

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/26/09

DEPT. M

HONORABLE Dudley W. Gray II

JUDGE F. COULTER

DEPUTY CLERK

HONORABLE
2.

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

R. ICHIKAWA

Deputy Sheriff

DARCY SENFF

Reporter

8:29 am

YC057330

ANN GRANT
VS

TOYOTA MOTOR SALES USA, INC. ET
AL.

Plaintiff

Counsel

MOSES LEBOVITZ (X)
JASON TORTORICI (X)

Defendant

Counsel

JEFFREY BARABAN (X)

NATURE OF PROCEEDINGS:

PLAINITFF (ANN GRANT)

1. MOTION TO RECOVER COST OF PROOF SANCTIONS AND REASONABLE ATTORNEYS' FEES TOTALLING \$139,609.95 FOR DEFENDANTS' REFUSAL TO ADMIT REQUEST FOR ADMISSIONS

1. CAUSE IS CALLED FOR HEARING ON PLAINTIFF'S MOTION TO RECOVER COSTS OF PROOF SANCTIONS AND REASONABLE ATTORNEY'S FEES.

THE MOTION IS ARGUED AND TAKEN UNDER SUBMISSION BY THE COURT.

LATER, THE COURT RULES AS FOLLOWS:

At Trial, Plaintiff ANN GRANT proved the truth of the matters subject to her requests for admissions, and Defendants TOYOTA MOTOR SALES, USA, INC. and GRANVILLE WEBSTER BURNS have failed to show any of the exceptions to the mandatory imposition of an award of expenses is applicable. Although Defendants argue they had reasonable ground to believe they would prevail on the matters or there was other good reason for the failure to admit and point to testimony elicited at Trial, the Court's denial of Plaintiff's Motion for Directed Verdict, the Jury finding Plaintiff was negligent, and that the finding Plaintiff's negligence was not a substantial factor in her causing her harm, was not shared by one of the twelve jurors, the argument and evidence are unavailing.

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NATURE OF PROCEEDINGS:

Defense Counsel avers Defendants relied upon witness statements, the police report, and an expert they consulted; however, none of this information, or the facts to be derived therefrom was identified in Defendants' response or supplement response to interrogatory No.17.1. Additionally, there is no evidence as to when this information was available to Defendants or when it was reviewed; indeed, Defendants fail to aver they reviewed the police report stating only it was available. The inquiry is whether a denial was reasonable at the time the denial was made. [BROOKS v AMERICAN BROADCASTING CO. (1986) 179 CalApp,3rd,500, 510]. According to Defendants' response and supplement response to interrogatory No.17.1, the only facts available to Defendants in support of their denial at time the denial was made was Plaintiff's deposition testimony to the effect she did not see Defendants' vehicle until just before it struck her. This is not a reasonable basis for denying the requests for admission, particularly those pertaining to whether BURNS was at fault, but also those pertaining to whether Plaintiff was comparatively at fault as that fact, taken alone, is entirely insufficient to prove either breach of duty or causation. Even if the availability of the witness statements and police report are considered, Defendant failed to provide copies of the witness statements or police report, and failed to point to specific facts therein supporting their contention Plaintiff was comparatively at fault.

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Defendants did not even state what those facts are in their supporting declaration, simply avering the testimony of one of the three witnesses that Plaintiff was three steps from the curb was consistent with the witnesses pre-trial statement. This evidence, too, taken alone or in conjunction with Plaintiff's deposition testimony, is insufficient to establish Plaintiff's comparative fault. Finally, Defendants may not rely on its consultation with expert THOMAS FUGGER. By failing to designate FUGGER as an expert witness, FUGGER could not have testified at Trial. A party may not rely upon information received from an expert it cannot or does not intend to use at Trial to justify its denials of requests for admissions. [WIMBERLY v. DERBY CYCLE CORP. (1997) 56 Cal.App 4th, 618,637]. Thus, there is no evidence from which this Court may find other good cause reason for the failure to admit.

Defendants also attack the hourly rates of Plaintiff's Counsel as excessive. However, in opposition, they present only a five year old survey of rates charged nationally, regionally, and statewide. Notably, page 93 of the survey indicates that in 2004 the 9th decile of rates for attorneys with 11 to 15 years of experience, into which experience category Plaintiff's Attorney JASON P.TORTORICI falls, was \$475. per hour, only \$25. per hour less than TORTORICI'S current rate, and while Plaintiff's Attorney MOSES LEBOVITZ'S \$750. per hour rate is \$184. higher than the \$566. per hour 9th decile of rates for attorneys with 21 years

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or more experience, into which experience category he falls with his 34 years of experience, this cannot be said to be "per se" unreasonable given the vast differences between 21 years and 34 years experience.

Finally, unlike other discovery sanctions, an award of expenses is not a penalty; instead, it is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission such that Trial would have been expedited or shortened if the request had been admitted. [AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES v. METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA (2005) 126Cal.App 4th, 247,266-267] and [BROOKS 179 Cal.App.3rd at 509]. Thus, an award pursuant to Code of Civil Procedure Sec 2033.420 is not an impermissible infringement upon Defendant's Constitutional Rights.

Accordingly, Plaintiff's Motion for an award of expenses incurred in providing the matters denied by Defendants in response to her requests for admissions is GRANTED.

PLAINTIFF IS AWARDED \$123,455.34 INCLUDING \$84,875.00 IN REASONABLE ATTORNEYS' FEES.

COURT CLERK IS TO GIVE NOTICE.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

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