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CIVIL LITIGATION UPDATES

Issue: Mediation Fees May Be Recoverable Costs To The Prevailing Party.

In *Berkeley Cement, Inc. v Regents Of The University of California*, (F073455, F073586) (1-7-19) the court held that the costs of *private voluntary mediation* fell within this category of recoverable costs.

ANALYSIS

After trial, the prevailing party may seek the recovery of costs. *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1014. Not all costs are recoverable. The categories of costs that are recoverable are listed in Code of Civil Procedure section 1033.5, subdivision (a). Items that “are not allowable as costs” are listed in subdivision (b) of that same section. Though otherwise legitimate costs may have been incurred during the litigation, if the item is not listed in the statute, the court has the discretion to deny a party recovery of that cost item. Code Civ. Proc., § 1033.5, subd. (c)(4).

However, even though a cost item may not be specifically identified in the statute, the court has the discretion to allow its recovery. For example, **mediation costs** are not listed among the costs that are expressly allowable. Code Civ. Proc., § 1033.5, subs. (a), (b). “An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if ‘reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.’ ” *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774 (*Ladas*). Consequently, **mediation costs** fall within the category of the type of commonly incurred litigation costs that the court may award. Code Civ. Proc., § 1033.5, subd. (c)(4).

Whether the parties mediate pursuant to a private agreement or pursuant to a court order, mediation is often viewed by the parties as a legitimate means of resolving the litigation. Accordingly, in *Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202 (*Gibson*), the court determined that the costs associated with **court-ordered mediation** could be awarded pursuant to the discretionary provision of the statute. Code Civ. Proc., § 1033.5, subd. (c)(4). In that case, the plaintiff prevailed at trial, and was awarded costs, including his share of the mediator’s fees from a court-ordered mediation. *Gibson*, 49 Cal.App.4th at 1205. On appeal, the defendants argued the trial court abused its discretion by awarding mediation fees as costs, because they were not reasonably necessary to the conduct of the litigation. *Id.* at 1207. The court held “that when an unsuccessful mediation has been court-ordered, reasonable necessary expenses incident thereto may, in the sound discretion of the trial court, be awarded after trial to a prevailing party.” *Id.* at 1209. Thus the court held that *court-ordered* mediation fees were recoverable costs. But the

court did not address whether the costs of *private voluntary mediation* also fell within this category of recoverable costs.

In *Berkeley Cement, Inc. v Regents Of The University of California*, (F073455, F073586) (1-7-19) the court addressed this issue. The court held that the costs of *private voluntary mediation* also fell within this category of recoverable costs.

CONCLUSION

The costs of *private voluntary mediation* may be recoverable costs.