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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re the Marriage of STEVEN and  
MELISSA NOBLE.

H041148  
(Santa Clara County  
Super. Ct. No. FL164748)

STEVEN O. NOBLE,

Respondent,

v.

MELISSA J. NOBLE,

Respondent,

PATRICIA M. MCKINNIE,

Appellant.

**I. INTRODUCTION**

In this marital dissolution action, appellant Patricia M. McKinnie, the former attorney of respondent Melissa J. Noble, challenges the trial court's May 1, 2014 order granting respondent Steven O. Noble's request for monetary sanctions and imposing sanctions on McKinnie in the amount of \$10,000 plus discovery sanctions in the amount of \$6,000. For the reasons stated below, we determine that the trial court did not abuse its discretion in imposing discovery sanctions of \$6,000 under Code of Civil Procedure section 2033.280, subdivision (c). We further determine that the trial court imposed the

\$10,000 sanctions award on McKinnie under Family Code section 271 (hereafter, section 271). Since monetary sanctions under section 271 may not be imposed on a party's attorney, we will reverse the May 1, 2014 order imposing sanctions of \$10,000 on McKinnie and remand the matter for reconsideration under the applicable legal principles.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. Marital Dissolution***

Melissa and Steven were married in March 2009 and separated nearly four years later in February 2013. Their son was two years old at the time of their separation. Steven filed a petition for dissolution of marriage in April 2013. Attorney McKinnie represented Melissa in this matter until she substituted out in April 2014 and was replaced by Melissa in propria persona.

Steven filed an income and expense declaration in June 2013 that stated he was 40 years old and employed as chief technology officer for Sideband Networks with a monthly salary of \$15,000. He was also the owner of consulting business, Router Analysis, Inc., from which he received no income. Melissa's June 2013 income and expense declaration stated that she was 24 years old and currently unemployed. She was last employed in August 2009 as an office assistant earning \$12 per hour.

Steven filed another income and expense declaration in September 2013 that contained the same information regarding income and employment as his previous income and expense declaration. Melissa's September 2013 income and expense declaration stated that she was a full-time college student at San Jose State University and she had most recently worked in 2010 as an "Admin." earning \$10 per hour.

### ***B. October 2013 Award of Uncharacterized Attorney's Fees***

On October 29, 2013, the trial court filed a findings and order after hearing that provided, among other things, for an award of attorney's fees to Melissa: "Based on [Melissa's] application for attorney's fees, testimony and argument, the Court orders that

[Steven] shall arrange payment to [Melissa's] attorney, as and for attorney's fees, the sum of \$10,000, which payment is without characterization. Said payment shall be made in full within forty-five (45) days of September 5, 2013."

***C. December 2013 Settlement Conference***

On December 2, 2013, a settlement conference took place before Commissioner Irwin Joseph. Both parties attended the settlement conference with their attorneys. Melissa was represented at the settlement conference by McKinnie. After placing the parties' December 2, 2103 settlement agreement on the record, Commissioner Joseph stated: "This [settlement agreement] takes care of all financial issues except attorney's fees which are a subject of a different dispute that I am not going to deal with. Judge Folan will deal with your attorney's fees dispute." The financial issues that were resolved included issues relating to Steven's businesses, as stated on the record as follows:

"[MCKINNIE]: Your Honor, as to the businesses, I want waivers of liability for my client related to any transfers of the three businesses.

"THE COURT: So Husband will indemnify Wife, and Wife will waive any rights she has in the businesses.

"[STEVEN'S COUNSEL]: That's acceptable, Your Honor."

