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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Conservatorship of the Estate of IDA McQUEEN,
_____ /

**SUPREME COURT
FILED**

FESSHA TAYE, as Conservator of the
Estate of Ida McQueen,

NO. MAR 19 2013

Plaintiff and Petitioner,

Frank A. McGuire Clerk

v.

Deputy

(A134337)

CAROL VERES REED,

Defendant and Respondent.
_____ /

PETITION FOR REVIEW

Alameda County Superior Court No. HP05 237122

Honorable Judge Jo-Lynne Q. Lee

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FESSHA TAYE, as Conservator of the
Estate of Ida McQueen,

NO.

Plaintiff and Petitioner,

v.

(A134337)

CAROL VERES REED,

Defendant and Respondent.
_____ /

PETITION FOR REVIEW

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF
JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner Fessha Taye, as Conservator of the Estate of Ida
McQueen (“Petitioner”), petitions this Court for review following the
decision of the Court of Appeal for the First Appellate District,
Division Four, filed in that court on February 7, 2013. A copy of the
unpublished opinion of the Court of Appeal is attached as Exhibit A.¹

¹ The opinion attached as Exhibit A is published at 2013 Cal.App. Unpub.
LEXIS 998; and also published at 2013 WL 453887.

INTRODUCTION

Recognizing that the need to redress financial exploitation is widespread² and that government lacks the resources to redress these wrongs, the California legislature has created a statutory framework that is specifically intended to encourage private attorneys to take up these difficult elder abuse cases by providing a statutory award of attorney fees to counsel who prevail in such litigation. Existing law provides that the award of fees to the successful plaintiff includes reasonable attorney fees incurred on appeal and in connection with plaintiff's efforts to protect the judgment, if any.

In the case at bar, an attorney defendant was found by a jury to have committed financial elder abuse upon her disabled and elderly former client. Defendant filed the first appeal and simultaneously transferred three (3) real estate parcels out of her name to other family members. Petitioner, through counsel, successfully prevented the fraudulent transfer of judgment-debtor's assets and also prevailed on

² The United States General Accounting Office recently found that elder financial abuse has reached near epidemic proportions and emphasized the need for States and the Bar to address this crisis. GAO Doc. No. 13-110 (November 15, 2012.) California has taken an aggressive approach to addressing abuse of the elderly and infirm by enacting the *Elder and Dependent Adult Civil Protection Act*, whose objectives and statutorily mandated attorneys fee awards are at issue in this case

the first appeal.

Shortly before petitioner filed his motion for attorney fees incurred during the appellate process, defendant paid the amount of the underlying judgment. Overruling defendant's objections, the trial court granted petitioner's motion and awarded \$57,974.50 in attorney fees incurred during the appellate process. Defendant brought the instant appeal on the grounds that said fee motion was untimely.

The Court of Appeals reversed; holding that all the fees incurred during the appeal were governed by the procedures set forth in Code of Civil Procedure §§ 685.040, *et seq.*, and that the payment of the underlying judgment barred recovery of petitioner's fees incurred both on appeal and for the related fraudulent transfer lawsuit.

The approach taken by the Court of Appeal is based on an erroneous view of the law governing statutorily-authorized attorney fees awards. This decision directly undermines the statutorily-articulated public policy objective of encouraging private attorneys to represent victims of elder abuse where necessary, as here.

Clear and unambiguous statutory objectives have been enacted to incentivize interested persons to retain private attorneys to

represent victimized elders and dependent adults in these claims³.

³ Welfare & Institutions Code §§ 15600 (a) – (c),(h), and (j) provide:

(a) The Legislature recognizes that elders and dependent adults may be subjected to abuse, neglect, or abandonment and that this state has a responsibility to protect these persons.

(b) The Legislature further recognizes that a significant number of these persons are elderly. The Legislature desires to direct special attention to the needs and problems of elderly persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are more subject to risks of abuse, neglect, and abandonment.

(c) The Legislature further recognizes that a significant number of these persons have developmental disabilities and that mental and verbal limitations often leave them vulnerable to abuse and incapable of asking for help and protection.

.....

(h) The Legislature further finds and declares that infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.

...

(j) It is the further intent of the Legislature in adding Article 8.5 (commencing with Section 15657) to this chapter to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.

(Emphasis provided,)

ISSUES PRESENTED FOR REVIEW

1. Whether the procedures for collection of post-judgment costs under Code of Civil Procedure §§ 685.040, *et seq.* govern the claims of a successful plaintiff for statutorily mandated fees under California's Elder Abuse Act for her efforts at protecting her judgment.
2. Whether satisfaction of the underlying elder financial abuse judgment acts as a bar to a subsequent motion for attorney fees by petitioner.

NECESSITY FOR REVIEW

A grant of review and resolution of this issue is necessary to settle important questions of law regarding motions for attorney fees incurred during the appellate process. The Court of Appeals' decision is that the recovery of petitioner's appellate fees are governed by § 685.040, and further, that the defendant's payment of the judgment bars recovery of any further attorneys fees.

Until the instant decision was issued, no California case had held that claims for statutorily-authorized fees in elder abuse litigation were governed by the procedures set forth in Code of Civil Procedure §§ 685.040, *et. seq.*

**I. Vital Public Policy Objective of Incentivizing
The Private Bar to Take On Elder Abuse cases:**

The legal issues presented here may well affect the growing number of victims of financial elder abuse by putting in jeopardy the incentive created by California's statutory scheme prohibiting abuse of the elderly and providing financial incentive to the successful plaintiff. Without this financial incentive, it will become more difficult for private attorneys to advocate on behalf of the exploited seniors and dependent adults as is contemplated by the Elder Abuse Act.

