S 162313

IN THE

SUPREME COURT OF CALIFORNIA

ROBERT CHAVEZ
Plaintiff, Appellant, and Respondent
vs.
CITY OF LOS ANGELES, *et al.*
Defendants, Respondents, and Petitioners

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B192375
APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, CASE NO. BC324514, THE HONORABLE ROLF M. TREU, JUDGE PRESIDING

OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED

1. Are the cost-shifting provisions found in California Code of Civil Procedure §1033(a) ("§1033")[1] and California Government Code §12965(b) ("§12965(b)")[2] so irreconcilable that the public policy of deterring a plaintiff from exaggerating the value of his case should never apply to a case brought under the Fair Employment and Housing Act?

2. Should a party's failure to settle a case serve as a predominant factor for awarding attorney's fees against it under §12965(b)?

II. INTRODUCTION

The Court of Appeal's decision in this matter attempts to judicially expand the award of attorney's fees under §12965(b) in two ways. First, by eliminating the application of §1033 to FEHA actions, such that §1033 cannot serve as a basis for denying an award of attorney's fees. And, by awarding attorney's fees against a party because of its failure to settle a case. Such judicial expansion of §12965(b), however, is unsupported by the law and comes at the cost of creating conflicting legal authority among the

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[1] Section 1033 provides a court with discretion to deny attorney's fees and costs when a plaintiff recovers a judgment that could have been rendered in a limited jurisdiction court. (Civ. P. Code §1033(a)).

[2] Section 12965(b) provides courts with discretion to award attorney's fees to a prevailing party in a FEHA action. (Gov. Code §12965(b)).

courts of appeal, ignoring rules of statutory construction and relevant legal authority, and disregarding public policy considerations.

In the instant matter, Plaintiff seeks nearly $880,000 in attorney's fees after having recovered only $11,500 on a single claim under FEHA. For over five years, Plaintiff brought one unsuccessful claim after another before the Los Angeles Superior Courts, the District Court and the Ninth Circuit, until he finally prevailed in the instant lawsuit on only one cause of action. Nevertheless, Plaintiff sought attorney's fees on virtually everything that had transpired over the past several years and then added a 2.0 multiplier simply because he might get it. Defendants opposed Plaintiff's motion arguing that Plaintiff overreached and outrageously inflated his fee request and, as such, the trial court should deny Plaintiff's request for attorney's fees.

After taking the matter under submission, the trial court denied Plaintiff's request for attorney's fees citing §1033(a) and noting that the requested attorney's fees were an item of costs under Civ. P. Code §1033.5(a)(10). The Court further stated that its decision was guided by Steele v. Jensen Instrument Co., 59 Cal. App. 4th 326 (1997), wherein the Court of Appeal read §1033 and §12965(b) in harmony with each other and denied the plaintiff's request for attorney's fees.

Over the last ten years, the Courts of Appeal have grappled with the issue of whether §12965(b) is subject to §1033.[3] And, until now, the only published decision on the issue was Steele. Disregarding this published decision as unpersuasive, the Court of Appeal in this case relied extensively upon an analysis set forth in an un-published decision, Galanter v. Oak Park Unified School District, 2003 Cal. App. Unpub. LEXIS 8750 (2003), and reversed the trial court's denial of attorney's fees. In reversing the trial court, the Court of Appeal misconstrued the trial court's analysis and improperly confined the court's decision to resting merely upon the low verdict Plaintiff had received. The Court of Appeal then found that §1033 and §12965(b) serve conflicting public policies and, as such, §1033 must yield to §12965(b). In short, the Court of Appeal found that a prevailing plaintiff under FEHA should not be denied attorney's fees for having only recovered a modest verdict.

In misconstruing the trial court's analysis, the Court of Appeal created a straw man argument that it could then defeat through a public policy comparison. The issue remains, however, whether the public policy

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[3] See, e.g., Steele v. Jensen Instrument Co., 59 Cal.App.4th 326 (1997); Steele v. NIBCO, Inc., 2002 Cal. App. Unpub. LEXIS 5410 (2002); Silva v. Stockton Further Processing, Inc., 2003 Cal. App. Unpub. LEXIS 1875 (2003); Galanter v. Oak Park Unif. Sch. Dist., 2003 Cal. App. Unpub LEXIS 8750 (2003); Flemens v. Looney, 2005 Cal. App. Unpub. LEXIS 35 (2005); Ditsch v. Peppertree Café, 2006 Cal. App. Unpub. LEXIS 6587 (2006).

of deterring a plaintiff from exaggerating the value of his case applies to FEHA actions. Furthermore, by confining its analysis to whether the public policies supporting these cost-shifting provisions were in conflict with each other, the Court of Appeal disregarded established cannons of statutory construction. Indeed, starting statutory analysis at the public policy point puts the proverbial "cart before the horse." The Court of Appeal's analysis also ignores the fact that §12965(b) is part of the cost-shifting framework found in Code of Civil Procedure §1032 *et seq.* and, as such, should be interpreted within the context of that framework.