On February 5, 2014, the trial court filed an "order after judicially supervised settlement conference of 12/2/13 re all financial issues except attorney's fees." Among other things, the order states: "The business entities known as Sonn, LLC, Router Analysis, Inc. and Network Device Education Foundation, together with the assets or liabilities of said business entities are awarded to Husband. Wife shall sign any paperwork that might be required in order to remove her name from any interest in any of said businesses or for the purpose of closing any of said businesses. Husband shall indemnify Wife with respect to said businesses and Wife waives any rights that she has in said businesses and relinquishes any interest whatsoever in any business Husband owns

or claims to own.” The order further states: “The orders as set forth hereinabove resolve all financial issues between the parties with the exception of each party’s right to seek attorney’s fees from the other, which issue is referred back to Judge Folan.”

***D. Discovery Motions and Orders***

**1. Melissa’s Post-Settlement Discovery Motion**

On December 4, 2013, two days after the settlement conference, Melissa served a status conference questionnaire that indicated +Melissa was making new claims of breach of fiduciary duty and perjury.

Melissa also served, on a date unspecified in the record, her demand for production of documents “set No. 2”<sup>1</sup> regarding Steven’s business records. On December 27, 2013, Melissa filed a memorandum of points and authorities in support of her motion to compel responses to her demand for production of documents “set No. 2.” The memorandum of points and authorities was signed by attorney “Sandra J. McManus for Patricia M. McKinnie.”

Melissa also filed a “separate statement of responses in dispute” in support of her motion to compel, which indicated that her demand for production of documents “set No. 2” included 27 demands and sought documents related to Steven’s businesses, including articles of incorporation and bylaws, organization meeting minutes, payments to Steven, consulting contracts, donations, surplus balances, income distribution, assets, revenue, annual budget, credit cards and lines of credit, corporate securities, and purchases. Melissa also sought an award of attorney’s fees and costs for discovery abuse.

Steven filed opposition to Melissa’s motion to compel production of documents and request for attorney’s fees and costs. He argued that the motion to compel was frivolous, pointing out that Melissa’s attorneys had failed to advise the trial court “of the

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<sup>1</sup> The record does not include a copy of Melissa’s request for production of documents “set No. 2.”

essential fact that a settlement has occurred and that all financial issues in the case, except attorney fees, have been resolved.” As set forth in his attorney’s supporting declaration, Steven requested an award of monetary sanctions in the amount of \$10,000 “under all applicable statutes, including without limitation Family Code §271 and Code of Civil Procedure §2031.310(h) [discovery sanctions].” Steven’s opposition also included his attorney’s responsive declaration, in which his attorney asserted that Melissa had relinquished all rights to Steven’s companies, including Router Analysis, SONN, LLC, and NetDef, during the December 2, 2013 settlement.

## **2. March 12, 2014 Order**

The trial court issued its ruling on Melissa’s motion to compel responses to her demand for production of documents “set No. 2” on March 12, 2014. The trial court denied the motion on the ground that the documents that Melissa requested had either been previously provided by Steven or were not reasonably calculated to lead to the discovery of admissible evidence. The court found that “[w]hat is relevant at a future hearing is the issue of attorney fees. That is all. The items requested do not assist in this process, and, moreover, [Melissa] fails to acknowledge that [Steven] has filed 6 large binders of discovery and other essential documents with [her] counsel.”

The trial court further found, as stated in the March 12, 2014 order, that “[w]hat is also disturbing about this process is that the moving party, [Melissa], did not bother to tell the court that the matter had settled. It is incomprehensible to the court why [Melissa], absent adequate information, would settle in a global manner all financial matters without having reviewed all of the relevant financial data. ¶] Further, because of the settlement in this case, [Steven] has released [Melissa] from any and all liabilities involved in the various business ventures. Th[eir] targeted reason for the production is cited in [Melissa’s] papers: ‘The information and documents sought through this demand are relevant to the issues before the Court, as documents bearing upon [Melissa’s] liabilities and interests in the community business which have not been divided or

settled.’ [Citation.] In fact, the settlement document arrived [at] on December 2, 2013, and recited and approved on the record by Commissioner Joseph makes clear, some 25 days before that [Melissa] was released. Therefore, the information was irrelevant to any claim contained in the Request for Orders.”

