COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 8

AARON SAMSKY, Petitioner and Appellant, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Respondent and Appellee.	No. B293885 Los Angeles Superior Court Case No. BS175182

Appeal from Order and Judgment
of the Los Angeles Superior Court
Hon. Barbara A. Meiers, Judge

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

State Farm makes the following arguments in its brief ("RB"): (1) the standard of review is abuse of discretion, not de novo; (2) the superior court correctly applied section 2033.420; and (3) even if the superior court did not correctly apply section 2033.420, there are alternative bases in the record to affirm its ruling.

The Court should reject each of these arguments.

II. THIS COURT REVIEWS DE NOVO THE SUPERIOR COURT'S LEGAL CONCLUSIONS

State Farm's contention, that because this Court is reviewing the denial of a costs of proof motion each aspect of its review is for abuse of discretion (RB 7-9), is wrong.

As noted in Mr. Samsky's opening brief citing California Supreme Court precedent (AOB 18), even under the penumbra of the abuse of discretion standard, the superior court's conclusions of law are reviewed de novo. This Court has repeatedly confirmed the application of this rule to circumstances analogous to those here. (See, e.g., *David v. Hernandez* (2014) 226 Cal.App.4th 578, 589 [172 Cal.Rptr.3d 204]; see also *O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal.App.5th 1115, 1124 [242

Cal.Rptr.3d 239] [explaining that under abuse of discretion standard, legal conclusions are reviewed de novo as "a disposition that rests on an error of law constitutes an abuse of discretion"].)

The superior court's legal conclusion that, under section 2033.420, Mr. Samsky had to show that State Farm did not have grounds to deny the pertinent RFAs is at issue on his appeal. That distinguishes this appeal from the one in *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, upon which State Farm relies (RB 7-9).

In *Laabs*, the trial court issued an order denying a cost of proof motion without any reasoning or findings, so it was impossible to review the trial court's legal conclusions. (*Laabs*, *supra*, 163 Cal.App.4th at p. 1275 & fn. 20.) The appellate court implied findings because the trial court did not explain its ruling.

Here, the superior court issued a two-and-a-half-page opinion with findings supporting its ruling against Mr. Samsky. That opinion set forth a demonstrably incorrect interpretation of section 2033.420—that Mr. Samsky had to show that State Farm did *not* have grounds to deny the pertinent RFAs—upon which its ruling against Mr. Samsky was explicitly based. (AA 349-350.) This legal error is reviewed de novo notwithstanding the implied

findings doctrine. (*Orange Cnty. Water Dist. v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 312 [219 Cal.Rptr.3d 474] ["the doctrine of implied findings does not apply to the court's legal conclusions (which are reviewed de novo on appeal)"].)

Brooks v. American Broadcasting Co. (1986) 179 Cal.App.3d 500 also does not support State Farm's position on this Court's standard of review. There, the denying party claimed the trial court erred by not finding it had good reason to deny the request or that the request was not of substantial importance. (*Id.* at pp. 507-08.) The appellate court was asked to review an application of law to fact. The appellate court did so, *first*, by applying a de novo standard of review (i.e., without deference or regard to what the superior court had decided on the subject) to the meaning of the statute. (*Id.* at pp. 508-11.) Only *then* did it evaluate whether application of the correct rule of law to the facts in that record resulted in an abuse of discretion by the trial court. (*Id.* at pp. 511-12.)

Here, the superior court applied an incorrect legal standard to its factual findings. The superior court erred by interpreting the cost of proof statute to mean that if the record did not permit

it to find that either of the two pertinent statutory exceptions did or did not apply under section 2033.420(b), then Mr. Samsky's cost of proof motion must be denied.[1] (AA 349-51.)

"If the [superior] court's decision is influenced by an erroneous understanding of applicable law," as it was here, "the court has not properly exercised its discretion under the law. Therefore, a discretionary order based on an application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion." (*Farmers Ins. Exch. v. Superior Court* (2013) 218 Cal.App.4th 96, 106 [159 Cal.Rptr.3d 580] [internal citations omitted].) In any and all cases, the superior court's "discretion must be exercised reasonably and in conformance with applicable law." (*Arnold Eng'g, supra*, 242 Cal.Rptr.3d at p. 371.) Here, it was not.

