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## ***Digest: Musaelian v. Adams***

*Julie Sarto*

Opinion by Werdegar, J., expressing the unanimous view of the court.

### Issue

Under California Code of Civil Procedure section 128.7<sup>1</sup> can attorney's fees be awarded to a party who represented him or herself in responding to a filing abuse?

### Facts

Joseph Reiter, represented by Attorney William L. Adams, obtained a default judgment against Andrew Musaelian and Andrew Musaelian's business, Attorney Legal Research (ALR).<sup>2</sup> Reiter sought partial satisfaction of this judgment through a forced sale of a residence owned jointly by Andrew Musaelian and his wife, Mary Musaelian.<sup>3</sup> Seeking to avoid the sale, Mary Musaelian filed a third party claim of ownership.<sup>4</sup> When the Superior Court denied this claim, the Musaelians sought to protect their home by filing for chapter 13 relief in the United States Bankruptcy Court for the Northern District of California.<sup>5</sup> Still seeking to satisfy the judgment against Andrew Musaelian and ALR, Reiter filed claims against the bankruptcy estate.<sup>6</sup> However, the bankruptcy court dismissed the claim against ALR, reasoning that it could be satisfied only from ALR's assets, which did not include the Musaelian's home.<sup>7</sup>

Based on Reiter's attempts to force the sale of the Musaelian's residence to satisfy the default judgment entered against ALR, Mary Musaelian then filed this suit against Reiter and Adams, seeking damages on theories of negligence, intentional infliction of emotional distress, abuse of process,

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<sup>1</sup> CAL. CIV. PROC. CODE § 128.7 (West 2006).

<sup>2</sup> *Musaelian v. Adams*, 198 P.3d 560, 561 (Cal. 2009). Reiter brought suit seeking damages for conduct relating to litigation between him and one of ALR's clients. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

slander of title, invasion of privacy, and malicious prosecution.<sup>8</sup> Adams, representing himself and, joined by Reiter, demurred on the grounds that the first five causes of action were subject to the litigation privilege of Civil Code section 47, and that the sixth cause of action for malicious prosecution lacked merit because the state court action had terminated in Reiter's favor.<sup>9</sup> They additionally moved under section 128.7 for sanctions, including attorney fees against Mary Musaelian and her attorney.<sup>10</sup>

In sustaining Adams' and Reiter's demurrers without leave to amend, the trial court also granted the motions for sanctions, ordering Mary Musaelian and her attorney to pay \$25,050 to Adams as "reasonable sanctions including attorney fees."<sup>11</sup> Reversing the award of attorney fees to Adams, the court of appeal concluded that because Adams had represented himself, he had not "incurred" attorney fees for purposes of sanctions under section 128.7.<sup>12</sup>

#### Analysis

The court first noted that, in California, following the "American Rule" and codified in Code of Civil Procedure section 1021, each party to a lawsuit ordinarily must pay its own attorney fees.<sup>13</sup> The measures and modes of attorney compensation are left to the agreement of the parties "[e]xcept as attorney's fees are specifically provided for by statute."<sup>14</sup> The court then acknowledged that California Code of Civil Procedure section 128.7 was such a statute.<sup>15</sup> Section 128.7 requires that parties and their attorneys certify that pleadings or other written materials presented to the courts have merit "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances."<sup>16</sup> Sanctions are authorized for violations of the section:

A sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. . . . [T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 562; CAL. CIV. PROC. CODE § 1021 (West 2006).

<sup>14</sup> *Musaelian*, 198 P.3d at 562 (citing § 1021).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (citing § 1021(b)).

some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.<sup>17</sup>

Next, the court looked to *Trope v. Katz*,<sup>18</sup> where the court held that the phrase "attorney's fees" in Civil Code section 1717 does not include compensation for an attorney's time and effort spent representing him or herself or for professional business opportunities lost as a result of self-representation.<sup>19</sup> The words "incur" and "attorney's fees" were examined and their ordinary and usual meanings were found to imply an agency relationship inconsistent with self-representation.<sup>20</sup> The general meaning of "incur" is "to become liable," and "attorney's fees" is the consideration a litigant actually pays or becomes liable to pay in exchange for legal representation; "[a]n attorney litigating in *propria persona* pays no such compensation."<sup>21</sup> The court reasoned that the language in section 128.7 should be interpreted in a similar manner and found that the inclusion of the words "incur" and "attorney's fees" in this section also implied an agency relationship where the client and the attorney are not one and the same, and where the attorney expects remuneration.<sup>22</sup>

The court additionally found that the statute viewed attorney's fees as an expense and authorized a court to impose sanctions in the form of "reasonable attorney's fees and other expenses incurred."<sup>23</sup> The word "expense" is associated with an obligation to pay, and a party who acts on his or her own behalf does not produce an expense that the party is obligated to pay.<sup>24</sup> Nor do lost earnings that a self-represented litigant might have obtained, but for devoting time to representing him or herself in litigation, constitute an expense.<sup>25</sup>

The court acknowledged that two California appellate court cases upheld awards of attorney fees, both having identified a need to compensate parties who had been compelled to respond to bad faith tactics.<sup>26</sup> Furthermore, the court noted that these courts found that to disallow an award of attorney's fees to self-represented attorneys would create "a separate and artificial category of litigants who would be inadequately protected against

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<sup>17</sup> *Id.* (citing § 1021(d)) (emphasis omitted).

<sup>18</sup> 902 P.2d 259 (Cal. 1995).

<sup>19</sup> *Musaelian*, 198 P.3d at 562.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (italics added).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (citing § 1021(d)) (emphasis omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 563.

<sup>26</sup> *Id.* (discussing *Abandonato v. Coldren*, 41 Cal. App. 4th 264 (1995) and *Laborde v. Aronson*, 92 Cal. App. 4th 459 (2001)).

another party's sanctionable activities."<sup>27</sup> The court found this reasoning to be inconsistent with the primary purpose of section 128.7—to deter filing abuses, not to compensate those affected by them.<sup>28</sup> This purpose would not suffer if attorney fees are not allowed for attorneys representing themselves.<sup>29</sup> The court was not concerned that a party that engaged in abusive filing practices would have been able to avoid monetary sanctions simply because the opposing party was a self-represented attorney—because section 128.7 provides the trial court with a wide range of options, all of which are designed to deter filing abuses.<sup>30</sup>

### Holding

The court held that an award of monetary sanctions for frivolous litigation tactics under Code of Civil Procedure section 128.7 could include an award of attorney fees in favor of an attorney who represented him or herself.

### Legal Significance

This decision reaffirms the idea that the phrase “attorney fees” does not include compensation for the time and effort attorneys expend representing themselves or for professional business opportunities lost because of self-representation. It extends its application to section 128.7. As a result of this decision, an attorney who responds *pro se* to a filing abuse may not recover sanctions under section 128.7 in the form of an award of attorney fees.

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<sup>27</sup> *Id.* (discussing *Abandonato v. Coldren*, 41 Cal. App. 4th 264 (1995) and *Laborde v. Aronson*, 92 Cal. App. 4th 459 (2001)).

<sup>28</sup> *Id.* at 564.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*