

## RESOLUTION 09-08-08

### DIGEST

#### Summary Judgment: Sanctions for Bad Faith Motions

Amends Code of Civil Procedure section 437c to add attorneys' fees as a sanction, and the motion itself as a basis, for the bringing of a summary judgment motion in bad faith.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure section 437c to add attorneys' fees as a sanction, and the motion itself as a basis, for the bringing of a summary judgment motion in bad faith. This resolution should be disapproved because it does not provide for sanctions for an opposition to a motion for summary judgment brought in bad faith, and the proposed new subdivision (j)(1) is not necessary or appropriate.

Attorneys' fees as a sanction for the bringing of any motion in bad faith is already provided for in Code of Civil Procedure sections 128.6 and 128.7. The special reference to affidavits brought in bad faith in existing section 437c addresses a species of improper filings that are not specifically or sufficiently addressed elsewhere in the Code. An amendment to section 437c to add attorneys' fees as a sanction for presenting affidavits in bad faith, without more, would be appropriate. This resolution, however, does more. It provides for sanctions for a bad faith motion, to the exclusion of sanctions for a bad faith opposition, and seeks to "abrogate" (that is, to abolish, repeal or annul) the holding in *Collins v. State Department of Transportation* [(2003) 114 Cal.App.4<sup>th</sup> 859].

*Collins v. State Department of Transportation* is a well-reasoned case. Relying upon the California Supreme Court case of *Bauguess v. Paine* [(1978) 22 Cal.3d 626], the *Collins* court held that the trial court has no inherent power to award attorneys' fees as a sanction, and that specific statutory authority to do so is required. *Collins* would not be "abrogated" by adding such statutory authority to Code of Civil Procedure section 437c. Furthermore, the opinion in *Collins* was filed in 2003. The plaintiff in *Collins* did not have the benefit of Code of Civil Procedure section 128.6 because his complaint was filed before its operative date, January 1, 2003. That problem is not likely to exist for a party to a summary judgment motion brought in 2009 or later.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 437c to read as follows:

1 §437c.

2 (a) Any party may move for summary judgment in any action or proceeding if it  
3 is contended that the action has no merit or that there is no defense to the action or  
4 proceeding. The motion may be made at any time after 60 days have elapsed since the  
5 general appearance in the action or proceeding of each party against whom the motion is  
6 directed or at any earlier time after the general appearance that the court, with or without  
7 notice and upon good cause shown, may direct. Notice of the motion and supporting  
8 papers shall be served on all other parties to the action at least 75 days before the time  
9 appointed for hearing. However, if the notice is served by mail, the required 75-day  
10 period of notice shall be increased by five days if the place of address is within the State  
11 of California, 10 days if the place of address is outside the State of California but within  
12 the United States, and 20 days if the place of address is outside the United States, and if  
13 the notice is served by facsimile transmission, Express Mail, or another method of  
14 delivery providing for overnight delivery, the required 75-day period of notice shall be  
15 increased by two court days. The motion shall be heard no later than 30 days before the  
16 date of trial, unless the court for good cause orders otherwise. The filing of the motion  
17 shall not extend the time within which a party must otherwise file a responsive pleading.

18 (b) (1) The motion shall be supported by affidavits, declarations, admissions,  
19 answers to interrogatories, depositions, and matters of which judicial notice shall or may  
20 be taken. The supporting papers shall include a separate statement setting forth plainly  
21 and concisely all material facts which the moving party contends are undisputed. Each of  
22 the material facts stated shall be followed by a reference to the supporting evidence. The  
23 failure to comply with this requirement of a separate statement may in the court's  
24 discretion constitute a sufficient ground for denial of the motion.

25 (2) Any opposition to the motion shall be served and filed not less than 14 days  
26 preceding the noticed or continued date of hearing, unless the court for good cause orders  
27 otherwise. The opposition, where appropriate, shall consist of affidavits, declarations,  
28 admissions, answers to interrogatories, depositions, and matters of which judicial notice  
29 shall or may be taken.

30 (3) The opposition papers shall include a separate statement that responds to each  
31 of the material facts contended by the moving party to be undisputed, indicating whether  
32 the opposing party agrees or disagrees that those facts are undisputed. The statement also  
33 shall set forth plainly and concisely any other material facts that the opposing party  
34 contends are disputed. Each material fact contended by the opposing party to be disputed  
35 shall be followed by a reference to the supporting evidence. Failure to comply with this  
36 requirement of a separate statement may constitute a sufficient ground, in the court's  
37 discretion, for granting the motion.