In reversing the trial court's order, the Court of Appeal also found that it was unjust to deny attorney's fees to Plaintiff in light of the City's settlement posture, which the Court of Appeal described as "recalcitrant." Once again, the Court of Appeal's analysis followed the un-published decision of Galanter. And, once again, the Court of Appeal disregarded relevant legal authority that prohibits courts from considering a party's settlement posture in determining whether to award attorney's fees.

Indeed, by allowing a party's failure to settle to serve as a predominant factor in awarding attorney's fees, the Court of Appeal has introduced a factor into the prevailing party analysis that converts an attorney's fee motion from a relatively uncomplicated evaluation of the

parties' comparative litigation success into a limitless attack on the ethics and character of the involved parties. Such an analysis also raises significant public policy concerns, including the invasion of the attorney-client privilege for the sole purpose of justifying a party's settlement posture in order to avoid an award of attorney's fees.

Consequently, Defendants respectfully request this Court to reject the Court of Appeal's unprecedented and unsupported attempt to judicially expand §12965(b), answer in the negative each of the issues presented and reverse the decision of the Court of Appeal.

III. STATEMENT OF THE CASE

In May 2000, Plaintiff and his wife filed a claim in Los Angeles Superior Court asserting causes of action under FEHA, Title VII, 42 U.S.C. §1983, intentional infliction of emotional distress, trespass and loss of consortium. (AA[4]: Vol. II at 381-404). Plaintiff and his wife filed two amendments to their complaint adding causes of action for nuisance and inverse condemnation. (AA: Vol. II at 406-451, 453-497). The action was eventually dismissed by the Court. (AA: Vol. II at 355-356; Vol. III at 748). Neither Plaintiff nor his wife sought attorney's fees or costs. (AA: Vol. II at 355-358).

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[4] A citation to "AA" refers to Appellant's Appendix in Lieu of Clerk's Transcript.

Plaintiff and his wife also filed an action in District Court asserting violations of due process and the Fourth Amendment under 42 U.S.C. §1983, and identified the above-identified state court action as a related case. (AA: Vol. II at 499-508; Vol. III at 748). Plaintiff and his wife then amended the complaint and added claims under FEHA, as well as a nuisance claim. (AA: Vol. II at 510-547). Defendants later sought and obtained summary judgment. (RA[5] at 18). Plaintiff appealed and the Ninth Circuit upheld the summary judgment, except as to two limited claims under FEHA. (RA at 18; see also Chavez v. City of Los Angeles, 2004 U.S. App. LEXIS 20603 (2004)). The Ninth Circuit further ordered each side to bear their own costs. (Chavez, 2004 U.S. App. LEXIS 20603 at 7; AA: Vol. III at 748).

On remand, the District Court dismissed the remaining claims without prejudice to Plaintiff re-filing in state court. (RA at 18-19). Neither Plaintiff nor his wife sought attorney's fees or costs from the District Court. (AA: Vol. II at 360-372).

Plaintiff, thereafter, filed the instant action on November 15, 2004, asserting the two limited claims for discrimination and retaliation under FEHA. (RA at 1, 19:6-13, 22:9-11, 26; AA: Vol. II at 549-573). The

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[5] A citation to "RA" refers to Respondents' Appendix.

parties unsuccessfully attempted to settle the matter and no Code of Civil Procedure §998 ("§998") offer was made by either party. (RA at 29; RT[6] at 27:24-28:27, 34:16-36:5). The matter eventually proceeded to a jury trial, where the jury returned a verdict in favor of Plaintiff and against the City and Ward solely on the retaliation claim. (AA: Vol. I at 102-107). Plaintiff was awarded economic damages of $1,500 and non-economic damages of $10,000. (AA: Vol. I at 102-107).

Plaintiff, thereafter, moved for attorney's fees under §12965(b) seeking $870,935.50 in fees. (AA: Vol. I at 51, 127, 154-185; Vol. III at 746, 748). Defendants opposed Plaintiff's motion arguing that Plaintiff's request was unreasonably inflated and requested the trial court to exercise its discretion and deny a fee award altogether, or, at a minimum, reduce the fee to a reasonable amount. (AA: Vol. I at 184:25-185:1; Vol. III at 733-750).