As to sanctions, the court made the following findings in the March 12, 2014 order: “1. [Melissa’s] conduct in this matter is violative of the spirit and letter of the law applied in Family Court. The conduct by [Melissa] in this matter was designed to harass, vex or annoy [Steven]. [Melissa] persisted in filing, forging ahead with and keeping from this court an essential ingredient in the matter, which was that the case was settled and claims released relative to the business entities. Moreover, [Melissa] failed to categorize and specify what items of discovery could have logically been used to pursue an additional claim of attorney fees. [¶] 2. *The court further finds that the conduct of [Melissa’s] counsel was not designed to promptly and efficiently settle all matters. This case was contentious. The court has an expectation that once matters are settled, the counsel will go about their business in a civilized manner to clean up remaining details. This was not done in this case. On one level, the court is receiving a message that there is buyer remorse in the settlement. On another level, and the one I am finding, the court believes that the conduct of [Melissa’s] counsel merely poured gas on a smoldering fire. . . . [¶] 3. The court does not have enough information, after the settlement, to properly evaluate the level of the sanction which will be imposed. Therefore, I am ordering both counsel to file with the court their clients’ income and expense form by April 11, 2014. This matter is scheduled on the Law and Motion Department 76 Calendar on April 22, 2014 at 1:30.” (Italics added.)*

Melissa filed a motion requesting reconsideration of the March 12, 2014 order, to which McKinnie’s declaration was attached. McKinnie stated in her declaration, among other things, that reconsideration was warranted because “new information” showed that not all of the financial issues had been resolved. Steven filed opposition to the motion for

reconsideration. The record does not include an order regarding the motion for reconsideration, but there is no indication in the record that the motion was granted.

### **3. Steven's Post-Settlement Discovery Motion**

The trial court's March 12, 2014 order did not end the parties' discovery battle. On March 17, 2014, Steven filed a request for an order compelling Melissa to respond to his December 23, 2013 discovery requests (including requests for admission, request for production of documents, and form interrogatories). His attorney's attached declaration asserted that the discovery was necessitated by Melissa submitting a status conference questionnaire on December 3, 2013, that indicated that Melissa was making new claims of breach of fiduciary duty and perjury. Steven sought an order (1) deeming the truth of the matters specified in his requests for admission to be admitted by Melissa; (2) compelling Melissa to respond to his interrogatories and request for production of documents; and (3) awarding monetary sanctions. Steven's attorney stated in his supporting declaration that Steven was entitled to discovery sanctions in the amount of \$6,000.

### **4. May 1, 2014 Stipulation and Order After Mediation**

While Steven's discovery motion was pending, McKinnie filed a substitution of attorney on April 9, 2014, in which McKinnie was substituted by Melissa in propria persona. Thereafter, the parties participated in voluntary mediation and entered into a "stipulation and order resolving all remaining issues in the case except timeshare," as well as a "stipulation and order regarding temporary timeshare."

The "stipulation and order resolving all remaining issues in the case except timeshare" was filed on May 1, 2014, and states that it "is designed to resolve all remaining issues in the case except timeshare with the parties' son . . . ." Among other things, the May 1, 2014 stipulation and order provided that all requests for orders filed by either party were dismissed with the exception of those for sanctions; all formal discovery requests by either party were dismissed with prejudice; all claims by either

party for breach of fiduciary duty or perjury through the date of the stipulation were waived; and (as indicated by handwritten interlineations) all pending court dates (including the hearings on Melissa's request for reconsideration, discovery motions, settlement conference and trial dates) with the exception of the April 22, 2014 hearing on sanctions, were vacated and off calendar with prejudice.

#### **5. May 1, 2014 Sanctions Order**

The hearing on the amount to be awarded on Steven's request for monetary sanctions was held on April 22, 2014, pursuant to the trial court's March 12, 2014 order reserving the sanctions issue. On May 1, 2014, the trial court entered the court's findings and order after the April 22, 2014 hearing. The May 1, 2014 order is the subject of this appeal.