38 (4) Any reply to the opposition shall be served and filed by the moving party not  
39 less than five days preceding the noticed or continued date of hearing, unless the court for  
40 good cause orders otherwise.

41 (5) Evidentiary objections not made at the hearing shall be deemed waived.

42 (6) Except for subdivision (c) of Section 1005 relating to the method of service of  
43 opposition and reply papers, Sections 1005 and 1013, extending the time within which a  
44 right may be exercised or an act may be done, do not apply to this section.

45 (7) Any incorporation by reference of matter in the court's file shall set forth with  
46 specificity the exact matter to which reference is being made and shall not incorporate the  
47 entire file.

48 (c) The motion for summary judgment shall be granted if all the papers submitted  
49 show that there is no triable issue as to any material fact and that the moving party is  
50 entitled to a judgment as a matter of law. In determining whether the papers show that  
51 there is no triable issue as to any material fact the court shall consider all of the evidence  
52 set forth in the papers, except that to which objections have been made and sustained by  
53 the court, and all inferences reasonably deducible from the evidence, except summary  
54 judgment may not be granted by the court based on inferences reasonably deducible from  
55 the evidence, if contradicted by other inferences or evidence, which raise a triable issue  
56 as to any material fact.

57 (d) Supporting and opposing affidavits or declarations shall be made by any  
58 person on personal knowledge, shall set forth admissible evidence, and shall show  
59 affirmatively that the affiant is competent to testify to the matters stated in the affidavits  
60 or declarations. Any objections based on the failure to comply with the requirements of  
61 this subdivision shall be made at the hearing or shall be deemed waived.

62 (e) If a party is otherwise entitled to a summary judgment pursuant to this section,  
63 summary judgment may not be denied on grounds of credibility or for want of cross-  
64 examination of witnesses furnishing affidavits or declarations in support of the summary  
65 judgment, except that summary judgment may be denied in the discretion of the court,  
66 where the only proof of a material fact offered in support of the summary judgment is an  
67 affidavit or declaration made by an individual who was the sole witness to that fact; or  
68 where a material fact is an individual's state of mind, or lack thereof, and that fact is  
69 sought to be established solely by the individual's affirmation thereof.

70 (f) (1) A party may move for summary adjudication as to one or more causes of  
71 action within an action, one or more affirmative defenses, one or more claims for  
72 damages, or one or more issues of duty, if that party contends that the cause of action has  
73 no merit or that there is no affirmative defense thereto, or that there is no merit to an  
74 affirmative defense as to any cause of action, or both, or that there is no merit to a claim  
75 for damages, as specified in Section 3294 of the Civil Code, or that one or more  
76 defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for  
77 summary adjudication shall be granted only if it completely disposes of a cause of action,  
78 an affirmative defense, a claim for damages, or an issue of duty.

79 (2) A motion for summary adjudication may be made by itself or as an alternative  
80 to a motion for summary judgment and shall proceed in all procedural respects as a  
81 motion for summary judgment. However, a party may not move for summary judgment  
82 based on issues asserted in a prior motion for summary adjudication and denied by the  
83 court, unless that party establishes to the satisfaction of the court, newly discovered facts  
84 or circumstances or a change of law supporting the issues reasserted in the summary  
85 judgment motion.

86 (g) Upon the denial of a motion for summary judgment, on the ground that there  
87 is a triable issue as to one or more material facts, the court shall, by written or oral order,  
88 specify one or more material facts raised by the motion as to which the court has  
89 determined there exists a triable controversy. This determination shall specifically refer to  
90 the evidence proffered in support of and in opposition to the motion which indicates that  
91 a triable controversy exists. Upon the grant of a motion for summary judgment, on the  
92 ground that there is no triable issue of material fact, the court shall, by written or oral  
93 order, specify the reasons for its determination. The order shall specifically refer to the

94 evidence proffered in support of, and if applicable in opposition to, the motion which  
95 indicates that no triable issue exists. The court shall also state its reasons for any other  
96 determination. The court shall record its determination by court reporter or written order.

97 (h) If it appears from the affidavits submitted in opposition to a motion for  
98 summary judgment or summary adjudication or both that facts essential to justify  
99 opposition may exist but cannot, for reasons stated, then be presented, the court shall  
100 deny the motion, or order a continuance to permit affidavits to be obtained or discovery  
101 to be had or may make any other order as may be just. The application to continue the  
102 motion to obtain necessary discovery may also be made by ex parte motion at any time  
103 on or before the date the opposition response to the motion is due.