To allow an abuser to circumvent this important public policy objective would further embolden other abusers, would operate to provide a financial windfall to this abuser, and encourage abusers to tender payments quickly to eliminate otherwise justified and appropriate claims for attorney fees.

Thus, to allow the Court of Appeals opinion to stand creates a grave injustice to the petitioner and her attorney, and would further serve to prevent successful plaintiffs (and the victims they represent) from recovering statutorily mandated fees.

STATEMENT OF THE CASE AND FACTS

In 2005, petitioner filed a complaint for elder abuse of this 77-year-old Conservaee by Carol Veres Reed, an attorney who the jury found was complicit in stealing the elders home. (CT 9.) On February 17, 2009, a jury found in favor of petitioner and the court then awarded petitioner her attorney fees. (CT 9.) Reed filed her first appeal. (CT 9.)

Simultaneous to the appellate process, Reed transferred her real estate assets out of her name, and petitioner was required to file suit to halt the transfers. (CT 10-11, 24-34.) As a result, Reed eventually agreed to undo these transfers. (CT 11, 35-38, 41-42.)

On January 14, 2011, the Court of Appeal affirmed the original judgment. (*Conservatorship of McQueen* (Mar. 14, 2011, A126825) review denied and opn. ordered nonpub. June 8, 2011, S192507.) Respondent moved for rehearing and the court of appeal concluded there had been no abuse of discretion and allowed the judgment to stand. (CT 10.) This Court denied respondent's petition for review on June 15, 2011 and the remittitur issued, with petitioner to recover costs. (CT 10, 59.)

During this process, Reed, who was under investigation by the State Bar for her conduct as an attorney in this case, began tendering

checks to pay the judgment to one of petitioner's counsel toward the end of June of 2011.³ (CT 63.) The full amount of the underlying judgment, exclusive of fees that had been incurred during the appellate process, was paid in the middle of July 2011. (CT 70.) Petitioner did not provide a satisfaction of judgment nor was there any agreement that such payments represented resolution of the outstanding post-judgment attorney fee claims. (CT 57-70, 89.)

On July 25, 2011, petitioner moved for an award of statutory attorney fees incurred during the appellate process. (CT 8-23.) Without citation to any authority, Reed argued that petitioner's motion should be denied because the judgment had been paid. (CT 52.) After the Honorable Jo-Lynne Lee, who had presided over the jury trial, issued her tentative ruling granting attorney fees, Reed cited her purported authority in support of her objection to the fees for the first time. (RT 1.)

I. Defendant Reed Has Cited A Single Authority That is Irrelevant to the Issues Presented in This Case.

Reed's moving papers and oral argument do not address the caselaw and statutory authority directly on point to the issue of

³ While Daniel Murphy was petitioner's trial and appellate counsel, the moneys were disbursed to petitioner's trial co-counsel, the law firm of Burnham Brown. (CT 67-69.)

timeliness which the Court had proffered in her tentative ruling. The authority cited, which is both relevant and does govern the the timeliness of the successful elder abuse claimant seeking statutorily mandated fees.

Opting instead to simply cite her one case, the Ninth Circuit's appellate decision in *Carnes v. Zamani* (9th Cir. 2007) 488 F.3d 1057, Reed's opposition to the instant motion was based on authority which is irrelevant to the issues presented in the instant case. With little detail or explanation, Reed argued under *Carnes* that Code of Civil Procedure § 685.080 (b) required that petitioner's motion for appellate fees and other post-judgment attorney fees must be made before satisfaction of judgment. (RT 4-5.)

Judge Lee responded at the hearing that:

[I]t doesn't seem to make sense that you would be able to avoid these fees, which are fees not for the -- not for the underlying -- you know, for the original trial, but for the additional fees that were incurred in defending the appeal. (RT 6.)

A. Reed's Citation to *Carnes*, a 2007 Ninth Circuit Federal Court Appellate Decision, is a Contract Case.

Following the anticlimactic and confusing defense argument, such as it was, the Trial Court then gave the parties additional time to

brief this new and unexplained authority. Reed thereafter has utterly failed to either clarify her theory, or to explain why her single citation to a federal court of appeal decision in a contract action was correct in the face of the authority proffered by the Court.

After post-hearing briefing, Judge Lee rejected Reed's position, finding that the motion for appellate fees *was* timely under Rule 3.1702(c) of the California Rules of Court, and further, that the satisfaction of judgment did *not* preclude a subsequent motion for attorney fees incurred post-judgment. (CT 106.) The trial court awarded petitioner \$56,974.50 in post-judgment attorney fees as mandated by the elder abuse statute. (CT 106.) Of this amount, approximately 70% or \$40,000 represented the attorney fees for the successful appeal and the remainder was for the fees arising from collection efforts, including the filing of the fraudulent transfer lawsuit. (CT 42.)

Reed appealed. (CT 109) The Court of Appeal reversed, holding that all attorneys fees incurred during the appellate process

were governed by the procedures set forth in §§ 685.040, *et seq.*, of the Code of Civil Procedure. (Ex. A, p. 6.)⁴

A. Reed's Citation of *Carnes*, a 2007 Ninth Circuit Federal Court Appellate Decision, is a Contract Case.

The sole caselaw authority Reed has cited as authority for her tortured reasoning is (1) not on point to the legal issue presented, and (2) is what appears to be a deliberate attempt to mislead both the trial court and the Court below. *Carnes*, *supra*, concerns the timeliness of seeking an award of post-judgment attorneys fees where the litigation is over a contract which contains a clause permitting attorneys fees to be awarded to the prevailing party.

