

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE**

IMA SCRUDE
Petitioner,

v.

CALIFORNIA SUPERIOR COURT
Respondent,

ROBOCORP, a California corporation,
Real Party in Interest

FROM THE SUPERIOR COURT OF ORANGE COUNTY
HONORABLE S. DREDD, JUDGE

**PETITION FOR WRIT OF MANDATE AND/OR
PROHIBITION OR OTHER APPROPRIATE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES**

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Class of 2002*

This is a hypothetical "closed research universe" writ of mandate that I wrote for an appellate practice seminar during my last year of law school. In May of 2002, I was awarded the CALI Award for Academic Excellence (formerly known as the American Jurisprudence Award) based on this writ.

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INTRODUCTION

The case now before this Court presents two issues. The first issue is of great importance to the judicial system as a whole because it requires a declaration of the proper method for seeking appellate review of discovery sanctions. The second issue is of great importance to Petitioner's ability to have the merits of her claims heard at trial; without the relief sought via this writ petition, the merits of Petitioner's claims will not see their day in court.

As to the first issue, Code of Civil Procedure § 904.1 provides that:

“An appeal may be taken from a superior court in the following cases: ... From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000)...” [emphasis added] (Civ. Pro. § 904.1(a))

Because the text of § 904.1 speaks in terms of “interlocutory judgment[s],” a split of authority has developed among the California Appellate Courts as to whether an order imposing a discovery sanction qualifies as an “interlocutory judgement” subject to appeal under § 904.1. This distinction between judgments and orders, in this context, ultimately dictates whether appellate review of discovery sanctions should proceed via appeal, or should proceed by writ of mandate. Obviously, the Petitioner contends that seeking review via writ of mandate is appropriate.

The split of authority among the Appellate districts regarding the proper interpretation of the language § 904.1 now compels this Court to either: 1) declare a right of immediate appeal to discovery sanction orders, thereby causing an exponential increase in the potential case load of the California Courts of Appeal, or 2) limit relief from discovery sanctions to proceeding by extraordinary writ.

Petitioner contends that the plain language of § 904.1 in fact does not create an immediate right of appeal from discovery sanctions. Thus, by proceeding via writ relief, Petitioner seeks appellate review of the discovery sanctions imposed below. The interests of justice would be served by allowing Petitioner proceed via writ relief so as to keep her underlying claims from being prejudicially dismissed prior to

direct appellate review of the discovery sanctions unfairly imposed upon Petitioner and her trial counsel becomes available.

At the outset, Petitioner emphasizes that the alleged discovery abuses leading to the trial court's imposition of discovery sanctions was precipitated by an erroneous, and subsequently vacated, order of the trial court. Shortly after Petitioner filed her Complaint against ROBOCORP, the trial court ordered the disqualification of Petitioner's trial counsel, Noyer Knott. During the time in which Knott was disqualified, he was subject to a court ordered inability to respond to a pending discovery request. Immediately after the appellate court ordered Knott's reinstatement, the trial court sanctioned Knott for failing to respond to discovery during the time in while he was disqualified. These discovery sanctions total \$6000 and are coupled with the trial court's threat that Petitioner's claims will be dismissed if the sanctions are not paid prior to trial. The court's erroneous disqualification of Knott and subsequent discovery sanction order has forced the Petitioner, through no fault of her own, into a position such that the merits of her claims may see their day in court. Beyond the need for this Court to resolve the current split as to the appealability of discovery sanctions, this facts of this case alone merit writ relief.

**PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION
OR OTHER APPROPRIATE RELIEF**

Authenticity of Exhibits

1. All exhibits accompanying this petition are true copies of original documents on file with respondent court, except Exhibit F which is a true copy of the original reporter's transcript of the hearing of March 1, 2002, concerning the motion for discovery sanctions filed by ROBOCORP, the Real Party in Interest. The exhibits are incorporated by reference as set forth in this petition.

Beneficial Interest of Petitioner; Capacities of Respondent and Real Party in Interest

2. Petitioner, IMA SCRUDE is the plaintiff in an action now pending in the respondent Orange County Superior Court, re: OCSC Case No. 095218. Defendant, ROBOCORP, is named herein as the real party in interest.

Chronology of Pertinent Events

3. On December 8, 2000, Petitioner/Plaintiff IMA SCRUDE was involved in a car accident from which she suffered serious personal injury and substantial economic harm. Plaintiff subsequently retained the services of Attorney Noyer Knott and, on April 6, 2000, filed a complaint in the Orange County Superior Court alleging that the defective "flubar crosstik" in her Robocorp Robomobile caused her injuries, thus leaving ROBOCORP liable for the damage to the Petitioner. (Exh. A. p. 1-2.)

