been decided. Judge Dugan then noted that, by so finding, the party who sought the recusal motion could do so without suffering any penalty. Linehan contended it was preposterous to argue that Al and Summers should have paid Renee \$40,000.

Judge Dugan asked Pittullo if he had also filed a motion for sanctions under Family Code section 270, to which he responded he had not. Judge Dugan then stated: “Frankly, because of all of the—you pointed out in your declaration as well, Mr. Pittullo, [Code of Civil Procedure section] 128.7 is a specific provision that contains that 21-day, quote, safe harbor letter so that you can remedy your wrong, and this wrong couldn’t be remedied. It couldn’t. You lost your trial, and the [Code of Civil Procedure section] 170.1 couldn’t have been withdrawn in the sense that it was rendered moot, but I do agree that a get-out-of-jail-free card for that kind of behavior is also inappropriate, but it seems like it would better lie in a [Family Code section] 271 motion.” Pittullo responded that he had filed under Code of Civil Procedure section 128.7 because there was fraud by Summers and Family Code section 271 only allowed sanctions against a party.

Further, Pittullo thought Summers and Al could comply with the safe harbor letter by paying \$40,000. The amount compensated Renee for resetting the trial date and punished both Al and Summers.

Linehan also reiterated that the notice was defective for failing to set a date for the sanctions motion. Linehan stated that in another case, he was able to contact the court and get a date for the motion. Pittullo agreed that he had done the same thing in other cases. Summers, who was also present, argued that the sanctions motion was more appropriately filed under Family Code section 271. Summers also stated that it was impossible to comply with the safe harbor letter.

Judge Dugan ruled: “The remedy, that is the other problem. He couldn’t fix the harm. The date was lost. A new judge was coming in making arguments about the [section] 170.1 moot. They prevailed in the sense their goal was accomplished and it couldn’t be fixed. That doesn’t mean—the logic that then they get off Scott-free makes no sense to me. It flies in the face of the intent of the statute which has very strong language about the Court even on its own motion sanctioning when appropriate for egregious behavior. [¶] I’m going to find procedurally it is not defective.” Al and Summers were directed that they should file a writ petition or appeal if they disagreed with the ruling. The issue of the merits of the sanctions motion was continued.

Both parties filed briefing on the merits of the issue of whether the recusal motion was frivolous or filed in bad faith in regards to whether sanctions were appropriately assessed against Al and Summers.

At the hearing on the merits of the sanctions motion, Judge Dugan inquired whether Summers or Linehan had filed a writ petition or appeal from the decision that the sanctions motion was not procedurally defective. Summers explained that no appeal had been filed because it was only part of the sanctions motion and that nothing in the ruling triggered the requirement for an appeal. Summers again explained to Judge Dugan that no writ was taken from the denial of the recusal motion.

Summers offered a copy of *Li* to Judge Dugan; she briefly reviewed the case. Pittullo argued that Summers and Al had a remedy in the safe harbor letter by paying the money requested in the letter and by seeking to get the case restored to the trial calendar.

Judge Dugan then held as to the validity of the recusal motion as follows: “Well, [Judge Ellsworth] made an order that she wasn’t doing all those bad things, and nobody in their right mind believed she was, and that became a final order when a writ wasn’t taken. [¶] So I can’t go back and second-guess that. I wasn’t here. That’s why on [section] 170.1 I’m bound by how it went, and it went how it went. So the question today was not did you take it in bad faith or not. The question really today is what is the appropriate remedy in dollars for what you did when another court has found already that what you did was wrong.” When Summers tried to argue that the recusal motion was not brought in bad faith, Judge Dugan responded: “I don’t think there’s any point in arguing whether there was or was not bias, or it was or was not appropriately taken. A judge said it wasn’t, and you had a writ chance to argue about that.”

Judge Dugan then asked, if Code of Civil Procedure section 128.7 did not apply, would it be appropriate to still award attorney fees to Renee due to the loss she incurred due to the recusal motion. Summers agreed that a Family Code section 271 motion could be made and would be appropriate. Pittullo represented to the trial court that if the sanctions motion was denied, a Family Code section 271 motion would be filed.