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[1] There is a far less persuasive case here for this Court's deference to the superior court's decision-making because none of the "core discretionary functions of the trial court" are in stake. (*Orange Cnty. Water Dist. v. Arnold Eng'g Co.* (2018) 31 Cal.App.5th 96 [242 Cal.Rptr.3d 350, 369].) The superior court neither managed the discovery aspects of the parties' arbitration nor tried the matter. So deference to its discretion in deciding Mr. Samsky's cost of proof motion is far less crucial to the efficient administration of justice. Indeed, given the procedural posture, the superior court's "ability to consider and weigh the myriad factors relevant to the decision at hand" is no greater than this Court's. (*Id.*)

III. THE SUPERIOR COURT MISAPPLIED SECTION 2033.420

A. The Doctrine of Implied Findings Does Not Apply Here

State Farm's contention that this Court must apply the doctrine of implied findings to affirm the superior court's ruling (RB 23-24) is wrong.

First, as noted above, that doctrine does not apply where, as here, Mr. Samsky challenges a legal conclusion made by the superior court. (*Alcoa*, *supra*, 12 Cal.App.5th at p. 312 ["Since the doctrine of implied findings does not apply to the court's legal conclusions (which are reviewed de novo on appeal), this procedure [that governing implied findings] does not apply to potential errors of law."]; *Duarte Nursery, Inc. v. Cal. Grape Rootstock Improvement Com.* (2015) 239 Cal.App.4th 1000, 1012 [191 Cal.Rptr.3d 776] [implied findings only applies "when there is an omission or ambiguity in the trial court's decision, not when the party attacks the legal premises"].) Mr. Samsky's appeal challenges the superior court's conclusion that section 2033.420(b) required him to show that the pertinent statutory exceptions, (b)(3) and (b)(4), did not apply before awarding him his costs of proof.

Second, as is evident from its ruling, the superior court made the factual finding requisite to a cost of proof award. It said, explicitly, that it could not determine from the record a factual basis to find that State Farm had a reasonable ground to believe it would prevail on the matters in question or that State Farm had other good cause for its failure to admit at the time it denied the RFAs in question. (AA 349-51.)

Here, applying the correct legal standard, the superior court's findings that the record failed to demonstrate a factual basis for an exception to an award of costs of proof means that the superior court should have ruled for Mr. Samsky, not against him. Where, as here, application of the correct legal standard to the factual findings the superior court actually made requires reversal, the correct appellate procedure is to remand with instructions. (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1517 [34 Cal.Rptr.3d 458].)

B. The Superior Court's Interpretation of Mr. Samsky's Burden on his Motion was Erroneous

The superior court's conflation of "burden of proof" with "burden of persuasion" does not save its fundamental misreading

of the statute, and State Farm's contention to the contrary is wrong.

Mr. Samsky had to show that he was entitled to costs of proof under section 2033.420. That burden consisted of demonstrating that (1) State Farm failed to admit the matter; and (2) Mr. Samsky proved the matter at trial. (§ 2033.420, subd. (a).)

State Farm had to show that one of two statutory exceptions applied under section 2033.420. That burden consisted of demonstrating either that (1) State Farm had a reasonable ground to believe that it would prevail on the matter in question; or (2) that it had another good reason for its denials. (§ 2033.420, subd. (b)(3) & (4).)

The superior court erred by not requiring State Farm to make that showing once it found (which it apparently did) that Mr. Samsky satisfied section 2033.420(a). The superior court compounded its error by ruling against Mr. Samsky even though it found that the record did not permit it to determine that either of the two exceptions State Farm invoked applied.

State Farm relies on a single appellate decision, *Smith v. Circle P Ranch Co., Inc.* (1978) 87 Cal.App.3d 267 [150 Cal.Rptr.

828], even though the *Smith* court considered a previous iteration of the cost of proof statute that the California Legislature amended with new language directly pertinent to the issue on appeal. To avoid that problem, State Farm directs the Court's attention to the non-substantive 2004 amendment which created the current section 2033.420, so as to suggest that the *Smith* standard should still apply to the current version of the statute. (RB 30-31.)

But that sleight-of-hand entirely ignores that the Legislature significantly amended the statute twice since 1978—once in 1986 (effective in 1987), and again in 2004 (effective in 2005). And whereas the 2004 amendment was a non-substantive reorganization of the statute, State Farm fails to mention that the 1986 amendment was part of the foundational California Civil Discovery Act of 1986 and *substantively altered the law*.[2]

The *Smith* court interpreted then section 2034, sub. (c), which provided:

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[2] When, in 2004, section 2033(o) was repealed and effectively became section 2033.420, the two sentences in section 2033(o) were divided into sections 2033.420(a) and (b), respectively. Although non-substantive, that alteration is a further indication of the Legislature's intent to place the burden to show an exception to a cost of proof award on the non-moving party.