Prior to the hearing on Plaintiff's fee motion, the trial court raised the issue of whether it had discretion under §1033 to deny fees and requested both sides to be prepared to address the issue at the hearing. (RT at 29:4-8). After taking the matter under submission, the trial court issued an order denying Plaintiff's request for attorney's fees relying on §1033,

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[6] A citation to "RT" refers to the Reporter's Transcripts on Appeal.

§1033.5(a)(10) and the decision in Steele. (AA: Vol. III at 864, 865-869). Plaintiff appealed the decision. (AA: Vol. IV at 881-886).

On February 22, 2008, the Court of Appeal reversed the trial court's denial of attorney's fees and remanded the matter for re-determination of the amount of reasonable fees. (Opinion at 1, 12).[7] A petition for re-hearing was not filed by either side. On April 2, 2008, Defendants timely filed a Petition for Review. This Court granted the review on May 14, 2008.

IV. STATEMENT OF THE FACTS

For five years, Plaintiff unsuccessfully litigated claims against the City and various individual defendants in the Los Angeles Superior Court, the Central District of the United States District Court and the Ninth Circuit. As set forth above, claims were asserted on behalf of Plaintiff and his wife for discrimination and retaliation under FEHA and Title VII, intentional infliction of emotional distress, trespass, loss of consortium, nuisance, inverse condemnation, and violations of due process and the Fourth Amendment under 42 U.S.C. §1983. But for two limited FEHA claims asserted by Plaintiff, all other aspects of Plaintiff and his wife's

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[7] The page references to the Court of Appeal's Opinion refer to the page numbers of the Opinion as they appear in the Appendix to the Petition for Review.

lawsuits were dismissed by the courts. Neither Plaintiff nor his wife sought attorney's fees and costs following the termination of their lawsuits before the Superior Court, District Court or Ninth Circuit. In fact, the Ninth Circuit ordered each party to bear their own costs.

The instant lawsuit was filed by Plaintiff in November 2004, against Defendants and asserted claims for discrimination and retaliation under FEHA. (RA at 1, 19:6-13, 22:9-11, 26). The matter proceeded to a jury trial, which lasted roughly 7 days, including jury deliberations and the verdict. Approximately 12 witnesses were called, Plaintiff's only economic loss was for loss of overtime, only two narrow issues (as outlined by the Ninth Circuit) were submitted to the jury for decision and one Defendant (Von Lutzow) was granted a nonsuit during the trial. (AA: Vol. I at 33-41, 102-107; Vol. III at 746-747, 865). The jury ultimately returned a verdict in favor of Plaintiff and against the City and Ward solely on the retaliation claim. (AA: Vol. I at 102-107). The jury awarded economic damages of $1,500 and non-economic damages of $10,000. (AA: Vol. I at 102-107).

Plaintiff, thereafter, moved for attorney's fees under §12965(b). (AA: Vol. I at 51, 127, 154). After amending his motion twice, Plaintiff finally requested a lodestar of $435,467.75 and a multiplier of 2.0. (AA: Vol. I at 154-185; Vol. III at 746, 748). The request for a multiplier came

after Defendants received an extension of time to oppose Plaintiff's motion and brought Plaintiff's total fee request to $870,935.50. (AA: Vol. III at 746, 748). Plaintiff's fee request also included such things as time spent towards his unsuccessful pursuit of liability in the preceding five years, which accounted for approximately 60% for the total fee request. (AA: Vol. III at 748-749).

Defendants opposed Plaintiff's motion and requested the trial court to exercise its discretion and deny a fee award altogether, or, at a minimum, reduce the fee to a reasonable amount. (AA: Vol. III at 736:27-737:27).[8] In their Opposition, Defendants argued that Plaintiff overreached and outrageously inflated his fee request by requesting unsubstantiated and unreasonably high hourly rates and by utilizing problematic billing practices, such as: (1) substantially billing in .25 and .5 increments, (2) including non-compensable clerical/secretarial tasks and work un-related to the instant matter, (3) billing at a higher hourly rate for work that could