4. After discovery began, Defendant / Real Party in Interest ROBOCORP, filed a motion to disqualify Petitioner's trial counsel, based upon an alleged conflict of interest. On July 10, 2001, the trial court granted ROBOCORP's motion and erroneously disqualifies Knott from representing the Petitioner at trial. (Exh. B.)

5. On July 5, 2001, five days prior to Knott's disqualification, ROBOCORP served Knott with a discovery request seeking documents that form the basis for opinion testimony to be given at trial by an expert witness. Because Noyer Knott had been ordered off of the case by the trial court, he did not timely respond to this discovery request. (Exh. C. p. 3).

5. On August 14, 2001, Petitioner filed for a Writ of Mandate, which was subsequently granted by this Court, compelling the trial court to vacate its order disqualifying Noyer Knott as Petitioner's counsel at trial. (Exh. D.)

6. On August 17, 2001, ROBOCORP filed a motion in the trial court seeking discovery sanctions in the amount of \$2000 from Petitioner and/or her now disqualified attorney Noyer Knott. (Exh. C. pp. 1-3.)

7. This Court ordered a stay of the trial court proceedings on September 14, 2001, pending the disposition of Petitioner's writ of mandate. On December 7, 2001, this Court granted Petitioner's writ of mandate, compelling the trial court, Judge Gessum presiding, to vacate its order disqualifying Noyer Knott. (Exh. D.)

8. On January 15, 2002, Judge Gessum, reinstated Noyer Knott and set the

case for a trial conference on March 1, 2002. Judge Gessum then disqualified himself, transferring the matter to Judge Dredd. (Exh. E.)

9. At the March 1, 2002 trial conference, Judge Dredd unexpectedly asked for oral argument on ROBOCORP's motion for discovery sanctions, which was pending since August of the prior year. At this trial conference, not only did Judge Dredd grant the Defendant's motion for discovery sanctions, he went beyond the \$2000 sanction sought by ROBOCORP and awarded discovery sanctions totaling \$6000. The trial court's order specifically requires Noyer Knott to pay \$3000 in discovery sanctions to ROBOCORP, coupled with an order that Noyer Knott donate \$3000 to his "favorite charity." If Noyer Knott failed to make this \$3000 charitable donation, the court's order would alternatively require Noyer Knott to directly pay ROBOCORP \$6000 as a discovery sanction. Judge Dredd required the sanctions to be paid by May 13, 2002, or IMA SCRUDE's claims against ROBOCORP would be dismissed. (Exh. F. pp. 1-3.) The Statute of Limitations would preclude refileing.

Basis for Relief

10. The issue presented in this Writ Petition concerns the trial court's abuse of the discretion given by Code of Civil Procedure § 2023, by imposing a \$6000 discovery sanction against Petitioner and her trial counsel Noyer Knott. Petitioner contends that the plain language of Code of Civil Procedure § 2023 does not permit the imposition of these sanctions, particularly under these circumstances.

Furthermore, the plain language of Code of Civil Procedure § 2023 specifically does not permit such sanctions when, coupled with the threat of dismissal for failure to pay those sanctions, Petitioner would be completely precluded from ever being able to have the merits of her claims against ROBOCORP considered in court.

Absence of Other Remedies

11. The order imposing discovery sanctions upon Noyer Knott is arguably not appealable because the Code of Civil Procedure § 904.1 provides for a direct appeal of an “order directing payment of monetary sanctions” if “the amount exceeds five thousand dollars.” (See Code Civ. Proc. § 904.1.) Because there is a split of authority as to whether the term “interlocutory judgment” within § 904.1 is applicable to discovery sanctions. Additionally, even if direct appeal was allowed, writ relief is essential in this specific case so as to avoid dismissal of Petitioner's claims because her attorney was erroneously disqualified, which led to sanctions which the Peitioner can not pay within the court’s proscribed time limit. As a practical matter, Petitioner has no adequate remedy other than the relief sought in this petition.

PRAYER

Petitioner, IMA SCRUDE, prays that this court:

1. Issue an alternative writ directing the Superior Court to either reverse and vacate its March 4, 2002 order imposing discovery sanctions upon Petitioner's , counsel or show cause why it should not be ordered to do so. While the alternaitve writ is pending, Petitioner asks that the Court impose a temporary writ of mandate and/or prohibition to preclude the Superior Court from dismissing Peitioner's suit against ROBOCORP until this Court's review of the order imposing the discovery sanctions and threatening dismissal is complete
2. Grant such other relief as may be just and proper.