> If a party, after being served with a request under Section 2033 of this code to admit . . . the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves . . . the truth of any such matter of fact, he may apply to the court in the same action for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. **If the court finds that there were no good reasons for the denial and that the admissions sought were of substantial importance, the order shall be made.**

(*Smith*, *supra*, 87 Cal.App.3rd at 273-74 [emphasis added].)

The 1986 statute, former section 2033(o), read:

> If a party fails to admit . . . the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the . . . truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. **The court shall make this order unless it finds that** (1) an objection to the request was sustained or a response to it was waived under subdivision (*l*), (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) there was other good reason for the failure to admit.

As the plain language of these two former versions of the statute demonstrate, *Smith* does not provide useful guidance to interpret the 1986 or 2004 versions of the statute. Under the pre-1986 statute, as *Smith* suggests, to make an award the court had

to find there "were no good reasons for the denial and that the admissions sought were of substantial importance." Under the 1986 and 2004 statutes, the Court must make an award *unless* it finds that any one of the four statutory exceptions apply.

As part of the California Civil Discovery Act of 1986, the Legislature unmistakably altered who has to show what on a cost of proof motion. As noted in Mr. Samsky's opening brief, that intention was acknowledged by both the leading treatise on California practice as well as the State's courtroom handbook and at least two reported appellate decisions. (AOB 21.)

More recently, it was acknowledged by the court in *Arnold Eng'g*, *supra*, 242 Cal.Rptr.3d at p. 370 ("The [non-moving party] is not responsible for [the moving party's] costs if it shows it had reasonable ground to believe it would prevail on the matter."). In short, by 1986, the Legislature made clear that a non-moving party needed to show that one of the four statutory exceptions applied.

In the event, the decision in *Smith* does not mean that a court may deny a motion because it lacks information on whether good cause existed, only that an award is mandatory when the moving party shows that the denial was without good cause.

Smith set forth sufficient conditions, not necessary ones, to an award of costs of proof.

IV. THERE WAS NO ALTERNATIVE BASIS IN THE RECORD TO AFFIRM THE SUPERIOR COURT'S RULING

A. Mr. Samsky Proved the Denied Matters at Trial

By its silence, State Farm concedes that Mr. Samsky proved the comparative negligence matters at trial (AA 5), but its continued claim that Mr. Samsky failed to prove his concussion and ulnar nerve injuries is wrong.

The arbitrator awarded Mr. Samsky the costs of all medical care for his concussion and ulnar nerve injury. (AA 7-8.) The arbitrator also awarded lost earnings, which State Farm claimed in its arbitration brief were "based on [Mr. Samsky's] ulnar nerve issue and claimed cognitive deficiencies and [] therefore are not compensable in this Arbitration." (AA 179.) If the Court did not find that these injuries were proved, it would not have awarded those damages.

To the extent this Court harbors any doubt on that matter as a result of ambiguity in the arbitrator's award, that doubt should be resolved in Mr. Samsky's favor. Against all common sense, State Farm snatched Mr. Samsky's cost of proof motion

from the arbitrator, insisting the matter belonged in the superior court. (AA 44-53.) It did so over Mr. Samsky's objection, and against the arbitrator's tentative and perfectly natural inclination to retain jurisdiction over the matter.

Need it be said that the arbitrator had the best vantage point from which to determine what was and was not proved at trial, and what he did or did not intend by his decision in the matter? State Farm should not benefit in any way, shape, or form from its choice to strip the fact-finder of decision-making authority in the matter of Mr. Samsky's costs of proof.

B. State Farm Did Not Show it Had Reasonable Grounds to Believe it Would Prevail on the Matters at Trial or Other Good Reason to Deny the Requested Admissions

State Farm's contention that the record demonstrates that State Farm had reasonable grounds to believe it would prevail on the issues at trial or that there were other good reasons for its denials (RB 13-18) is also wrong.

1. State Farm Had No Reasonable Grounds to Believe It Would Prevail on the Comparative Fault Issue

The inadmissible hearsay statement of a witness State Farm never spoke to does not constitute reasonable grounds to

believe it would *prevail* on the comparative fault issue at trial. Yet this is all State Farm had to rely upon on that subject. (RB 17-19.) (The chain reaction nature of the accident proves nothing about Mr. Samsky's fault in relation to the individual who rear-ended him.) While State Farm's counsel stated after the fact in opposition to the cost of proof motion that State Farm intended to present this witness at the arbitration (AA 260 at ¶ 15), State Farm did not mention her testimony before the fact in its arbitration brief (AA 177).