[8] Defendants argued that the Court should award an amount no higher than $44,459.37. (AA: Vol. III at 749). Defendants' expert, Kenneth Moscaret, Esq., recommended a fee no greater than $158,783.44. (AA: Vol. I at 220). It must be noted, however, that Mr. Moscaret's opinion was limited to the reasonableness of Plaintiff's requested hourly rate and billing entries. Mr. Moscaret offered no opinions as to entitlement to fees or a multiplier. (AA: Vol. I at 193). Defendants' opposition papers, on the other hand, attacked Plaintiff's requested hourly rate, billing entries, entitlement to fees and Plaintiff's request for a multiplier, thus further reducing Plaintiff's requested fees. (AA: Vol. III at 744-749).

have been done by a less expensive biller, (4) employing vague, non-descriptive billing entries related to substantial fees, and (5) claiming time for work that is grossly inflated. (AA: Vol. III at 733-750; Vol. I at 187-289, Vol. II at 290-333, 350-577, Vol. III at 578-707, 708-732). Plaintiff further unreasonably inflated his lodestar calculation in an apparent "shoot-for-the-moon" tactic. This tactic was revealed through Plaintiff's overall lack of success in the matter, his bad faith litigation tactics with respect to his attorney's fees request (including the unsupported request for a 2.0 multiplier) and his inclusion of substantial amounts of time devoted to the prior unsuccessful litigation and claims. (AA: Vol. III at 733-750; Vol. II at 350-577, Vol. III at 578-707, 708-732).

Prior to the hearing on Plaintiff's fee motion, the trial court raised the issue of whether it had discretion under §1033 to deny fees and requested both sides to be prepared to address the issue at the hearing. (RT at 29:4-8). At the hearing, the trial court questioned Plaintiff's counsel and confirmed that she was requesting over $800,000 in fees for a case where a judgment of only $11,500 was received. (RT at 31:26-28). The trial court also questioned Plaintiff's counsel as to the specific amount of damages requested at trial by Plaintiff. Plaintiff's counsel, however, was unable to recall the amount of Plaintiff's special damages despite being involved in

the litigation for five years, and admittedly did not request a specific amount for general damages. (RT at 21:24-26:11). In fact, the only evidence presented at trial regarding the amount of Plaintiff's special damages was presented by Defendants' expert. (RT at 26:13-21). The trial court also questioned Plaintiff's counsel as to the reasonableness of requesting fees for all activity during the five-year history of the litigation. (RT at 41:4-44:28; 45:21-48:23). And, questioned Plaintiff's counsel regarding the basis for the 2.0 multiplier as no grounds were ever provided by Plaintiff to support the request. (RT at 39:10-41:3; AA: Vol. I at 51-100, 127-151, 154-185). Plaintiff's counsel stated that she simply asked for what she thought she could get. (RT at 39:18-41:3). Plaintiff's counsel then ended the hearing by stating that she only wanted a reasonable fee and did not care if it was the $400,000 lodestar Plaintiff had requested. (RT at 50:22-51:19).

After taking the matter under submission, the trial court issued an order denying Plaintiff's request for attorney's fees citing §1033(a) and noting that the requested attorney's fees were an item of costs under Civ. P. Code §1033.5(a)(10). (AA: Vol. III at 876). The Court further stated that its decision was guided by Steele. (AA: Vol. III at 867). In explaining its decision, the trial court cited Plaintiff's low verdict and lack of success at

trial on all his claims against all of the Defendants; specifically that Plaintiff had only prevailed on one cause of action, whereas Defendants prevailed on the other claim and one Defendant was granted non-suit during the trial. (AA: Vol. III at 865). The trial court also stated that Plaintiff's evidence at trial was over-whelmingly devoted to liability with no specific testimony as to the amount of special damages that Plaintiff suffered. (AA: Vol. III at 865-866). And, further, that Plaintiff had only presented sparse testimony regarding his general damages with no detail about his alleged emotional distress. (AA: Vol. III at 865-866). The trial court also noted that during both opening statements and closing arguments, Plaintiff failed to provide any detailed explanation as to Plaintiff's alleged damages. (AA: Vol. III at 866-867). Plaintiff appealed the decision. (AA: Vol. IV at 881-886).

On February 22, 2008, the Court of Appeal reversed the trial court's denial of attorney's fees and remanded the matter for re-determination of the amount of reasonable fees. (Opinion at 1, 12). In reversing the trial court, the Court of Appeal found that §1033 and §12965(b) serve conflicting public policies and, as such, §1033 must yield to §12965(b). (Opinion at 7, 9). The Court of Appeal also found that it was unjust to deny attorney's fees to Plaintiff in light of the City's settlement posture, which the Court of Appeal described as "recalcitrant." (Opinion at 10).