Dated: April 30, 2002

Respectfully submitted,

By: _____
Gary D. Schneider
Attorney for Petitioner/Plaintiff
Ima Scruce

VERIFICATION

I, Noyer Knott, declare as follows:

I am the attorney for plaintiff in the underlying cause of action. I have read the foregoing Petition for Writ of Mandate/Prohibition or Other Extraordinary Relief and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than petitioner, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and the this verification was executed on April 30th, 2002, at 283 Avocado, Suite 12, Costa Mesa, California.

Noyer Knott
Petitioner's Trial Counsel

MEMORANDUM OF POINTS AND AUTHORITIES

I.

WRIT RELIEF IS THE PROPER METHOD TO SEEK REVIEW OF A TRIAL COURT'S ORDER IMPOSING DISCOVERY SANCTIONS

This Court's determination of the appealability of discovery sanctions under Code of Civil Procedure § 904.1 is an issue of statutory interpretation which, as a question of law, must be decided de novo. Rail-Transport Employees Assn. v. Union Pacific Motor Freight (1996) 46 Cal.App.4th 469, 473.

A. Writ Relief Is Arguably the Only Manner Through Which to Seek Review of Discovery Sanctions

Code of Civil Procedure § 904.1 provides in relevant part that:

“An appeal may be taken from a superior court in the following cases: ...From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).” [emphasis added] (Civ. Pro. § 904.1(a))

Prior to the recent amendments to § 904.1, a split of authority developed regarding the appealability of discovery sanctions imposed under § 904.1 regardless of the amount of those sanctions.¹ Prior to the 1994 amendments, the language of

¹ Code of Civil Procedure § 904.1 was amended once in 1989, at that time, the statutory minimum for appealing a “judgment directing payment of monetary sanctions” was \$750. Another amendment in 1994 modified the language of the § 904.1 and subsequently raised the the statutory minimum for appealability under § 904.1 to \$5000. (See Rail-Transport Employees Assn. v. Union Pacific Motor Freight (1996) 46 Cal.App.4th 469, 471-472.

§ 904.1 spoke in terms of appealing a “*judgment* directing payment of monetary sanctions.” The aforementioned split of authority hinged on this language employed within former Code of Civ. Pro. § 904.1.

One line of cases interpreting Code of Civil Procedure § 904.1, the Green decision and others, held that § 904.1 DID authorize the appealability of discovery sanctions so long as the discovery sanctions were in excess of \$750, the then existing statutory minimum. The Greene line of cases interpreted the legislature’s intent of the 1989 amendment to § 904.1 as designed to allow the interlocutory appeal of “both orders and judgments” but only when meeting the statutory minimum dollar amount. Green v. Amante (1992) 3 Cal.App.4th 684, 686.

The alternate line of cases interpreting Code of Civil Procedure § 904.1, the Rao case and others opted instead to give the word “judgment” a plain language reading, finding that discovery sanctions are not “judgments”; discovery sanctions are “orders” and as such cannot be appealed regardless of the amount. Rao v. Campo (1991) 233 Cal.App.3d 1151, 1561. Via the Rao approach, discovery sanctions may be reviewed only by petition for extraordinary writ relief, regardless of the threshold amount that gives rise to the interlocutory appealability of ‘judgments.’ Id. Petitioner supports the approach taken by the Rao court.

The most recent case to address this split of authority, Rail-Transport Employees Assn. v. Union Pacific Motor Freight (1996) 46 Cal.App.4th 469,

specifically held that the most recent set of amendment to § 904.1 in 1994 “accomplished two things, it: 1) raised the appealable threshold from \$750 to \$5,000, and 2) permitted appeals from [both ‘judgments’] and ‘orders.’” Id. at 474. The Rail-Transport reading of § 904.1 thus forecloses the possibility of appellate relief from discovery sanctions via the expedited method of extraordinary writ relief. Unfortunately, the Rail-Transport case did not, as it claimed, “resolve the issue raised by Rao and its progeny.” Id. at 474-75.

The Rail-Transport case found that “the Legislature’s [1994] Amendment of § 904.1 does not, **on its face**, clarify whether discovery sanctions in excess of \$5,000 are appealable.” [emphasis added] Id. at 473. Petitioner urges this Court to find that the statute in fact is clear on its face. However, even if this Court finds that §904.1 is textually unclear regarding its applicability to discovery sanctions, the legislative history also supports the position taken by the Rao Court.