⁴ The Court of Appeal opinion erroneously claimed the trial court based its entire award on § 685.040. (Ex. A., p. 6.) In fact, the trial court order states,

“Contrary to [Reed’s] arguments, the Court finds this motion was timely filed (See CRC 3.1702(c)(10, CRC 8.278(c)(1). Moreover, memorandum of costs is not required to seek fees pursuant to statute after appeal.” (CT 100.)

If the trial court was relying on section 685.080, a 2-year statute would apply, not the 40-days at issue. (See Code of Civ. Pro. §685.080(a).) The trial court did rely on § 685.040 but only in the context of Reed’s argument that reasonable post-judgment attorney fees cannot be awarded, which the Court then found was contrary to the applicable authority. CCP § 685.040 is applicable here where the attorney fees at issue were incurred to protect a judgment that includes an award of attorney fees to the judgment creditors” (CT 100.)

By relying on the Ninth Circuit's appellate decision in *Carnes*, the Court below has erroneously ruled that the payment of the underlying judgment by Reed cuts off the right to recovery of any further fees by this successful Petitioner. (Ex. A, pp. 8-10.)

This petition for review follows.

ARGUMENT

The Court Of Appeal Below Erred When It Applied The Law Governing the Collection Of Post-Judgment Costs for Contract-based Disputes, Thereby Erroneously Barring Petitioner’s Recovery of Statutory Attorney Fees.

California’s Elder Abuse Act originally was passed in 1982 to protect the elderly from a variety of abuses. (Welf. & Inst. Code §§ 15600, *et seq.*) The purpose of the Act is to protect a particularly vulnerable portion of the population. (*In re Estate of Lowrie* (2004) 118 Cal.App.4th 220, 226.) The Act defines abuse to include financial abuse of an elder and provides remedies for curbing such abuse. (Welf. & Inst. Code §§ 15610.07, 15657.)

“In 1991, to rectify the problem of lack of incentive to prosecute civil suits and encourage attorneys to represent victims of financial elder abuse, payment of attorney fees to a successful victim of elder abuse was mandated. (*Bickel v. Sunrise Assisted Living* (2012) 206 Cal.App.4th 1, 11.) This statutory provision

“was enacted to carry out an important *public* purpose: that of protecting an especially vulnerable portion of our population – elders and dependent adults – by creating civil incentives for attorney to represent victims of egregious abuse and neglect.”

(*Id.* at p. 12 (emphasis in original).)

Thus, where the plaintiff proves by a preponderance of the evidence, as occurred here, that the defendant is liable for financial

elder abuse, the court *must* award the plaintiff her reasonable attorney fees and costs, in addition to compensatory damages and all other remedies otherwise provided by law. (Welf. & Inst. Code §15657.5(a); see also *Woods v. Jamison* (2008) 167 Cal.App.4th 156, 164 [attorney fees awarded against attorney liable for financial elder abuse].)

Statutorily authorized fee awards include the payment of fees on appeal to the successful plaintiff in a financial elder abuse case. (See *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 461 [statutory fee shifting statute includes attorney fees on appeal].)

This Court has long recognized the necessity of encouraging the litigation of important public policy objectives by the private Bar. In the *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1217 – 1218, this Court unambiguously set forth the essential nature of these statutory fee provisions:

As we explained in *Serrano*, the fundamental objective of the private attorney general doctrine of attorney fees is ' "to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees . . . to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens." The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied

in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will *as a practical matter frequently be infeasible.*"*Id.*[citations omitted.]

The decision below is also wildly at odds with California's private attorney general statutory scheme enacted to protect the elderly and infirm. Claims for attorney fees for successful elder abuse litigation cannot be waived. (*Bickel v. Sunrise Assisted Living, supra*, 206 Cal.App.4th at 13.) To allow such a waiver would defeat the purpose of incentivizing lawyers to take financial elder abuse cases. (*Id.*)

The statutory attorney fee provision allows for unilateral or one-way fee shifting, and does not permit successful defendants to recover their fees. (*Bates v. Presbyterian Intercommunity Hosp.* (2012) 204 Cal.App.4th 210, 216.) Such a provision is,

“created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy” by “offer[ing] a bounty for plaintiffs who sue to enforce a right the Legislature has chosen to favor,” thereby “encourag[ing] injured parties to seek redress—and thus simultaneously enforc[ing] public policy—in situations where they otherwise would not find it economical to sue.” (*Id.* at 216, quoting *Covenant Mutual Ins.*

Co. v. Young (1986) 179 Cal.App.3d 318, 324-325.)

One-sided fee shifting promotes the stated legislative intention to allow more injured people to seek redress and to encourage improved enforcement of public policy. (*Id.* at 217.)

The Appeals Court below failed to recognize that a statutory fee motion is a collateral matter, ancillary to the main cause, and seeks what is due as a result of the judgment. (*Lewow v. Surfside III Condominium Owners Assn., Inc.* (2012) 203 Cal.App.4th 128, 133.)