At the outset, the trial court noted in the May 1, 2014 order that the parties had participated in a voluntary mediation with mediator Robert C. Redding to resolve child custody and timeshare issues, and the mediation had also included all remaining financial issues except sanctions. The trial court had signed both stipulations and orders that were presented by the parties following the mediation. Regarding the reserved issue of sanctions, the court made two orders.

First, the trial court ordered that Melissa's "prior counsel, Patricia McKinnie, is sanctioned in the sum of \$10,000 (the amount of attorney fees previously paid without characterization by [Steven] to Ms. McKinnie pursuant to court order, which attorney fees were paid with respect to Ms. McKinnie's representation of Melissa Noble). Patricia McKinnie is hereby ordered to pay said \$10,000 sanction award directly to the office of [Steven's counsel] on or before May 15, 2014, at 4:00 p.m."

Second, the trial court ruled on Steven's request for sanctions in his March 17, 2014 discovery motion. Having been advised that the parties had resolved all discovery issues through mediation, the court ordered that McKinnie "is sanctioned in the additional sum of \$6,000 pursuant to the provisions of Code of Civil Procedure

§2033.280[, subdivision ](c). This additional monetary sanction is imposed against [Melissa's] former counsel, Patricia McKinnie, for failure to respond to the discovery requests (and in particular the Request for Admissions), which additional sanction the Court finds to be a reasonable sum based upon the content of [Steven's counsel's declaration]. Patricia McKinnie is hereby ordered to pay this additional \$6,000 sanction award directly to the office of [Steven's counsel] on or before June 2, 2014, at 4:00 p.m.”

The trial court further stated in the May 1, 2014 order that “[t]he Court finds the amount of both sanctions set forth hereinabove to be reasonable in light of the family law background of [Steven's] attorney and the degree to which [Steven's] attorney was required to diligently represent [Steven] with respect to what the Court finds to have been a straightforward matter that was made complex by the conduct of [Melissa's] former counsel, Patricia McKinnie. [¶] . . . The Court further finds that neither of the sanction orders shall be enforceable as against [Melissa], but only as against [Melissa's] former counsel, Patricia McKinnie.”

On May 21, 2014, McKinnie filed a request for an order vacating the May 1, 2014 sanctions order pursuant to Code of Civil Procedure section 663.<sup>2</sup> In her supporting memorandum of points and authorities McKinnie argued that she had standing to move to vacate the sanctions order as an aggrieved nonparty. She also argued that the trial court had erred in awarding sanctions because (1) there was no basis for the \$6,000 award since the parties' stipulation and award had dismissed all discovery requests and Steven's discovery motion was not granted; (2) the court did not provide any statutory basis for

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<sup>2</sup> Code of Civil Procedure section 663 provides in part: “A judgment or decree, when based upon a decision by the court, . . . may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.”

imposing the \$10,000 award or refunding a previous award of need-based attorney's fees; (3) service of Steven's discovery requests was defective because McKinnie had given notice of her unavailability; (4) she did not have adequate notice or an opportunity to be heard; and (5) Steven's discovery requests were irrelevant.

Steven filed a responsive declaration in opposition to McKinnie's motion to vacate the May 1, 2014 sanctions order. He asserted that the \$6,000 sanctions award was made due to McKinnie's failure to respond to Steven's discovery requests regarding Melissa's new claims for breach of fiduciary duty and perjury. He also asserted that the \$10,000 sanctions award was made because McKinnie's December 27, 2014 motion to compel discovery responses was denied.