“It is a paramount rule of statutory interpretation that where a statute’s provisions are unclear, the court must first ascertain the Legislature’s intent and then give it effect.” Rao v. Campo (1991) 233 Cal.App.3d 1151, 1562. In rejecting the Rao approach, the Rail-Transport court found that the legislative history of the 1994 Amendment to § 904.1 did not definitively reflect the legislature’s intent as to appeals from discovery sanctions. Rail-Transport, *supra*, at 472. This finding is completely contrary to the Rail-Transport court’s own acknowledgment that the

committee responsible for the 1994 amendment to § 904.1 urged that ***“interlocutory orders, particularly sanction orders, should be subject to review by writ only, not by appeal”*** because a right of appeal in this circumstance would ***“unwisely, create a new and unwarranted class of appeals.”*** [emphasis added] Id.

The legislative intent of the amendment, while not absolutely crystalline, strongly indicates that the legislature meant to limit appeals from sanction orders in general by raising the statutory threshold amount for appealability. Clearly, the legislature did not intend to “unwisely create a new and unwarranted class of appeals” for discovery sanctions. To do so in this situation would significantly raise the caseload of the appellate courts. Furthermore, the Rail-Transport court ignored its own finding that historically, “most cases concluded that discovery sanction orders, regardless of the amount, were not directly appealable, and were reviewable only on appeal from the final judgment in the action or, in the court’s discretion, upon petition for extraordinary writ.” Id. at 472.

There is no reason for this Court to follow the Rail-Transport court down its path of disregard for history as well as the plain language and legislative intent of § 904.1. This Court should determine that § 904.1 does not grant a right to appeal discovery sanctions in excess of \$5,000. As such, the discovery sanctions imposed by the trial court upon Petitioner and her counsel are properly reviewable by means of this petition for extraordinary writ relief.

**B. Delayed Review by Appeal is an Inadequate Remedy
And Would Result in Irreparable Harm to Petitioner**

Even if this Court interprets Code of Civil Procedure § 904.1 as granting a right to appeal from any discovery sanction in excess of \$5000, the threat of irreparable harm to the petitioner as a result of the passage of time to seek review by means of appeal. Thus, Petitioner's claim merits writ relief on that basis alone.

Neither the Petitioner nor the Petitioner's newly reinstated trial counsel Noyer Knott possess the funds needed to pay these discovery sanctions during the time frame set forth by the trial court; as a result, the trial court intends to dismiss Petitioner's underlying case against ROBOCORP with prejudice. (See Exh. H.) Because dismissal with prejudice would bring Petitioner's underlying claims against ROBOCORP to an abrupt end, without any opportunity to have her claims heard on their merits, ROBOCORP could permanently escape liability for its production of the faulty "flubar crosstik" that resulted in harm to the Petitioner.

Furthermore, there are numerous Robomobiles being operated on the California streets at this very moment. Dismissal with prejudice would result in permanent frustration of Petitioner's ability to have the merits of her claim heard and would delay the public from being made aware of the potentially faulty nature of the Robomobile's flubar crosstik. The needs of the Petitioner, as well as those of the general public, require the relief requested in this writ petition.

II.

THE DISCOVERY SANCTION ORDERED BY JUDGE DREDD GOES BEYOND THE AUTHORITY GRANTED TO TRIAL COURTS BY CIVIL PROCEDURE CODE § 2023.

Discovery sanctions imposed under Code of Civil Procedure § 2023 are reviewed under an abuse of discretion standard. Rail-Transport Employees Assn. v. Union Pacific Motor Freight (1996) 46 Cal.App.4th 469, 471.

A. The Discovery Sanctions Imposed by the Trial Court are Improper Regarding the Amount of the Sanctions

Code of Civil Procedure § 2023 specifically empowers trial courts to impose sanctions for abuse of the civil discovery process. However, this authority is not limitless. Under § 2023, a trial court is allowed to compel a person abusing the discovery process to pay “reasonable expenses, including attorneys’ fees, incurred by anyone as a result of the conduct.” Civ. Pro. § 2023.

Trial courts may not randomly determine the amount of “reasonable expenses” without some basis for that determination. Indeed, § 2023 limits the discretion of trial courts in this regard by setting forth the mechanism through which the amount of discovery sanctions are to be determined: “[t]he notice of the motion shall...specify the type of sanction sought... accompanied by a declaration setting forth facts supporting the amount of any sanctions sought.” Civ. Pro. § 2023.