This Court has long recognized that the trial court retains jurisdiction to award statutory post-judgment attorney fees, notwithstanding even a written settlement between the parties (which does not specifically address statutory fees). (*Folsom v. Butte County Assn. of Governments, supra*, 32 Cal.3d at 679.) This Court explained:

Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits – an inquiry that cannot even commence until one party has prevailed. [Citation omitted.] The conclusion follows that the [settlement] agreement here, which included no provision as to costs or statutory fees, did not deprive the trial court of jurisdiction to entertain either a cost bill or, under section 1021.5 [Private Attorney General Attorney Fee Doctrine], a motion for fees. (*Id.* at p. 680.)

Thus, as the trial court below recognized, the procedures for claiming statutory attorney's fees on appeal are governed by Rule 3.1702, subdivision (c)(1) of the California Rules of Court. (CT 100, see Note 4, supra.) This is the standard practice in California for claiming fees under the fee-shifting statutes implicated here.

If a party is seeking to recover attorney's fees on appeal pursuant to contract or statute that requires the court to determine the entitlement to the fees, the amount of fees, or both, that party must serve and file a notice of motion requesting the trial court make these determinations. This motion must be served and filed within 40 days after the clerk of the appellate court has mailed to that party notice of the issuance of remittitur, that is within the time for filing the memorandum of costs.

(Gustafson & Chesney, Cal. Appellate Prac. & Proc. (Mathew Bender, 2012), §53.34; to the same effect see 16 Cal. Jur. Costs §142 (West 2013).

It is undisputed that petitioner's motion for fees was filed within that time period. (CT 58-59, 88.)

Where the appeal, as here, simply affirms the judgment without remanding the matter for further proceedings, the claim for attorney fees is made under Rule 3.1702 subdivision (c)(1). (CEB, Cal. Attorney Fee Awards (2013) §§ 11.43, 12.20.) Nothing in Rule 3.1702 makes any reference to Code of Civil Procedure §§ 685.040,

et seq. (See Cal. Rules of Court, Rule 3.1702, 23, pt. 2 West's Ann. Code Court Rules (2006, 2013 Supp.))

The decision below has ignored an entire body of law, finding instead that §§ 685.040, *et seq.* of the Code of Civil Procedure shall govern claims for attorney fees by the successful elder abuse petitioner on appeal. As the Court of Appeal decision from below states:

Given that [petitioner's] July 25, 2011 motion was filed after appellant fully satisfied the judgment, [petitioner] was precluded from recovering more postjudgment costs and attorney fees. In so holding, we find persuasive the conclusion reached in *Carnes, supra*, 488 F.3d at page 1061: "Because their right to recover post-judgment attorney fees is depending on § 685.040, [the claimants] were required to comply with the timeliness requirements for post-judgment attorney fee motions set forth in the [enforcement of judgment law]. Sections 685.070 and 685,080 require that a motion for fees incurred in enforcing a judgment be filed before the underlying judgment is fully satisfied. Because the [claimant] filed their postjudgment fee motion after the underlying judgment was fully satisfied the motion was untimely. (Ex. A, p. 5.)

In so doing, the Court of Appeal ignores existing authority for

both post-judgment costs and the accepted procedure for handling statutorily authorized attorneys fees during the appellate process. Section 685.040 pertains to recovery of post-judgment fees to the prevailing party as authorized by the underlying provision in contract litigation; it does not apply to statutorily mandated fees incurred on appeal. (Compare 15 Cal. Forms of Pleading & Practice Chpt. 174 (Matthew Bender 2012) §174.254, pps. 174-288-89 [form motion for postjudgment collection costs] with 5 Cal. Forms of Pleading & Practice Chapt. 53, supra §53.71, pps 53.42-44; Gustafson & Chesney, *supra*, §53.71 [form motion for attorney fees on appeal].) No California case interpreting § 685.080 has applied it to the successful elder abuse plaintiff's right to an award of attorney fees incurred on appeal.

When § 685.040 was enacted in 1982, it did not provide for the recovery of contractually authorized attorney fees incurred in collection efforts. (*Chelios v. Kaye* (1990) 219 Cal.App.3d 75, 79 [no recovery of attorney fees incurred to enforce judgment in state and bankruptcy court].) In response to the *Chelios* decision, § 685.040 was amended in 1992 to allow for such recovery. (*Chinese Yellow Pages v. Overseas Marketing Service Corp.* (2008) 170 Cal.App.4th 868, 879-81 [attorney fees allowed for postjudgment enforcement in

bankruptcy court].)

Section 685.040, even as amended, does not affect statutorily mandated fees incurred during the appeal in this type of case, which this Court has specifically recognized were recoverable long before this amendment became effective. (See e.g. *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637-38.) The purpose of § 685.040 is to encourage payment of the underlying judgment without the necessity of plaintiff incurring additional collection fees. (*Ronald B. Slates, APC v. Gorabi* (2010) 189 Cal.App.4th 1210, 1215.) It does not affect the well-established procedures for obtaining fees for work on appeal.

Nothing in *Carnes* is to the contrary. *Carnes* involved a judgment in a diversity action for breach of a contract that contained an attorney fees clause. (*Carnes v. Zamani, supra*, 488 F.3d at 1059.) *Carnes* did not involve a claim for attorney fees on appeal, which as set out above, is a cost of protecting the judgment.

To the extent that the fees and costs of approximately \$16,000 incurred while the appeal was pending to set aside fraudulent transfer of funds may be considered a post-judgment cost, Code of Civil Procedure § 685.080 does not bar it. This reasoning formed the basis of the trial judge's ruling. (CT 100; see footnote 4, *supra*.)