The trial court denied McKinnie's motion to vacate the May 1, 2014 order during the June 17, 2014 hearing on the motion, as reflected in the minute order of June 17, 2014. During the hearing, the trial court rejected McKinnie's contentions that the handwritten interlineations on the stipulation and order resolving all remaining issues except sanctions was altered or forged by Steven's counsel: "There is absolutely clear and convincing testimony about how that interlineations was made. It is clearly not a forged document." The court also explained the basis for the \$6,000 sanctions award: "[T]here were discovery orders presented to the Court but [McKinnie's] failure to respond to them as far as the Court was concerned was a complete violation of [Code of Civil Procedure section] 2033.280[, subdivision ](c) and it is my recollection I did not impose the full amount [Steven's counsel] requested, rather I reduced it back to \$6000 which I felt to be a reasonable sum for the violation . . . ."

The trial court also stated during the June 17, 2014 hearing that "the Court made an order back in March of [2014] under [section 271]. . . . The order that I made on the 22nd of April was one . . . anchored completely in Family Code section 271."

McKinnie filed a timely notice of appeal from the May 1, 2014 sanctions order on June 23, 2014. The order is appealable pursuant to Code of Civil Procedure

section 904.1, subdivision (a)(12), which provides that an appeal may be taken “[f]rom an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).”

### III. DISCUSSION

#### A. *Discovery Sanctions Award of \$6,000*

McKinnie contends that the trial court erred in awarding discovery sanctions against her in the amount of \$6,000 for failure to respond to Steven’s December 2013 discovery requests. We will begin our evaluation of this sanctions issue with an overview of the rules governing discovery sanctions.

“The Civil Discovery Act ([Code Civ. Proc., ]§ 2016.010 et seq.) provides in pertinent part: ‘To the extent authorized by the chapter governing any particular discovery method . . . , the court, after notice . . . and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process: [¶] (a) . . . If a monetary sanction is authorized by any provision of this title, the court *shall* impose that sanction *unless* it finds that the one subject to the sanction acted with *substantial justification* or that other circumstances make the imposition of the sanction unjust.’ ([Code Civ. Proc., ]§ 2023.030, subd. (a), italics added.)” (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1434 (*U.S. Swimming*).)

In this case, the trial court expressly stated that the \$6,000 award of discovery sanctions was made pursuant to Code of Civil Procedure section 2033.280, subdivision (c), which provides in pertinent part: “If a party to whom requests for admission are directed fails to serve a timely response, the following rules apply: [¶] . . . [¶] . . . It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with [Code of Civil Procedure] Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion.” An award of sanctions was therefore mandatory under Code of

Civil Procedure section 2033.280, subdivision (c) unless Melissa met her burden to prove that there was either “substantial justification” for the failure to respond to Steven’s December 2013 requests for admission, or “other circumstances mak[ing] the imposition of the sanction unjust.” (See *U.S. Swimming, supra*, 200 Cal.App.4th at p. 1434.)

The applicable standard of review is abuse of discretion. “ ‘We review the trial court’s ruling on a discovery sanction under the deferential abuse of discretion standard. [Citations.]’ [Citation.] ‘A court’s decision to impose a particular sanction is “subject to reversal only for manifest abuse exceeding the bounds of reason.” [Citation.]’ [Citation.]” (*U.S. Swimming, supra*, 200 Cal.App.4th at p. 1435; see also *In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108 [same].)

McKinnie does not argue that the amount of the \$6,000 award of discovery sanctions was excessive, nor does she contest the trial court’s finding that no responses were served to Steven’s December 2013 discovery requests. We understand her to argue, however, that the trial court abused its discretion in imposing discovery sanctions because (1) the trial court lacked authority to order discovery sanctions after the parties had entered into the stipulation dismissing all discovery matters at the April 2014 mediation; and (2) the December 23, 2013 proof of service for Steven’s discovery requests was invalid because McKinnie’s law office was closed on that day as stated in her notice of unavailability.