104 (I) If, after granting a continuance to allow specified additional discovery, the  
105 court determines that the party seeking summary judgment has unreasonably failed to  
106 allow the discovery to be conducted, the court shall grant a continuance to permit the  
107 discovery to go forward or deny the motion for summary judgment or summary  
108 adjudication. This section does not affect or limit the ability of any party to compel  
109 discovery under the Civil Discovery Act (Title 4 (commencing with Section 2016.010) of  
110 Part 4).

111 (j) If the court determines at any time that the motion or any of the affidavits are  
112 presented in bad faith or solely for purposes of delay, the court shall order the party or  
113 attorney presenting the motion or the affidavits to pay the other party the amount of  
114 reasonable attorney fees and the reasonable expenses which the filing of the motion or the  
115 affidavits, caused the other party to incur. Sanctions may not be imposed pursuant to this  
116 subdivision, except on notice contained in a party's papers, or on the court's own noticed  
117 motion, and after an opportunity to be heard.

118 (1) It is the intent of the Legislature by enacting this section to abrogate the  
119 holding in *Collins v. State Department of Transportation* (2004) 114 Cal. App. 4<sup>th</sup> 859,  
120 and to bestow power on the court to award reasonable attorneys fees pursuant to this  
121 section.

122 (k) Except when a separate judgment may properly be awarded in the action, no  
123 final judgment may be entered on a motion for summary judgment prior to the  
124 termination of the action, but the final judgment shall, in addition to any matters  
125 determined in the action, award judgment as established by the summary proceeding  
126 herein provided for.

127 (l) In actions which arise out of an injury to the person or to property, if a motion  
128 for summary judgment was granted on the basis that the defendant was without fault, no  
129 other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or  
130 comment on the absence or involvement of the defendant who was granted the motion.

131 (m) (1) A summary judgment entered under this section is an appealable judgment  
132 as in other cases. Upon entry of any order pursuant to this section, except the entry of  
133 summary judgment, a party may, within 20 days after service upon him or her of a  
134 written notice of entry of the order, petition an appropriate reviewing court for a  
135 peremptory writ. If the notice is served by mail, the initial period within which to file the  
136 petition shall be increased by five days if the place of address is within the State of  
137 California, 10 days if the place of address is outside the State of California but within the  
138 United States, and 20 days if the place of address is outside the United States. If the  
139 notice is served by facsimile transmission, Express Mail, or another method of delivery

140 providing for overnight delivery, the initial period within which to file the petition shall  
141 be increased by two court days. The superior court may, for good cause, and prior to the  
142 expiration of the initial period, extend the time for one additional period not to exceed 10  
143 days.

144 (2) Before a reviewing court affirms an order granting summary judgment or  
145 summary adjudication on a ground not relied upon by the trial court, the reviewing court  
146 shall afford the parties an opportunity to present their views on the issue by submitting  
147 supplemental briefs. The supplemental briefing may include an argument that additional  
148 evidence relating to that ground exists, but that the party has not had an adequate  
149 opportunity to present the evidence or to conduct discovery on the issue. The court may  
150 reverse or remand based upon the supplemental briefing to allow the parties to present  
151 additional evidence or to conduct discovery on the issue. If the court fails to allow  
152 supplemental briefing, a rehearing shall be ordered upon timely petition of any party.

153 (n) (1) If a motion for summary adjudication is granted, at the trial of the action,  
154 the cause or causes of action within the action, affirmative defense or defenses, claim for  
155 damages, or issue or issues of duty as to the motion which has been granted shall be  
156 deemed to be established and the action shall proceed as to the cause or causes of action,  
157 affirmative defense or defenses, claim for damages, or issue or issues of duty remaining.

158 (2) In the trial of the action, the fact that a motion for summary adjudication is  
159 granted as to one or more causes of action, affirmative defenses, claims for damages, or  
160 issues of duty within the action shall not operate to bar any cause of action, affirmative  
161 defense, claim for damages, or issue of duty as to which summary adjudication was either  
162 not sought or denied.

163 (3) In the trial of an action, neither a party, nor a witness, nor the court shall  
164 comment upon the grant or denial of a motion for summary adjudication to a jury.

165 (o) A cause of action has no merit if either of the following exists:

166 (1) One or more of the elements of the cause of action cannot be separately  
167 established, even if that element is separately pleaded.

168 (2) A defendant establishes an affirmative defense to that cause of action.