V. LEGAL ARGUMENT

A. Section 12965(b) Should Not Be Judicially Expanded to Exclude the Application of §1033 to FEHA Actions

In the instant matter, the trial court denied Plaintiff's request for attorney's fees relying on §1033 and the inclusion of attorney's fee awards as an item of costs under §1033.5(a)(10). The trial court stated that its decision was also guided by Steele, wherein the Court considered the complex relationship between §1033 and §12965(b) and upheld a denial of attorney's fees. (Steele, 59 Cal.Ap.4th at 331).

By holding that §1033 does not apply to FEHA actions, the Court of Appeal has effectively expanded the scope of §12965(b) by precluding courts from denying attorney's fees where a plaintiff has exaggerated the value of his claims. In reaching this conclusion, the Court of Appeal misreads the trial court's ruling, directly contradicts the holding in Steele and fails to acknowledge that §12965(b) is part of a cost-shifting statutory scheme that should be interpreted within the context of that scheme.

Contrary to the Court of Appeal's analysis, Plaintiff was not denied attorney's fees for simply recovering a low damages award. Indeed, the trial court's analysis focuses on the sparse presentation of damages evidence during the trial demonstrating that, having litigated the case for

five years, Plaintiff was fully cognizant of the fact that he had minimal damages as a result of Defendants' conduct. Accordingly, Plaintiff exaggerated the value of his case by filing it in an unlimited jurisdiction court rather than a limited jurisdiction court. Consequently, this Court should disregard the Court of Appeal's – and Plaintiff's anticipated – straw man and consider the real issue of whether the cost-shifting provisions found in §1033 and §12965(b) are so irreconcilable that the public policy of deterring a plaintiff from exaggerating the value of his case should never apply to a case brought under FEHA.

The Court of Appeal's decision is also in direct contradiction to Steele, which the Court of Appeal decided was unpersuasive as the Steele court and parties merely assumed that §1033 applied to §12965(b). (Opinion at 7). The Court of Appeal then analyzed §1033 and §12965(b) solely in terms of the public policies they seek to enforce and finding that while not all FEHA actions involve large sums of money, all FEHA actions seek to vindicate significant public policy. As such, a FEHA plaintiff should not be denied attorney's fees simply for recovering a modest verdict. Consequently, §1033 does not apply to §12965(b). (Opinion at 7-8).

The Court of Appeal's analysis, however, puts the proverbial "cart before the horse." By focusing exclusively on the public policies

supporting §1033 and §12965(b), the Court of Appeal skips to the end of statutory interpretation analysis and fails to give effect to the plain language of the statutes. In point of fact, unlike the trial court and Steele Court, the Court of Appeal's decision fails to recognize and consider that §12965(b) is part of the cost-shifting statutory framework found at Civil Procedure Code §1032 *et seq.* and, as such, must be given effect within the context of that framework. By applying California rules of statutory construction, §1033 and §12965(b) can be read in harmony with each other, thereby giving effect to Legislative intent and the salutary public policies supporting each of these statutes.

1. Under California Rules of Statutory Construction, §1033 and §12965(b) Can Be Read in Harmony With Each Other

The most fundamental rule of statutory construction is that "the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (Select Base Materials v. Bd. Of Equal., 51 Cal.2d 640, 645 (1959); California Teachers Ass'n. v. San Diego Comm. College Dist., 28 Cal.3d 692, 698 (1981); Moyer v. Workmen's Comp. Appeals Bd., 10 Cal.3d 222, 230 (1973)).

The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of that language and seeking to avoid making any language mere surplusage. (Id.). Further, a statute must be construed in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts. (People v. Woodhead, 43 Cal.3d 1002, 1009 (1987)). If the statutes conflict on a central element, the court is to strive to harmonize them so as to give effect to each statute. If conflicting statutes cannot be reconciled, later enactments supersede earlier ones and more specific provisions take precedence over more general ones. (Collection Bureau of San Jose v. Rumsey, 24 Cal.4th 301, 310 (2000)).

Statutory provisions must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, and which, when applied will result in wise policy rather than mischief or absurdity. (United Business Com. V. City of San Diego, 91 Cal. App.3d 156, 170 (1979); City of Costa Mesa v. McKenzie, 30 Cal.App.3d 763, 770 (1973)). The court should also take into account matters such as context and the evils to be remedied. (Cossack v. City of Los Angeles, 11 Cal.3d 726, 733 (1974); United Business Com., 91 Cal.App.3d at 170).