Where, as here, attorney fees are recoverable for post-judgment

efforts, a judgment does not act as a merger and bar to such fees. (*Berti v. Santa Barbara Beach Properties* (2006) 145 Cal.App.4th 70, 77 [nonappellate post-judgment statutory fees recoverable under Corp. Code §15634(g), (h)].) Fees incurred in maintaining a related action are recoverable. (*Globalist Internet Technologies v. Reda* (2008) 167 Cal.App.4th 1267, 1275-76.)

The Court of Appeal's extension of *Carnes* to the attorneys fees issue in this case effectively frustrates the vital public policy objective of motivating private attorneys to undertake these difficult elder abuse cases. In *Carnes*, after judgment was entered and attorney fees were granted pursuant to contract, plaintiffs made efforts to collect the judgment. (*Carnes v. Zamani, supra*, 488 F.3d at 1059.) When the *Carnes* defendants paid the judgment, plaintiffs recorded a full satisfaction of judgment. (*Id.*) Plaintiff's subsequent attempt to recover costs incurred in enforcing the judgment was made pursuant to § 685.070. (*Id.*) The trial court denied the motion as untimely, and the Ninth Circuit affirmed the holding that the language of § 685.080 barred claims for costs of enforcing the judgment filed after the judgment is satisfied. (*Id.* at 1060.)

In the case at bar, unlike the facts in *Carnes*, it is undisputed that petitioner did not acknowledge that the judgment had been

satisfied. (CT 52-53.) In fact here, the motion established that the fees incurred in pursuit of the fraudulent transfers were correct, reasonable, necessary, and had not been satisfied. (CT 11-12, 40-43.)

The determinations to be made regarding the award of attorney fees are properly subject to the discretion of the experienced trial judge. (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1240.) Where the parties enter into a settlement agreement after litigation for which statutory authority exists, if the settlement agreement is silent on the waiver of those fees, those fees remain recoverable and the (silent) settlement agreement cannot constitute a waiver of statutorily mandated attorney fees and costs. (*Folsom v. Butte County Assn. of Governments, supra*, 32 Cal.3d at 681.)

In the case at bar, petitioner did not file a satisfaction of judgment because the amount tendered did not include the statutory post-judgment attorney fees at issue. (CT 52, 96.) Given these facts, the trial court was within its discretion to render a judgment for attorney fees for plaintiff's post-judgment litigation efforts. The Order properly included those fees for time expended in connection with the fraudulent conveyance lawsuit, since there is no indication that petitioner intended to release this claim prior to the agreement of defendant to reconvey those three properties back into her name. (See

Shamblin v. Brattain (1988) 44 Cal.3d 474, 478 [trial court's exercise of discretion in connection with attorney fee claims will be reversed only if it was arbitrary, capricious or patently absurd].)

To allow the erroneous opinion below to stand could dramatically change the law governing the procedures for collecting statutorily mandated appellate fees in California. Recovery of the fees incurred during the appellate process where the elder abuse plaintiff prevails is an essential incentive meant to encourage private attorneys to bring this type of litigation where necessary. If only for that reason, statutory elder abuse fee motions should not be governed by § 685.070. In so far as § 685.070 applies to the fees incurred by petitioner pursuing the fraudulent transfer action, the trial judge correctly determined that such fees were not barred by defendant's payment.

To prevent petitioner's recovery of fees for the reasonable time expended in litigating defendant's attempt to avoid paying the judgment, and then later to have that same defendant object to the fees so incurred on grounds that she has paid the underlying judgment, is irksome but it also raises a potential conflict of interest between the attorney and his client. (*Folsom v. Butte County Assn. of Governments, supra*, 32 Cal.3d at 681.) An ethical attorney cannot

place his or her interest in recovering statutorily-authorized attorney fees above that of his or her client's interest in recovery. (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 910.)

Under the Court of Appeal's holding, the successful plaintiff's attorney is then placed in the position of choosing between obtaining the funds owed the client in the underlying judgment at the risk of losing the otherwise valid and appropriate attorney fees claim.

Turning the elder abuse public policy implications inside out, defendant would, after an unsuccessful appeal, not only be incentivized to pay off the underlying judgment so as to cut off accruing post-judgment interest at ten percent⁵ but, under this erroneous decision, such a payment would also cut off the successful party's right to payment of reasonable attorney fees for that work.

The decision complained of directly undermines the statutory-public policy objectives set forth in the Elder Abuse Act, and will operate to provide a windfall to the abuser in this case.

⁵ Interest on a judgment accrues at the rate of ten percent. (Code of Civ. Proc. §§ 685.010, 685.020). Interest ceases to accrue on the date satisfaction is tendered to the judgment creditor. (§685.030(d)(2).)

Certainly, California law did not intend such a result.

CONCLUSION

For the reasons given, Petitioner requests that this court grant review to resolve these important issues.

DATED: March 19, 2013 Respectfully submitted,

LAW OFFICES OF DANIEL MURPHY

By: DANIEL D. MURPHY,
Attorneys for Petitioner

CERTIFICATE OF WORD COUNT

The full text of this Petition for Review, excluding the table of contents and table of authorities consists of 4295 words as calculated by Microsoft Word, the word processing software utilized to generate the Brief.

By: DANIEL D. MURPHY

Exhibit A

COPY

Filed 1/7/13

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

FILED

FEB - 7 2013

Court of Appeal - First App. Dist.
DIANA HERBERT

By _____
CLERK

Conservatorship of the Estate of IDA
McQUEEN.