Steven responds that McKinnie fails to demonstrate abuse of discretion because (1) the discovery issues, including sanctions, remained pending until the trial court approved the stipulation and order that was filed on May 1, 2014; (2) and Steven’s discovery requests were personally served on Sandra McManus, the attorney who had previously informed Steven’s counsel in a December 19, 2013 letter that she had been “asked [by McKinnie] to fill in and oversee some of her cases, this being one of them” while McKinnie was on vacation, and who occupied the same suite of law offices as McKinnie.

We determine that McKinnie has not met her burden to show that the trial court abused its discretion in ordering her to pay \$6,000 in discovery sanctions pursuant to Code of Civil Procedure section 2033.280, subdivision (c), for two reasons. First, McKinnie's argument that the trial court lacked authority to impose discovery sanctions after the parties entered into a stipulation dismissing all discovery matters is unconvincing. The stipulation and order resolving all issues except timeshare that was filed on May 1, 2014, expressly provides that "All other *Requests for Orders* filed by either party through the date of this *Stipulation and Order*, except those for sanctions, are dismissed with prejudice." (Underscoring added.) Thus, the parties had agreed that any request for an order imposing sanctions was not resolved at the April 22, 2014 hearing.

Second, the record reflects that the trial court implicitly found that Steven's December 2013 discovery requests were properly served on Melissa via personal service on McManus, the attorney who had advised Steven's counsel that she was filling in for McKinnie during McKinnie's vacation, as stated in the proof of service. Although McKinnie contends that proof of service is defective because the evidence shows that her office was closed on the day the December 2013 discovery requests were served, this contention lacks merit because our standard of review does not permit us to reweigh the evidence regarding service. " "[W]e have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." [Citations.]' [Citation.]" (*In re Marriage of Schnabel* (1994) 30 Cal.App.4th 747, 752.)

Accordingly, we determine that the trial court did not abuse its discretion in awarding Steven discovery sanctions of \$6,000 to be paid by McKinnie.

**B. The \$10,000 Sanctions Award**

McKinnie also contends that the trial court erred in awarding monetary sanctions against her in the amount of \$10,000 in the May 1, 2014 order. We understand McKinnie

to argue that the trial court abused its discretion because she did not commit discovery abuse and did not have notice of the April 22, 2014 hearing on sanctions, and, in any event, the court lacked authority to order a refund of previously ordered, uncharacterized need-based attorney's fees as a monetary sanction.

According to Steven, McKinnie had notice of the April 22, 2014 hearing since the trial court's March 12, 2014 order stated that the matter of sanctions was scheduled for a hearing on April 22, 2014, and his counsel informed her of the hearing date in a letter. Steven also argues that the trial court properly imposed \$10,000 in sanctions under section 271 because McKinnie violated "the public policy in family law cases to promote settlement and reduce the costs of litigation by encouraging cooperation between attorneys and parties. [Citations.]"

Section 271, subdivision (a) provides: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

Section 271 therefore advances the policy of the law "to promote settlement and to encourage cooperation which will reduce the cost of litigation." (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 177.) "Family law litigants who flout that

policy by engaging in conduct that increases litigation costs are subject to the imposition of attorneys' fees and costs as a sanction. [Citations.]" (*Ibid.*)

Section 271, subdivisions (b) and (c) expressly provides for an award of monetary sanctions on a party: "An award of attorney's fees and costs as a sanction pursuant to this section shall be imposed only after notice to *the party* against whom the sanction is proposed to be imposed and opportunity for that party to be heard. [¶] An award of attorney's fees and costs as a sanction pursuant to this section is payable only from the property or income of *the party* against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property." (Italics added.)

