

Moonlight Fire

Congratulations to Rick Linkert, Madison Simmons and Shawn Borin on their recent remand victory in the infamous *Moonlight Fire* case – now in its 11th year of litigation.

In 2013, Mr. Linkert and counsel representing two other Defendant groups secured dismissals of Cal Fire's \$8 million fire suppression cost recovery action and more than \$60 million in private Plaintiff claims by way of nonsuit on the eve of jury trial. Thereafter, the Defendants all brought motions for terminating sanctions as well as for attorneys' fees and litigation expenses against Cal Fire based upon a corrupt and fraudulent investigation. The evidence included perjury by the lead investigator, destruction of evidence and a host of other misconduct. Hon. Leslie C. Nichols (Ret.), specially appointed by the Chief Justice of the California Supreme Court, granted the motions and awarded the collective group \$32.4 million in attorneys' fees, expert fees and costs as sanctions. Cal Fire appealed.

The Third District Court of Appeal in *Department of Forestry and Fire Protection v. Howell* (December 2017) 18 Cal. App. 5th 154, upheld the terminating sanctions but declined to award total fees and costs that were claimed under three of four theories (Civil Code §1717 – reciprocal contract fees, Code of Civil Procedure §2033.420 - Requests for Admission, and Code of Civil Procedure §1021.5 - private attorney general). However, the case was remanded to the trial court to determine the amount of fees and costs recoverable as a result of "discovery abuses." The Court: "[W]e reverse the post-judgment order imposing monetary discovery sanctions against Cal Fire and remand for further proceedings to determine the recoverable expenses pursuant to CCP 2023.030. The post-judgment order imposing terminating sanctions against Cal Fire is affirmed." *California Dept. of Forestry and Fire Protection v. Eunice E. Howell*, (2017) (18 Cal. App. 5th 154 at pg. 204.)

Cal Fire successfully moved to recuse Judge Nichols and the Chief Justice appointed Hon. Michele Verderosa (Ret.) to conduct the remand hearing to determine fees and costs that were incurred as a result of Cal Fire's "abuse of the discovery process." Unfortunately, California judges are not empowered to award fees and costs under their "inherent authority" as are their federal counterparts and there is no statute protecting citizens from fraudulent misconduct by a State agency.

Cal Fire and the Attorney General argued in their Brief - and in Oral Argument for nearly 8 hours - that both Cal Fire investigators and the Deputy Attorneys General were innocent of any bad faith conduct, false testimony, spoliation of evidence and any of the other types of misconduct that Defendants cataloged. These inexplicable and indefensible arguments were made in complete denial and disregard of the findings that were conclusively determined on appeal – including a rejection of their arguments by the California Supreme Court.

Judge Verderosa, the second judge to spend months reviewing the evidence, made the same findings as did Judge Nichols. She found overwhelming evidence of discovery abuses and misuses, completely rejecting the improper arguments made by Cal Fire and the Attorney General. Below are a few select quotes:

"This court finds that the list of Cal Fire's discovery abuses and misuses extends far beyond those mentioned in the Cal Fire v. Howell appellate opinion. '... [t]here is substantial evidence to support other factual findings made by the trial court that Cal Fire engaged in discovery abuses.' (Cal Fire v. Howell at pg. 193.) Further this court finds that the

monetary sanctions against a party engaged in the misuse of the discovery process are the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct.”

“Further this court finds that from the date of March 5, 2010 through July 2013 the time of the pre-trial hearings, Cal Fire's misuse and abuse of the discovery process continued and was pervasive throughout the litigation, so much so that the defendants were placed in a position to investigate and unravel the multiple layers of sanctionable conduct committed by Cal Fire which resulted in tremendous financial cost to the defendants. It is not as if a discovery misuse occurred and the defendants immediately or shortly thereafter realized the misuse, or that Cal Fire committed a misuse and then within a reasonable amount of time attempted to correct the misuse or abuse. This was several years of repeatedly abusing and or misusing the discovery process which compounded the problem exponentially, causing the defendants to spend countless hours and resources on sifting through false and misleading information.”

“The list of Cal Fire's discovery abuses and misuses was so lengthy and egregious that the trial court issued a terminating sanction against Cal Fire post-judgment; and the appellate court upheld the terminating sanction. Therefore, this court finds that all of the defendant's expert fees and a significant portion of the defendant's attorneys' fees as described further were reasonable expenses defendants incurred from March 5, 2010 through July 2013, the time of the pre-trial hearings, were as a result of Cal Fire's sanctionable conduct of misusing and abusing the discovery process pursuant to CCP section 2023.030.”

Judge Verderosa awarded Defendants a total of \$14,201,535. Even though the award is substantially less than the total fees awarded by Judge Nichols, it is still believed to be one of the largest discovery sanctions awards in California history and certainly the largest such award against a State agency represented by the Office of the Attorney General. Mr. Linkert recovered \$2,981,614 for his clients, including \$640,295 paid to personal counsel to protect their uninsured exposure in the State cases.

It remains to be seen if Cal Fire will appeal again.