Judge Dugan believed that Summers was responsible for filing the recusal motion. The parties acknowledged that the only way to assess sanctions against Summers was through section 128.7. Pittullo then represented that he had incurred \$15,000 in attorney fees and costs due to the delay.

Judge Dugan ruled: “So the question is, really, both sanctions and the interpretation of [section] 128.7. I ruled last time—and I’ll let the appellate court tell me I’m wrong—it is not clear. It’s a fuzzy area. You know, we set a motion date because that’s how we do it, and you need to have a motion date. [¶] Subsequently, there was a case that came down that says no, we don’t do it that way, but that was subsequently. So I’ll let the appellate court do what they wish with this, but I’m going to issue an order for \$35,000. [¶] I do think that when you file something like this within days of trial, and you know—everybody knows, and as you said, you’ve been an attorney for 33 years—the ramification is that you get your continuance, and both sides pay for that. This case has been going on since ’07, and both sides have paid for dragging it out so long. Closure is appropriate for everybody. So the Court is awarding \$35,000 in sanctions

under [section] 128.7.” The award was assessed against both Al and Summers, and they were jointly and severally liable.

The trial court also noted: “Mr. Summers proceeded with the declaration as [Al’s] attorney of record, and I’ll find they’re both jointly and severally liable. And we’ll let the appellate court do with the procedurals what they choose to do. But this Court is bothered that there’s no code section—and maybe that’s a legislative problem and not ours today—that covers these unique circumstances.”

Dissolution of the marriage was ordered on May 25, 2010. Al and Summers filed their notices of appeal on July 12, 2010.

II

PROCEDURAL DEFECT IN MOTION FOR SANCTIONS BROUGHT PURSUANT TO SECTION 128.7

Al and Summers essentially contend in their first two arguments that the sanctions motion filed by Renee was procedurally defective and could not be the basis for the sanctions award imposed by Judge Dugan. Renee responds that Al and Summers have waived any argument the sanctions motion was procedurally defective by failing to file an appeal or writ petition from Judge Dugan’s order that resolved the procedural argument. Renee further contends the sanctions motion was not procedurally defective.

A. *Section 128.7*

Section 128.7, “[s]ubdivision (b) requires that parties and their attorneys certify that pleadings or other written matters presented to the courts have merit, ‘to the best of

the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.’” (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 516.) If, after notice and a reasonable opportunity to respond, the court determines the certification was improper under the circumstances, it may impose an appropriate sanction. (§ 128.7, subd. (c).)

Section 128.7, subdivision (c)(1), provides the procedure for filing a sanctions motion as follows: “A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010,² but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney’s fees incurred in presenting or opposing the motion. . . .”

Based on the above statutory language, “[a] party seeking sanctions must follow a two-step procedure. First, the moving party must serve on the offending party a motion for sanctions. Service of the motion on the offending party begins a [21]-day safe harbor period during which the sanctions motion may not be filed with the court. During the

² Section 1010 provides, in pertinent part, as follows: “Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based.”

safe harbor period, the offending party may withdraw the improper pleading and thereby avoid sanctions. If the pleading is withdrawn, the motion for sanctions may not be filed with the court. If the pleading is not withdrawn during the safe harbor period, the motion for sanctions may then be filed.” (*Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 440.)

The safe harbor period of the statute allowing for sanctions is mandatory, and the full 21 days must be provided absent a court order shortening that time period. (*Li, supra*, 177 Cal.App.4th at pp. 592-594.) Strict compliance with the provisions of section 128.7 is required. (*Galleria Plus, Inc. v. Hanmi Bank* (2009) 179 Cal.App.4th 535, 538 [“Strict compliance with the statute’s notice provisions serves its remedial purpose and underscores the seriousness of a motion for sanctions.”].)

“The availability of sanctions under section 128.7 in connection with undisputed facts is a question of law subject to de novo review.” (*Li, supra*, 177 Cal.App.4th at p. 591; see also *Galleria Plus, Inc. v. Hanmi Bank, supra*, 179 Cal.App.4th at p. 538.)

B. Waiver

Renee contends that Al and Summers cannot argue on appeal that the sanctions motion was procedurally defective—i.e., that Renee violated the safe harbor provisions of section 128.7—because they failed to file an appeal from Judge Dugan’s order finding that the sanctions motion was not procedurally defective.