The declaration that accompanied ROBOCORP’s motion for discovery

sanctions failed to set forth any “facts” to support the amount of the discovery sanction being sought (See Exh. C. p. 2). Thus, this Court could now determine that the trial court abused its discretion by awarding any amount of monetary sanction in ROBOCORP’s favor because ROBOCORP did not set forth “facts supporting the amount of the monetary sanctions” being sought.

However, even if the ROBOCORP’s unsubstantiated request for \$2000 is somehow found to have satisfied the factual assertions required for the imposition of discovery sanctions, the trial court’s *sua sponte* imposition of \$6000 as a discovery sanction, which is three times the amount requested, clearly goes beyond the scope of the discretion granted to trial courts in § 2023. As a result, a writ of mandate compelling the trial court to vacate its current order imposing discovery sanctions in the amount of \$6000 should be granted.

B. The Discovery Sanctions Imposed by the Trial Court are Improper Regarding the Threat of Dismissal

Code of Civil Procedure § 2023 specifically empowers trial courts to dismiss an underlying cause of action for abuse of the civil discovery process. However, this authority is also not limitless. Under § 2023, a party seeking discovery sanctions is required to “specify the type of sanction sought” for the alleged abuse of the discovery process. Civ. Pro. § 2023.

In neither ROBOCORP’s motion requesting discovery sanctions nor at the

hearing on this motion, did ROBOCORP seek dismissal of petitioner's claims. (See Exh. C; Exh. F.) In the same fashion that the trial court elected to impose three times the amount of the monetary sanctions sought by ROBOCORP, the impending dismissal of Petitioner's underlying case is a remedy that has been imposed *sua sponte* by the trial court .

Based upon a plain language reading of § 2023, the trial court's discretion to impose discovery sanctions is limited to granting only those sanctions requested by ROBOCORP. Civ. Pro. § 2023. As a result, the trial court's threat to dismiss Petitioner's underlying claims for failure to pay the trial court's arbitrarily designated \$6,000 discovery sanction order, should be found to constitute an abuse of the trial court's discretion. As a result, this Court should issue a writ of mandate compelling the trial court to vacate its order imposing discovery sanctions and threatening dismissal.

C. The Trial Court's Imposition of Sanctions, Both Monetary and the Threat of Dismissal, are Improper when Considered in Light of the "Substantial Justification" Clause of § 2023

While Code of Civil Procedure § 2023 gives trial courts a great deal of authority to remedy abuses of the discovery process, the legislature wisely inserted limiting language into this statutory provision:

"If a monetary sanction is authorized by any provision of this article, 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.” [emphasis added] Civ. Pro. § 2023.

Five days after ROBOCORP filed its discovery request, the trial court disqualified Noyer Knott from representing Petitioner against ROBOCORP. (See Exh. B; Exh. C. p.2.) Noyer Knott was not reinstated as Petitioner’s counsel until January 15, 2002, more than four months after the timely discovery response deadline had come and gone. (Exh. E.) During the interim, Noyer Knott was presented with two conflicting duties: 1) the duty to respect the trial court’s erroneous and ultimately vacated, yet still valid order disqualifying him from representing Petitioner, and 2) the duty to respond to ROBOCORP’s then pending request for discovery.

Until the trial court’s order disqualifying Noyer Knott was reversed, he was duty bound to abide by the trial court’s order. The trial erroneous disqualification order was the direct cause of Noyer Knott’s alleged “abuse” of the discovery process. Had Knott responded to the pending discovery request after being disqualified from the case he would have been subject to contempt sanctions for violating the trial court’s disqualification order. To not respond to the discovery request has now merited a \$6,000 sanction by the trial court. As a practical matter, Noyer Knott was caught in a proverbial “catch-22.”

The trial court failed to consider Knott’s justification for the alleged abuse

of the discovery process, a consideration that is specifically authorized, if not required, by § 2023. As a result, the trial court's action in this regard clearly constitutes an abuse of its statutorily granted discretion. As a result, a writ of mandate directing the trial court to vacate its order imposing discovery sanctions should be granted.

CONCLUSION

For the reasons stated, petitioner IMA SCRUDE respectfully requests that this Court grant the extraordinary writ relief as prayed for herein.

Respectfully submitted,

By: _____ this 30th Day of April 2002

Gary D. Schneider
Attorney for Petitioner/Plaintiff
IMA SCRUDE