Section 271's substantially identical predecessor statute, former Civil Code section 4370.6,<sup>3</sup> was construed to authorize an award of attorney's fees and costs as a monetary sanction only against a party, not the party's attorney: "[A] party who individually, or by counsel, engages in conduct frustrating or obstructing the public policy is thereby exposed to liability for the adverse party's costs and attorney fees such

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<sup>3</sup> Former Civil Code section 4370.6 provided: "(a) Notwithstanding Sections 4370 and 4370.5, the court may base an award of attorneys' fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and abilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden upon the party against whom the sanction is imposed. In order to obtain an award under this section the party requesting an award of attorneys' fees and costs is not required to demonstrate any financial need for the award. [¶] (b) An award of fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard. [¶] (c) An award of fees and costs as a sanction pursuant to this section shall be payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property."

conduct generates. However, [former Civil Code] section 4370.6 does not allow or contemplate an award against an attorney; attorneys are generally subject to sanctions under Code of Civil Procedure section 128.5,<sup>[4]</sup> and the Legislature did not need to enact [former Civil Code] section 4370.6 in order to sanction attorneys. [Citation.]” (*In re Marriage of Daniels* (1993) 19 Cal.App.4th 1102, 1110 (*Daniels*).

In other words, “[former Civil Code s]ection 4370.6 explicitly makes parties liable for the obstreperous actions of their counsel.” (*Daniels, supra*, 19 Cal.App.4th at p. 1110; see also *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1536, fn. 17 [§ 271]; *Orange County Dept. of Child Support Services v. Superior Court* (2005) 129 Cal.App.4th 798, 804 [§ 271]; *Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 403, 403, fn. 7 (*Burkle*) [party sanctioned under section 271 and party’s attorneys sanctioned under Code of Civil Procedure section 128.7]<sup>[5]</sup>.)

Here, the record reflects that the trial court sanctioned attorney McKinnie the amount of \$10,000 under section 271. In the March 12, 2014 order, the trial court stated that monetary sanctions were warranted, in part because “the conduct of [Melissa’s] counsel was not designed to promptly and efficiently settle all matters. This case was contentious. The court has an expectation that once matters are settled the counsel will go about their business in a civilized manner to clean up remaining details. This was not done in this case. On one level, the court is receiving a message that there is buyer’s

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<sup>4</sup> Code of Civil Procedure section 128.5, subdivision (a) provides in part: “A trial court may order a party, the party’s attorney, or both to pay the reasonable expenses, including attorney’s fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.”

<sup>5</sup> “Code of Civil Procedure section 128.7 allows sanctions to be imposed upon attorneys who present to the court claims, defenses or legal contentions not warranted by existing law, and allows sanctions against parties and attorneys when pleadings are presented primarily for an improper purpose, such as to harass or cause a needless increase in the cost of litigation. (Code Civ. Proc., § 128.7, subds. (b)(1), (2) & (c).)” (*Burkle, supra*, 144 Cal.App.4th at p. 399.)

remorse in the settlement. On another level, and the one I am finding, the court believes that the conduct of [Melissa's] counsel merely poured gas on a smoldering fire.”

Thereafter, the trial court imposed the sanctions awards of \$6,000 and \$10,000 exclusively on McKinnie, as stated in the May 1, 2014 order: “The Court further finds that neither of the sanction orders shall be enforceable as against [Melissa], but only as against [Melissa's] former counsel, Patricia McKinnie.”

Although the trial court did not state the statutory basis for the \$10,000 sanctions award in either the March 12, 2014 order or the May 1, 2014 order, the court indicated that section 271 was the statutory basis during later proceedings. During the June 17, 2014 hearing on McKinnie's motion to vacate the May 1, 2014 order, the trial court stated that “the Court made an order back in March [12, 2014] under [section 271]. . . . The order that I made [during the hearing] on the 22nd of April [regarding the amount of sanctions against McKinnie] was one . . . anchored completely in Family Code Section 271.”