“‘Generally, no order or judgment in a civil action is appealable unless it is embraced within the list of appealable orders provided by statute.’ [Citation.]” (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19.)

Appealable judgments and orders are listed in section 904.1. (*Walker*, at p. 19.) An appeal may be taken from an order of the court directing payment of monetary sanctions by a party where the amount exceeds \$5,000. (§ 904.1, subd. (a)(12).) If the award of sanctions is less than \$5,000, it is not an immediately appealable order. (*Id.*, subd. (a)(11), (12).)

A party aggrieved by a trial court's ruling on a nonappealable matter may seek review of the order by a timely writ petition. (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 319 [appellate courts may consider interim rulings on petitions for an extraordinary writ].) "[T]he Legislature has authority . . . to limit review to that available by discretionary writ, and to foreclose review of such a preliminary issue on appeal, even from a subsequent final judgment. [Citations.]" (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 174, fn. 55.)

Here, on April 6, 2010, Judge Dugan made a ruling that the sanctions motion was not procedurally defective. Judge Dugan advised Al and Summers that if they disagreed with the decision, they should file a writ petition or an appeal from the decision. At that point, the hearing was essentially continued in order for the parties to file briefing on the merits of the sanctions motion. Judge Dugan did not impose the \$35,000 sanctions award until May 14, 2010. The notice of appeal was filed on July 12, 2010.

Renee has provided no authority, and we have found none, that would make Judge Dugan's ruling on the procedural issues on the sanctions motion an appealable order. Judge Dugan could have reconsidered her ruling at the time the merits of the sanctions

motion was heard. Further, if Judge Dugan had awarded less than \$5,000 in sanctions, or none at all, there would be no right to appeal the sanctions motion. Al and Summers did not waive their right to appeal the procedural defects in the sanctions motion.

Although Al and Summers could have filed a writ petition, they were not required to do so, and the failure to file a writ petition does not foreclose filing an appeal. There is no legislative writ requirement under these circumstances. As such, we can review the procedural defect claims brought by Al and Summers.

C. *Procedural Defect in Section 128.7 Notice*

“In order to effectuate the safe harbor provisions [of section 128.7], a party may not bring a motion for sanctions unless there is some action the offending party may take to withdraw the improper pleading. [Citation.]” (*Malovec v. Hamrell, supra*, 70 Cal.App.4th at p. 441.) “The law is well settled that the safe harbor provisions preclude a party from seeking monetary sanctions for an offending pleading following a dispositive ruling by the trial court on the pleading.” (*Id.* at p. 442.)

“A number of appellate courts have recognized, albeit in somewhat different contexts, that once the offending pleading or motion is resolved, the party who filed it has no opportunity to take the corrective action contemplated by the safe harbor provision and an award of sanctions is not proper. (See *Day v. Collingwood* (2006) 144 Cal.App.4th 1116, 1128 . . . (*Day*) [courts in a number of cases ‘have concluded that a motion for sanctions under section 128.7 that is not *served* sufficiently in advance of a dispositive ruling on the challenged pleading fails to comply with the safe harbor

provision set forth in section 128.7, subdivision (c)(1)']; *Malovec v. Hamrell*, *supra*, 70 Cal.App.4th at p. 442 [“party seeking sanctions must leave sufficient opportunity for the opposing party to choose whether to withdraw or cure the offense voluntarily before the court disposes of the challenged contention”]; *Barnes v. Department of Corrections* [1999] 74 Cal.App.4th [126], 135 [motion for § 128.7 sanctions served after judgment entered; ‘[a]t the time [the defendant] served the motion on [plaintiff], there was no action [plaintiff] could take to avoid the imposition of sanctions’].)” (*Li*, *supra*, 177 Cal.App.4th at pp. 591-592; but see *Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967, 975-977 [if a sanction motion is filed prior to the voluntary dismissal of an action or pleading, sanctions under § 128.7 are appropriately imposed].)

Here, Summers and Al filed their recusal motion on October 23, 2009, and Judge Ellsworth denied the motion on October 29, 2009. Renee’s safe harbor letter was dated November 9, 2009. As such, by the time that Renee served notice that she intended to file a motion for sanctions against Summers and Al, they could no longer withdraw the recusal motion. Based on well-established authority, Renee failed to comply with the procedural requirements of section 128.7, and therefore sanctions under this section were not properly imposed.