FESSHA TAYE, as Conservator, etc.,
Plaintiff and Respondent,
v.
CAROL VERES REED,
Defendant and Appellant.

A134337

(Alameda County
Super. Ct. No. HP05237122)

I.

INTRODUCTION

After a jury trial, Fessha Taye, who is the conservator for 77-year-old Ida McQueen (collectively, respondent), prevailed in his action for financial elder abuse against attorney Carol Veres Reed (appellant). Respondent also prevailed in defending the judgment on appeal.¹ Appellant then paid the \$402,000 judgment, including interest, in full. Thereafter, respondent moved for the recovery of an additional \$57,681.90 in attorney fees and costs incurred for defending the judgment on appeal and in bringing a separate lawsuit to prevent appellant from transferring three parcels of real property to

¹ Following our affirmance of the judgment, appellant filed a petition for review in the California Supreme Court, which denied the petition, but ordered the opinion be depublished. (*Conservatorship of McQueen* (Mar. 14, 2011, A126825) review denied and opn. ordered nonpub. June 8, 2011, S192507.)

third parties in a purported attempt to avoid satisfaction of the judgment. The trial court granted respondent's motion over appellant's objection that the motion was untimely.

We agree with appellant that respondent's motion was untimely, and reverse.

II.

FACTS AND PROCEDURAL HISTORY

The sole issue raised by this appeal is whether respondent's motion for attorney fees and costs was timely filed after appellant fully satisfied the judgment against her. Therefore an extended discussion of the facts in the underlying case is unwarranted. Briefly, in 2006, respondent filed a complaint against appellant and several other defendants claiming causes of action for financial elder abuse, fraud and concealment, conversion, breach of fiduciary duty and negligence. Essentially, respondent claimed that the defendants violated the terms of a trust set up for Ida McQueen, a mentally and physically disabled elder, when they sold the family residence, in which McQueen held a life estate, without her consent or knowledge. Appellant was the family attorney who prepared the trust, and who played an active role in the sale of the property and distribution of the proceeds.

The matter was tried to a jury, and appellant was found liable for financial elder abuse, breach of fiduciary duty as an attorney, and conversion. On September 11, 2009, judgment was entered against appellant and two other defendants for compensatory damages in the amount of \$99,900. Appellant was the only defendant who was found liable under the elder abuse statute, which contains an attorney fees and costs provision. (Welf. & Inst. Code, § 15657.5, subd. (a).) As a result, she was the only defendant ordered to pay attorney fees and costs to respondent in the amount of \$302,000.

After judgment was entered against appellant, she and the other two defendants filed an appeal in this court. We affirmed the judgment (*Conservatorship of McQueen, supra*, A126825).

In the meantime, in December 2009, respondent filed a new complaint against appellant, her husband, and her two children alleging that fraudulent transfers of real property had been made shortly after the jury rendered its verdict in the underlying case

in an effort to avoid satisfaction of the judgment against appellant. This new lawsuit was ultimately dismissed after settlement was reached, and appellant and her family members agreed to transfer the property back to appellant.

Through a series of payments beginning in May 2011, and ending with a check that was accepted and deposited by respondent on July 15, 2011, appellant eventually paid an amount that fully satisfied the judgment, with interest. On July 25, 2011, 10 days after respondent deposited the final check that satisfied the judgment, respondent filed a “Second Motion for Reasonable Attorney Fees and Costs” requesting additional attorney fees and costs in the amount of \$57,681.90. The requested fees were not only for the cost of defending the appeal, but also included all costs and attorney fees associated with the complaint that alleged appellant had made fraudulent conveyances to avoid paying the judgment.

In responsive papers, and then in a more developed argument in front of the judge when the motion was argued, appellant contended that respondent was barred from filing a motion for additional fees by virtue of the fact that the judgment in the case had already been fully paid, citing Code of Civil Procedure sections 685.070 and 685.080, and a federal case interpreting these statutes, *Carnes v. Zamani* (9th Cir. 2007) 488 F.3d 1057 (*Carnes*).² After receiving supplemental briefing on the timeliness of respondent’s motion, the trial court ruled in respondent’s favor, concluding that appellant’s argument that satisfaction of the judgment cut off respondent’s right to additional attorney fees was “unsupported.” The court then awarded respondent \$56,974.50 in “reasonable attorneys’ fees incurred on appeal and in connection with related collection efforts”³ This appeal followed.

² All undesignated statutory references are to the Code of Civil Procedure.

³ Because we conclude the motion should have been denied as untimely, we need not reach appellant’s backup argument that the amount awarded was unreasonable.

III. DISCUSSION

“On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law. [Citations.]” (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) The question on appeal is whether appellant’s full satisfaction of the judgment barred respondent from seeking additional fees and costs. The question is resolved through statutory construction, specifically sections 685.040, 685.070 and 685.080. Consequently, the correct standard for review is de novo.

When the court granted respondent’s “Second Motion for Reasonable Attorney Fees and Costs,” it relied on section 685.040, which expressly allows a party to collect its reasonable costs, including attorney fees, in an action for the enforcement of a judgment where the underlying judgment included an award of attorney fees. (See *Globalist Internet Technologies, Inc. v. Reda* (2008) 167 Cal.App.4th 1267, 1274-1276 [attorney fees incurred in enforcing judgment, or defending its validity against a challenge in another forum, recoverable under § 685.040]; *Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, 938 [attorney fees and expenses expended by the respondent in seeking to defeat the appellant’s appeal fall within the ambit of what is compensable under § 685.040].) The attorney fees may be claimed either filing a memorandum of costs (§ 685.070, subd. (b)) or by a noticed motion (§ 685.080, subd. (a)).