In fact, State Farm never had any reason to believe it could or would produce this witness at trial. Her statement was taken by a third-party. The record reflects no evidence that State Farm ever engaged her to testify. Indeed, counsel admitted that she "could not find her." (AA 260 at ¶ 15.)

Even if State Farm thought it could convince a witness it never found to testify, any belief that it would *prevail* on the issue of comparative fault based on that testimony was nothing more than "hope or a roll of the dice." (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 532 [192 Cal.Rptr.3d 551]; see also *Arnold Eng'g*, *supra,* 242 Cal.Rptr.3d at pp. 368-69 [iterating factors when considering proffer of whether non-moving party

had grounds to believe that it would prevail on the issue at trial; among others, courts should assess "the likelihood that [the evidence] would be admissible"].)

2. State Farm Had No Reasonable Grounds to Believe it Would Prevail on the Concussion and Ulnar Nerve Issues

State Farm relies on its counsel's summary of expert testimony in its arbitration brief (AA 180-82) to support its contention that it had reason to believe it would prevail on the concussion and ulnar nerve issues at trial (AA 14-17). The superior court had no reason to consider counsel's summary when deciding whether State Farm had reasonable grounds to believe it would prevail on the issues at trial when it denied them.

First, counsel's summary is not evidence. (*Arnold Eng'g*, *supra*, 242 Cal.Rptr.3d at p. 366 ["A party's reasonable belief must be grounded in the evidence"]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 8:1408 [a reasonably entertained good faith belief must be based on "admissible evidence"].) If State Farm wanted to rely on its experts' opinions in opposition to Mr. Samsky's cost of proof motion, it should have proffered excerpts of their testimony or copies of their reports. It chose not to.

Second, State Farm's arbitration brief was filed two days after the comparative negligence and ulnar nerve denials (AA 140-41, 154-56), and almost two months after the concussion denials (AA 115-17). While it shows the maximum amount of information State Farm might have had at the time of its denials, it does not necessarily show the information it had at that time. (*Laabs*, *supra,* 163 Cal.App.4th at p. 1276 [question is whether "at the time the denial was made" party had reasonably entertained good faith belief that it would prevail on issue at trial].) This was precisely the problem the superior court said it had with the state of the record.[3]

Third, State Farm did not argue in the superior court that its experts provided it good cause to deny the requests, nor did it proffer any evidence to support that notion. (AA 254 [arguing only that Mr. Samsky did not prove injuries and that State Farm had good reason to think Mr. Samsky was not injured because of photos of damaged vehicles and the fact that it hired experts (not the substance of their opinions)].) State Farm therefore waived

[3] As State Farm chose not to proffer any admissible evidence of what its expert's opinions were at the time it denied the concussion RFAs, one perfectly reasonable inference to be drawn therefrom is that it did not have Dr. Carpenter's opinion (see below) at the time it denied them.

that argument. (*Bank of New York Mellon v. Preciado* (2013) 224 Cal.App.4th Supp. 1, 6 [169 Cal.Rptr.3d 653] ["A party's failure to perform its duty to provide argument, citations to the record, and legal authority in support of a contention may be treated as a waiver of the issue."].)

State Farm could not have reasonably believed it would prevail at trial based on its experts' opinions because those opinions were neither credible nor persuasive. (*Arnold Eng'g*, *supra*, 242 Cal.Rptr.3d at pp. 366-67 ["the credibility and persuasiveness of expert opinion evidence must be evaluated to determine whether it would be reasonable for a party to believe it would prevail on it"].) Those opinions were directly and fatally contradicted by facts known to State Farm—precisely why the arbitrator found Dr. Woo's and Dr. Gupta's opinions "not believable." (AA 6.)

These experts pinned Mr. Samsky's ulnar nerve injuries and concussion symptoms on repetitive use and sleep apnea, which the arbitrator found to be "too much in the realm of coincidence, especially," he wrote, "when [Mr. Samsky] never complained of sleep apnea o[r] pain in the wrist due to repetitive use." (AA 6.) In other words, direct factual evidence contradicted

this expert opinion evidence in its entirety. And Dr. Carpenter, who State Farm now throws into the mix, is not a medical doctor; his paid-for conclusion that there was a zero percent chance of a closed head injury in a car accident is not credible on its face.

