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Jerky behavior in *Snoeck v. Exaktime* sparks negative lodestar multiplier

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BENJAMIN T. IKUTA
Partner, Ikuta Hemesath LLP

1327 N Broadway
Santa Ana , CA 92706

Phone: (949) 229-5654

Fax: (949) 336-8114

Email: ben@ih-llp.com

UC Hastings COL; San Francisco CA

Benjamin focuses his practice in medical malpractice cases on the plaintiff side. He has successfully litigated many cases involving birth injury, delay in cancer diagnosis cases, and

On Oct. 25, the Court of Appeal, Second District, Division Three issued a scathing decision in *Snoeck v. Exaktime Innovations, Inc.*, upholding a ***negative*** multiplier for attorney fees due to the plaintiff's counsel's lack of civility throughout the entire litigation process. The Court of Appeal did not mince words: "The record before us amply supports the trial court's finding that plaintiff's counsel was repeatedly, and apparently intentionally, uncivil to defense counsel - and to the court - throughout this litigation."

The underlying case involved an employment matter after the plaintiff partially prevailed on only one of six causes of action. The plaintiff prevailed on his cause of action for disability discrimination under the FEHA. The jury awarded $130,088 in damages on his claim that the employer failed to engage in a good faith interactive process. Prior to trial, the defendant issued a Code of Civil Procedure section 998 offer for $500,000, and separately, offered to pay reasonable fees and costs.

After "prevailing" at trial, the plaintiff's attorney then sought nearly $2.09 million in attorney fees consisting of $1.19 million with a 1.75 lodestar multiplier. The attorney sought an hourly rate of $750 for himself and $600 and $535 for his two other attorneys. The employer argued that the lodestar should be reduced based on excessive billing, inflated hourly rates, and billing attributed to unprofessional emails.

The emails were unhinged, repeatedly and baselessly accusing defense counsel of committing fraud on the court and the public. The emails spanned years, not only calling defense counsel "cons" and "frauds," but also made many comments alleging the defense firm took advantage of the trial judge and the judge's purported lack of legal knowledge.

The trial court found the hourly rates asserted were reasonable, but imposed a 20% reduction across the board due to duplicative, vague, and overstaffed billing. This reduced the base figure to around $954,000. The court then applied a 1.2 positive lodestar multiplier to account for the contingent nature of the work. After applying the positive multiplier, the

court then applied a negative multiplier to account for counsel's lack of civility. The final fee amount was just under $687,000.

At the hearing, after quoting the emails for two and a half pages, the trial court explained that the attorney's "incivility was not only directed to opposing counsel; it was also directed to the Court." The plaintiff's attorney's tone and language throughout the entire trial were belittling and antagonistic.

Yet, ***even at the hearing***, the plaintiff's lawyer continued his ad hominem attacks on the defense lawyer and accused the court of not understanding the law. As explained by the Court of Appeal, "Smith's apparent disdain for the trial court practically jumps off the pages of the reporter's transcript of the fee motion hearing."

Months after the hearing, the attorney sent yet another email to defense counsel, stating, "Your most egregious and successful attempt to cause a court to abuse its authority. Do any of you know what rule of law the trial court was using to define the selections of emails you used to add another appeal to this litigation and slash reasonable FEHA fees by $457,000 based on some rule only he knows?" A few weeks later, the plaintiff lawyer sent another email accusing the trial court of acting with no authority and described the court's action as "no rule, just abuse."

Well, even if there was no prior authority allowing a trial court to apply a negative multiplier based on incivility, there is now. The Court of Appeal affirmed the trial court's decision in full. In doing so, the Court of Appeal excoriated the attorney. Addressing him by name in the opinion over one hundred times, the Court of Appeal went into painstaking detail about both the attorney's misconduct in the underlying proceedings as well as his poor appellate briefing.

The Court of Appeal then explained that the attorney was consistently and constantly uncivil in lower briefing as well as the appellate briefing. Even at the appellate level, he continued to baselessly accuse the defendant's counsel of dishonesty and lacking integrity. As the Court of Appeal explained, the attorney seemed incredulous at both the trial court and appellate court that his communications could possibly be considered uncivil. And worse, he continued to belittle the trial judge at the appellate level, accusing the trial court of "provocative misconduct" and being "duped" and "exploited" by the defense attorneys.

The Court of Appeal provided a reminder that while "Incivility may not serve as a basis for attorney discipline by the state bar, ... all licensed California attorneys are expected to conduct themselves in a civil manner." The Court of Appeal recognized that litigation, by its nature, is contentious. "One side's frustration with the other side's legal theory is understandable. Certainly, attorneys must advocate for their clients' positions, point out the flaws in opposing counsel's argument, and express disagreement with the court."

However, this did not give the attorney "a license to personally attack defense counsel and belittle the trial court. Smith's incivility does not reflect persuasive advocacy."

The Court of Appeal then found that "The record supports the trial court's implied finding that Smith's repeated and apparently intentional lack of civility throughout the entire course of this litigation - and seeming personal embroilment in the matter - resulted in inefficient, fractious, and thus more costly, litigation."

While not considered by the trial court, the post-hearing emails, sent months after the litigation, also showed that the attorney had become "personally embroiled" in the action, which unnecessarily increased fees on both sides. Notably, for whatever reason, these post-hearing emails were included by the plaintiff's attorney in his appellant's appendix, which only ended up hurting him further.

The Court of Appeal noted that civility is an aspect of skill: "Excellent lawyers deserve higher fees, and excellent lawyers are civil. Awarding the same amount of attorney fees to an uncivil lawyer as one who is civil thus would not constitute a reasonable fee."

Accordingly, it was proper for the trial court to reduce an attorney fee award based on the lack of civility.

The plaintiff's attorney's decision to appeal an attorney fee award of $687,000, based on a $130,000 jury verdict, despite prevailing on only one out of six of his client's claims, was incredibly foolish, especially considering his improper conduct. But it also hurts plaintiffs moving forward. Statutes that allow for a prevailing plaintiff to recover attorney fees, such as employment claims under the FEHA, lemon law claims under the Song-Beverly Act, and Elder Abuse claims under Welfare and Institutions Code section 15600, et seq., were meant to protect either a vulnerable portion of our society or to encourage attorneys to take important cases that were not otherwise economically viable.

Now, every prevailing plaintiff's attorney can expect to see defense counsel comb through every email and correspondence in the case, aiming to depict the plaintiff's attorney as uncivil, thus justifying applying a negative lodestar. While the conduct in this case clearly justified a lower fee award, this opinion may make it miserable for everyone (including the courts) if fee motions devolve into fights about civility.

But the biggest lesson remains: Just don't be a jerk. This case did not involve an isolated email. This case involved dozens of emails spanning years, including some that were sent on weekends and holidays.