Respondent chose to seek additional fees by motion, and section 685.080 is explicit as to the time requirements for bringing such a motion. Section 685.080, subdivision (a), provides in part: “The judgment creditor may claim costs authorized by Section 685.040 by noticed motion. *The motion shall be made before the judgment is satisfied in full*, but not later than two years after the costs have been incurred.” (Italics

added.)⁴ As explained in *Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, “the statutory purpose of requiring that the motion for enforcement costs be brought ‘before the judgment is satisfied in full’ [citation] is to avoid a situation where a judgment debtor has paid off the entirety of what he believes to be his obligation in the entire case, only to be confronted later with a motion for yet more fees. [Citation.]” (*Id.* at p. 144.)

Thus, the statutory scheme governing the recovery of postjudgment attorney fees unambiguously required respondent to request attorney fees before the underlying judgment had been fully satisfied. Here, respondent deposited appellant’s last payment in full satisfaction of the judgment on or about July 15, 2011, leading appellant to believe she had fully satisfied her entire obligation. (See § 724.010, subd. (a) [“A money judgment may be satisfied by payment of the full amount required to satisfy the judgment”].) Ten days later, respondent filed a “Second Motion for Reasonable Attorney Fees and Costs” requesting additional attorney fees and costs in the amount of \$57,681.90. Given that respondent’s July 25, 2011 motion was filed after appellant fully satisfied the judgment, respondent was precluded from recovering more postjudgment costs and attorney fees.

In so holding, we find persuasive the conclusion reached in *Carnes, supra*, 488 F.3d at page 1061: “Because their right to recover post-judgment attorney fees is dependent on section 685.040, [the claimants] were required to comply with the timeliness requirements for post-judgment attorney fee motions set forth in the [enforcement of judgment law]. Sections 685.070 and 685.080 require that a motion for fees incurred in enforcing a judgment be filed before the underlying judgment is fully

⁴ Section 685.070, subdivision (b), similarly requires that the memorandum of costs be filed “[b]efore the judgment is fully satisfied.”

satisfied. Because the [claimants] filed their postjudgment fee motion after the underlying judgment was fully satisfied, the motion was untimely.”⁵

While respondent spends a great deal of time on irrelevant matters, such as reiterating the details of appellant’s wrongdoing and criticizing the State Bar of California’s investigation into appellant’s conduct in the underlying case, respondent fails to address the main issues governing the disposition of this appeal. For instance, respondent does not dispute that the attorney fees and expenses expended in seeking to defeat appellant’s appeal and in bringing a separate lawsuit to make sure that assets would be available to satisfy the judgment fall within the ambit of what is compensable under section 685.040, i.e., “[a]ttorney fees incurred in enforcing a judgment.” Nor does respondent attempt to distinguish or refute the reasoning of *Carnes*, *supra*, 488 F.3d at page 1060, holding that the rights contained in section 685.040 can be implemented either by motion (§ 685.080) or by memorandum of costs (§ 685.070), but “[u]nder either section, the judgment creditor must request post-judgment attorney fees *before the underlying judgment is fully satisfied*.” (*Carnes*, at p. 1060, italics added.) Furthermore, respondent does not challenge appellant’s chronology of events establishing that the judgment was satisfied in full 10 days before respondent filed his motion for additional attorney fees and costs. (See *County of Butte v. Bach* (1985) 172 Cal App.3d 848, 867 [issues raised by appellant which are unaddressed in respondent’s brief are deemed submitted on appellant’s brief].)

Instead, respondent’s sole argument that might be deemed relevant to the dispute at hand is that his motion was timely because he complied with the procedure and time limits set forth in California Rules of Court, rule 3.1702(c), for a motion to claim attorney

⁵ Although we are not bound by Ninth Circuit authority, we find the court’s analysis in *Carnes* to be persuasive, well-reasoned, and precisely on point. (See *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97 [“although not binding, we give great weight to federal appellate court decisions”]; *Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1454 [following “the well-reasoned and on-point decisions of the Ninth Circuit”].)

fees on appeal.⁶ That rule provides that in order to recover appellate attorney fees and expenses, respondent was required to serve and file a notice of motion for attorney fees on appeal and a memorandum of costs within 40 days after the clerk of this court sent notice of the issuance of the remittitur.⁷ Since respondent filed his “Second Motion for Reasonable Attorney Fees and Costs” on the 40th day after the remittitur issued in this case, he claims the motion was timely filed.

However, the 40-day time limitation established in rule 3.1702 applies “[e]xcept as otherwise provided by statute” (Rule 3.1702(a).) Therefore, facially rule 3.1702 was not intended to prevail over the statutory language of sections 685.070 and 685.080, both of which plainly preclude a postjudgment request for additional fees and costs after the judgment has been fully satisfied. For this reason we hold that sections 685.070 and 685.080 must be given effect over the 40-day timeframe established by rule 3.1702(c).

For the first time at oral argument, respondent’s counsel argued that section 685.040 was inapplicable to this case—even though the trial court specifically stated it was awarding respondent attorney fees pursuant to section 685.040. Counsel claimed that section 685.040, and its companion statutes 685.080 and 685.070, only authorize the recovery of attorney fees where the underlying judgment includes an award of attorney fees *arising from contract*. Since the attorney fees in the underlying case *arose from statute* (elder abuse statute), counsel claimed that section 685.040, and the timeliness requirements imposed by section 685.080, were inapplicable to this case.