The parties did not address the issue of whether the trial court was authorized to sanction McKinnie under section 271, either during the proceedings below or on appeal. For that reason, we requested that the parties submit supplemental briefing addressing the following issues: “1. Whether the award of monetary sanctions against attorney Patricia M. McKinnie in the amount of \$10,000, as set forth in the trial court's May 1, 2014 findings and order after hearing, was made pursuant to Family Code section 271. [¶] 2. Assuming for purposes of argument that the award of \$10,000 in monetary sanctions was made pursuant to Family Code section 271, is the award against attorney Patricia M. McKinnie authorized by Family Code section 271? (See Family Code section 271, subdivision (c); see also *In re Marriage of Daniels* (1993) 19 Cal.App.4th 1102, 1106 [referring to former Civ. Code, § 4370.6, now Fam. Code, § 271].) [¶] 3. Assuming for purposes of argument that the award of \$10,000 in monetary sanctions against attorney Patricia M. McKinnie is not authorized by Family Code section 271, whether the

appropriate disposition is reversal of the May 1, 2014 findings and order after hearing and remand with directions to the trial court to reconsider the award of monetary sanctions.”

In her supplemental briefing letter, McKinnie responds that although the May 1, 2014 order is silent as to the basis for the \$10,000 sanctions award, the trial court lacked authority to award monetary sanctions against her under section 271. McKinnie also responds that the appropriate disposition is reversal of the May 1, 2014 order without a remand for reconsideration of the order.

In his supplemental briefing letter, Steven argues that the \$10,000 sanctions award was an award of discovery sanctions, not an award under section 271. We note that this argument appears to be contrary to the argument presented in his respondent’s brief that “[t]here is overwhelming evidence that it was within the sound discretion of the trial court to impose sanctions against [McKinnie] that were anchored in Family Code Section 271 and separate sanctions required to be imposed by Code of Civil Procedure Section 2033.280 (c).”

However, Steven concedes that if the \$10,000 award was made under section 271, then the award was not authorized. Regarding the appropriate disposition, we understand Steven to argue that the May 1, 2014 order should either be affirmed with a clarification that the \$10,000 sanctions order against McKinnie was made under the discovery statutes (Code Civ. Proc., §§ 2031.300, subd. (c) & 2013.310, subd. (h)) or reversed with directions to the trial court to clarify that the \$10,000 sanctions order was made under the discovery statutes.

We again note that during the June 17, 2014 hearing on McKinnie’s motion to vacate the May 1, 2014 order, the trial court stated that “the Court made an order back in March [12, 2014] under [section 271]. . . . The order that I made [during the hearing] on the 22nd of April [regarding the amount of sanctions against McKinnie] was one . . . anchored completely in Family Code Section 271.” To the extent that the record

indicates that the trial court's May 1, 2014 order imposing sanctions of \$10,000 on McKinnie was made under section 271 due to her litigation conduct, we determine that the award was unauthorized under section 271 because McKinnie was a party's attorney. (See § 271, subs. (b), (c); *Daniels, supra*, 19 Cal.App.4th at pp. 1110-1111.)

As to the appropriate disposition, "a discretionary order based on the application of improper criteria or incorrect legal assumptions is *not* an exercise of *informed* discretion and is subject to reversal even though there may be substantial evidence to support that order. [Citations.]" (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 16.) Under the circumstances of this case, we believe the appropriate disposition includes a remand to the trial court "to permit that court to exercise *informed* discretion with awareness of the full scope of its discretion and applicable law. [Citations.]" (*Ibid.*)

For these reasons, we will reverse the May 1, 2014 order insofar as the order requires McKinnie to pay \$10,000 in monetary sanctions. We will remand the matter to the trial court with directions to reconsider Steven's request for monetary sanctions in the amount of \$10,000 in accordance with the applicable legal principles. We express no opinion regarding any future award of monetary sanctions.

#### **IV. DISPOSITION**

The May 1, 2014 order is reversed insofar as the order requires appellant Patricia M. McKinnie to pay \$10,000 in monetary sanctions. The matter is remanded with directions to the trial court to reconsider respondent Steven Noble's request for monetary sanctions in the amount of \$10,000 in accordance with the applicable legal principles. Each party is to bear its own costs on appeal.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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