The state of the evidence at the time of State Farm's denials included: treating physician Dr. Regev's Aug. 20, 2015 concussion and ulnar nerve diagnoses *before* the second accident (AA 82-83, 184-87); his Sept. 8, 2015 follow-up evaluation of Mr. Samsky's concussion and ulnar nerve injury, again *before* the second accident (AA 189-90); Mr. Samsky's uncontradicted testimony concerning the symptoms he suffered and the timing thereof (AA 62-64); and Dr. Shayfer's deposition testimony and diagnosis that the accident caused the ulnar nerve injury (AA 99-100).

Given the state of the evidence at the time of its denials, State Farm's experts' opinions were "not believable" and therefore could not have provided State Farm good cause to believe it would prevail on the concussion and ulnar nerve matters at trial or any other good reason to deny the RFAs. (*Arnold Eng'g*, *supra*, 242 Cal.Rptr.3d at pp. 367-68 ["Whether a party has a reasonable ground to believe he or she will prevail

necessarily requires consideration of all the evidence, both for and against the party's position, known or reasonably available to the party at the time the RFA responses are served."].) As the *Arnold Eng'g* court correctly concluded, "a party cannot rely on a plainly unqualified expert [like Dr. Carpenter on the head injury], or a sham opinion [like that of Drs. Woo and Gupta on the wrist injury], to avoid cost of proof sanctions." (*Id.* at p. 367.)

3. Mr. Samsky's Accounting Does Not Support Affirmance

In a last-ditch attempt to justify the superior court's order, State Farm argues that this Court should affirm because Mr. Samsky's detailed contemporaneous time records and itemized costs (AA 39-42 at ¶ 17-28; AA 201-212) were insufficient to support an award of costs of proof. That is legally and factually incorrect.

First, the sufficiency of Mr. Samsky's fee and costs records was never raised in the superior court. (AA 255 [arguing only over counsels' rates].) State Farm has waived that argument.

Second, counsel's costs and fee accounting are "limited to the attorney and paralegal time associated with Samsky's proof of RFAs denied by State Farm at issue . . . and only seeks

reimbursement of time corresponding with those matters of proof." (AA 39-40 at ¶ 21.) Non-recoverable expenses were not included in the accounting.

Third, none of the cases cited by State Farm support its position that a court may deny a cost of proof motion because a proffered accounting makes it difficult to separate recoverable from non-recoverable costs. (See, e.g., *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 807-08 [192 Cal.App.4th 881] [court affirmed denial of § 2033.420 motion when moving party provided no accounting at all]; *Arnold Eng'g*, *supra*, 242 Cal.Rptr.3d at pp. 356 & 364 [when some evidence was inadequate because it did not distinguish between recoverable and nonrecoverable costs, remanding to superior court to make new award]; *Smith*, *supra,* 87 Cal.App.3d at p. 280 [remanding for superior court to reconsider evidence and take further evidence on issue of expenses and attorney's fees necessarily incurred by plaintiff and reasonably related to denied requests].)

If the Court is persuaded that the proffered records are insufficient (and they are not), the proper remedy is remand with instructions to the superior court to determine the proper amount of the costs of proof award.

V. CONCLUSION

For all the foregoing reasons, as well as the reasons set for in Mr. Samsky's opening brief, the order of the superior court should be reversed, and the matter remanded with instructions to grant Mr. Samsky's motion and to consider the proper amount of the costs of proof award. That award should include costs on this appeal.

Dated: March 1, 2019 Respectfully submitted,

By /s/ Nicholas A. Carlin
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 4,057 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: March 1, 2019

By /s/ Brian S. Conlon
Brian S. Conlon

PROOF OF SERVICE

I, the undersigned, declare that I am over the age of eighteen and not a party to this action. My business address is Phillips Erlewine, Given & Carlin LLP, 39 Mesa Street, Suite 201, The Presidio, San Francisco, California 94129.

On the date below, at my place of business at San Francisco, California, a copy of the following document(s) were served by **ELECTRONIC TRANSMISSION** to the parties listed below.

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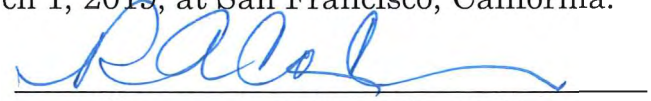
California Supreme Court (served electronically under CRC 8.212(c)(2)(C))	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 1, 2019, at San Francisco, California.



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