⁶ All rule references are to the California Rules of Court.

⁷ Rule 3.1702(c) provides that “A notice of motion to claim attorney’s fees on appeal . . . under a statute or contract requiring the court to determine entitlement to the fees, the amount of the fees, or both, must be served and filed within the time for serving and filing the memorandum of costs under rule 8.278(c)(1)” Rule 8.278(c)(1) provides, “Within 40 days after the clerk sends notice of issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under rule 3.1700.” The time for filing a motion for attorney fees on appeal may be extended by stipulation of the parties (rule 3.1702(c)(2)) or by the trial court upon a showing of good cause (rule 3.1702(d)).

We need not address this argument, as it was made for the first time at oral argument. (See, e.g., *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226 [declining to consider waiver and statute of limitations issues raised by respondent for the first time at oral argument].) However, even if we were to consider the argument, we would reject it as unsupported by the language of section 685.040 and controlling authority from the California Supreme Court.

Section 685.040 provides as follows: “The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. Attorney’s fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. Attorney’s fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney’s fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5.”

Focusing exclusively on the last sentence of section 685.040, respondent’s counsel claims that because section 1033.5, subdivision (a)(10)(A) permits fees authorized by “[c]ontract” to be included as an item of costs, section 685.040 allows the judgment creditor to recover attorney fees *only* if the attorney fee award in the underlying judgment was based on *contract*, not a statute.

Counsel’s reading of this last sentence of the statute is correct as far as it goes. It is obvious that the last sentence of section 685.040—which authorizes an award of attorney fees incurred in enforcing the judgment, where the judgment includes an award of attorney fees arising from *contract*—does not itself authorize the recovery of fees here, where the fees in the underlying judgment were authorized by *statute*.

However, the *second* sentence of section 685.040 states that attorney fees incurred in enforcing a judgment are not recoverable “unless otherwise provided by law.” It seems evident that if attorney fees are authorized by statute, they have been “otherwise provided by law,” and thus may be recovered as costs if expended to enforce a judgment.

Significantly, the California Supreme Court in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141, footnote 6 (*Ketchum*), construed an attorney fees *statute* so as to

authorize attorney fees under the “otherwise provided by law” language of section 685.040. In that case, our state Supreme Court held that section 425.16—which permits a defendant to “recover his . . . attorney’s fees and costs” for bringing a successful motion to strike a strategic lawsuit against public participation (SLAPP) suit—includes “the fees incurred in enforcing the right to mandatory fees under Code of Civil Procedure section 425.16.” (*Ketchum*, at p. 1141.) Rejecting the plaintiff’s argument that “section 685.040 preclude[d] [such] an award of ‘collection’ fees,” the state high court reasoned: “The statute [§ 685.040] provides that attorney fees incurred in enforcement efforts ‘are not included in costs collectible under this title unless otherwise provided by law.’ Under its provisions, a litigant entitled to costs for successfully enforcing a judgment is entitled to costs, but not attorney fees *unless there is some other legal basis for such an award*. Because Code of Civil Procedure section 425.16, subdivision (c) provides a legal right to attorney fees, they are a permissible item of costs. [Citation.]” (*Ketchum*, at p. 1141, fn. 6.)

Likewise, here, there was “some other legal basis” for the award of attorney fees, namely, the elder abuse statute, upon which basis respondent was awarded attorney fees as part of the judgment. (*Ketchum, supra*, 24 Cal.4th at p. 1141, fn. 6.) As such, the elder abuse statute made the attorney fees incurred in enforcing the judgment a permissible item of costs under section 685.040.

At oral argument, respondent’s counsel cited *Berti v. Santa Barbara Beach Properties* (2006) 145 Cal.App.4th 70 (*Berti*), a case not mentioned in his brief, in support of counsel’s argument that section 685.040 is inapplicable to a case where the underlying attorney fee award was based on statute. However, a close reading of *Berti* finds that it supports, rather than defeats an award of attorney fees under section 685.040 in a case such as this. (See *Berti*, at pp. 76-77 [§ 685.040 did not preclude award of postjudgment attorney fees authorized under Corporations Code section 15634 in an action to enforce limited partners’ right to inspect partnership books; recovery of those fees was “otherwise provided by law”].)

IV.

DISPOSITION

The order granting respondent's motion for attorney fees is reversed. Appellant is awarded her costs on appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

HUMES, J.

PROOF OF SERVICE BY MAIL

Code of Civil Procedure_§1013

I, Daniel Murphy, declare as follows: I am a citizen of the United States, over 18 years of age, and not a party to the within case. My business address is:

819 Eddy Street, Stadtmuller House
San Francisco, California 94109-7701.

On the date hereof I served a true copy of the attached

PETITION FOR REVIEW

on each of the following persons, by placing same in each of the envelopes addressed, respectively, as follows:

First District Court of Appeal
Division Four
350 McAllister Street
San Francisco, CA 94102

Honorable Jo-Lynn Lee
Alameda Superior Court
1221 Fallon Street
Oakland, California 94612

Carol Veres Reed
Veres & Reed
3871 Piedmont Avenue
Oakland, CA 94611

and then sealing the envelopes and placing them for collection and mailing following our ordinary business practices in San Francisco, California, the county in which I am employed, with first-class postage thereon fully prepaid.

That I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 19, 2013 in San Francisco, California.

Daniel D. Murphy