Renee contends the safe harbor letter was appropriate and enforceable because it directed Al and Summers to pay \$40,000 to compensate her for the emotional damage caused by the delay in trial and to cover her attorney fees and costs and attempt to restore the trial dates. Renee argues this provided an effective remedy. However, she provides

no authority for a proposition that this is appropriate under section 128.7. As noted by the court in *Li*, “[b]y mandating a 21-day safe harbor period to allow correction or withdrawal of an offending document, section 128.7 is designed to be remedial, not punitive. [Citation.]” (*Li, supra*, 177 Cal.App.4th at p. 591.) Forcing Al and Summers to pay \$40,000 without a determination that the recusal motion was frivolous or that sanctions were even warranted was improper. Clearly, the plain language of section 128.7 does not authorize such a demand in a safe harbor letter; it only allows withdrawal of the offending pleading.³ Moreover, nothing in section 128.7 mandates corrective action after a pleading has been dismissed. We must follow the plain language of the statute. (*People v. Loeun* (1997) 17 Cal.4th 1, 9 [“[i]n interpreting statutes, we follow the Legislature’s intent, as exhibited by the plain meaning of the actual words of the law”].)⁴

The safe harbor provisions of section 128.7 prohibit a trial court from imposing sanctions following a dispositive ruling on the challenged pleading. It is clear that Judge Dugan felt that Al and Summers should both be held responsible for filing the recusal motion. Although apparently recognizing that Renee had failed to comply with section

³ At oral argument, Renee attempted to parcel up the safe harbor letter by claiming that Al and Summers could have complied by restoring the trial date. However, the letter clearly stated that “in addition” to restoring the trial date, Al and Summers had to pay \$40,000.

⁴ Contrary to Renee’s suggestion at oral argument, we in no way condone the actions of Summers in this case, but we must follow the plain language of section 128.7 absent a legislative change.

128.7, she also did not want Al and Summers to get off “Scott-free” or receive a “get-out-of-jail-free card” for filing what she considered a frivolous motion. However, section 128.7 requires strict compliance and simply could not be used in this case to impose sanctions under section 128.7.⁵

We note that sanctions may have been appropriate under Family Code section 271. Pursuant to Family Code section 271, a court may award sanctions against a party whose conduct “frustrates” the policy of promoting settlements and reducing litigation costs. (Fam. Code, § 271, subd. (a).) Family Code section 271 sanctions are imposed for “obstreperous conduct which frustrated the policy of the law in favor of settlement, and caused the costs of the litigation to greatly increase” [citation] . . .” (*In re Marriage of Freeman* (2005) 132 Cal.App.4th 1, 6.)

Our decision here in no way impacts Renee’s ability to file a Family Code section 271 motion requesting sanctions. The amount of any sanction awarded is not limited to expenses incurred in opposing the sanctionable conduct. (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1226-1227.) Renee asks us to uphold the \$35,000 award on appeal under Family Code section 271. However, under Family Code section 271, only attorney fees and costs are awarded and are based on the “parties’ incomes, assets, and liabilities.” (Fam. Code, § 271, subd. (a).) It is impossible for this court to discern

⁵ Since we conclude the sanctions motion was procedurally defective on the grounds it violated the 21-day safe harbor provision of section 128.7, we need not address the additional claims raised in the appellants’ brief.

the proper award under Family Code section 271 or that the conduct required such an award. We believe the trial court is in the best position to determine sanctions under Family Code section 271.⁶

III

DISPOSITION

The order awarding sanctions pursuant to section 128.7 is reversed. In the interests of justice, the parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

KING
J.

⁶ Al and Summers had initially sought in their opening brief remand of the case in order for them to be awarded attorney fees and costs for defending the sanctions motion in the trial court. However, they clarify their argument in the reply brief as follows: “The [appellants’ opening brief] does not seek an award of attorney fees for the defense of the sanctions motion, only a reservation of the right to seek fees in the trial court should fees be warranted.” We express no opinion on the propriety of such fees and do not by this ruling foreclose the filing of such request in the trial court.