169 (p) For purposes of motions for summary judgment and summary adjudication:

170 (1) A plaintiff or cross-complainant has met his or her burden of showing that  
171 there is no defense to a cause of action if that party has proved each element of the cause  
172 of action entitling the party to judgment on that cause of action. Once the plaintiff or  
173 cross-complainant has met that burden, the burden shifts to the defendant or cross-  
174 defendant to show that a triable issue of one or more material facts exists as to that cause  
175 of action or a defense thereto. The defendant or cross-defendant may not rely upon the  
176 mere allegations or denials of its pleadings to show that a triable issue of material fact  
177 exists but, instead, shall set forth the specific facts showing that a triable issue of material  
178 fact exists as to that cause of action or a defense thereto.

179 (2) A defendant or cross-defendant has met his or her burden of showing that a  
180 cause of action has no merit if that party has shown that one or more elements of the  
181 cause of action, even if not separately pleaded, cannot be established, or that there is a  
182 complete defense to that cause of action. Once the defendant or cross-defendant has met  
183 that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable  
184 issue of one or more material facts exists as to that cause of action or a defense thereto.  
185 The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its

186 pleadings to show that a triable issue of material fact exists but, instead, shall set forth the  
187 specific facts showing that a triable issue of material fact exists as to that cause of action  
188 or a defense thereto.

189 (q) This section does not extend the period for trial provided by Section 1170.5.

190 (r) Subdivisions (a) and (b) do not apply to actions brought pursuant to Chapter 4  
191 (commencing with Section 1159) of Title 3 of Part 3.

192 (s) For the purposes of this section, a change in law does not include a later  
193 enacted statute without retroactive application.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** San Mateo County Bar Association

### **STATEMENT OF REASONS**

Existing Law: Permits a court that finds affidavits are presented in bad faith or solely for purposes of delay, to sanction the offending party with the reasonable expenses the other party incurred. The appellate court in *Collins v. State Department of Transportation* (2004) 114 Cal. App. 4th 859, determined that C.C.P. 437c did not allow for reasonable attorney fees as a sanction.

This Resolution: Would enable a party that has been subjected to a bad faith motion or bad faith affidavits, to seek sanctions of both reasonable attorney fees and reasonable expenses incurred.

The Problem: Most statutory provisions allowing for sanctions permit the courts to award the non-offending party both their attorney's fees and costs. No good reason exists for sanctions in the summary judgment context to be limited to costs. Indeed, summary judgment oppositions can be the most attorney time intensive projects in a civil case, next to trial. Because summary judgment disposes of a case without trial, the opposing party must spend an enormous amount of time to avoid dismissal. Moreover, a summary judgment can be made in bad faith or solely for the purposes of delay without its supporting affidavits being guilty of any wrongdoing. It is not necessarily the affidavits that cause the motion to be in bad faith or a delaying tactic. For example, summary judgment motions can be made without any supporting legal authority, or simply contrary to all existing legal authority. Whatever the reason, any motion that a court finds is brought in bad faith or to delay should draw the full range of potential sanctions, including both the reasonable attorney's fees and expenses needed to oppose such a motion.

### **IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Mara Feiger

## **COUNTERARGUMENT**

### **SAN DIEGO COUNTY BAR ASSOCIATION**

Subdivision (j) of Code of Civil Procedure section 437c authorizes sanctions when *any* party files an affidavit (i.e. declaration) in bad faith. Although the statute is rarely applied, it is applied more often against obstructive opposing parties than it is against moving parties. The classic illustration is the party who attempts to avoid summary judgment or adjudication by filing a declaration that contradicts his or her deposition testimony.

This resolution mistakenly enlarges the sanctions power against bad faith motions but not against bad faith oppositions. If superior courts should have a new power to grant sanctions in the summary judgment process, it should apply to both moving and opposing parties.

SDCBA also is concerned about the possibility that we could return to the days of Code of Civil Procedure section 128.5 when every summary judgment opposition contained a request for sanctions and every summary judgment reply contained a request for sanctions for requesting sanctions. Because of the long deadlines in the summary judgment process, Code of Civil Procedure section 128.7 should provide an adequate remedy when some part of a party's presentation other than a declaration is filed in bad faith.

Finally, *Collins v. State Department of Transportation* (2004) 114 Cal.App.4th 859 should not be abrogated because such a declaration of legislative intent would create inappropriate uncertainty about whether the Legislature intends trial courts to have inherent power to impose sanctions.