Here, Plaintiff sought attorney's fees pursuant to §12965(b), which provides a court with discretion to award reasonable attorney's fees to a prevailing party. (Gov. Code §12965(b)). However, as the trial court correctly found statutory attorney's fees are an item of costs and are, therefore, subject to the cost-shifting framework found in Code of Civil Procedure §1032 *et seq*.

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a. Section 12965(b) is Part of the Cost-Shifting Framework Found in California Code of Civil Procedure §1032 *et seq*

California adheres to the "American Rule," which generally requires parties to bear their own costs, including attorney's fees. (Civ. P. Code §1021). Indeed, the right to recover costs exists solely by virtue of statute. (Civ. P. Code §§ 1021, 1032; Murillo v. Fleetwood Enterprises, Inc., 17 Cal.4th 985, 989 (1998)).

Code of Civil Procedure §1032 is the fundamental authority for awarding costs in civil actions; "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Civ. P. Code §1032(b)). A court has

discretion, however, in awarding costs where the prevailing party recovers a judgment that could have been rendered in a limited civil case. (Civ. P. Code §1033(a)).

Code of Civil Procedure §1033.5 specifies the items allowable as costs, including attorney's fees when authorized by statute. (Civ. P. Code §1033.5(a)(10)(B)). Section 1033.5 further provides, in relevant part, "When any statute of this state refers to the award of 'costs and attorney's fees,' attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a)." (Civ. P. Code §1033.5(c)(5)).

Thus, when attorney's fees are to be awarded pursuant to a statute, including under §12965(b), they are an item of costs. (Davis v. KGO-T.V., Inc., 17 Cal.4th 436, 443-445 (1998); Bond v. Pulsar Video Prod., 50 Cal.App.4th 918, 921 (1996); Santisas v. Goodin, 17 Cal.4th 599, 606 (1998); Heritage Engineering Const., Inc. v. City of Industry, 65 Cal.App.4th 1435, 1441-1442 (1998)).

As set forth above, the right to recover costs, including statutory attorney's fees, exists solely by statute. Indeed, §1033.5 was amended in 1990 to bring statutory attorney's fees into the cost-shifting framework. (See Civ. P. Code §1033.5, Annotated, Legislative History Notes).

Consequently, the Legislature intended statutory attorney's fees to be regulated by the cost-shifting framework of §1032 *et seq.*

Additionally, the plain language of §1033, as well as the cost-shifting framework found in §1032 *et seq.*, states that it applies to all civil actions. (See Civ. P. Code §§1032 and 1033 including the titles and chapters thereto). There is also no exception in either the plain language of §1033 or the cost-shifting framework of §1032 *et seq.* for FEHA actions.[9],[10] By holding that §1033 does not apply to §12965(b), the Court of Appeal rendered the language appearing in §1032(b) -- "in any action or proceeding," and the language appearing in §1033 – "in a case other than a limited civil case," as mere surplusage, which, under rules of statutory construction, is to be avoided.

Further, when the Legislature amended §1033 in 1998 to account for the unification of the Courts, the Legislature did not disapprove of Steele,

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[9] Indeed, there is nothing in FEHA that prohibits the prosecution of an action in a limited jurisdiction court. (See Gov. Code §12965(b); see also Section V(A)(1) (a) at 21, *infra*).

[10] In fact, §1033 is a specifically delineated exception to the general rule of §1032 to award costs. And, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. (Mutual Life Ins. Co. v. City of Los Angeles, 50 Cal.3d 402, 410 (1990)). Neither the plain language of FEHA, nor §1033, states that either section should not apply to the other. As such, the Court of Appeal's presumed exception of §1033 to FEHA should not stand.

which had been decided in 1997. (See Civ. P. Code §1033, Annotated, Legislative History Notes). And, the same is true when the Legislature amended §12965(b) in 1999, to add a provision regarding expert witness fees, and again in 2007, when the Legislature amended the language of §12965(b) to also account for the unification of the courts. (See Gov. Code §12965(b), Annotated, Legislative History Notes).

Finally, the Legislature designed these statutes to advance various public policies. Section 1033 encourages the filing of actions in the appropriate forum and works to deter plaintiffs from unduly puffing the value of their cases. (2 Witkin, Cal. Procedure (4th Ed. 1996) Jurisdiction, §30). The award of attorney's fees to plaintiffs who prevail in FEHA actions is designed to promote the important public policies favoring the elimination of workplace discrimination. (Flannery v. Prentice, 26 Cal.4th 572, 582-583 (2001)).

While FEHA unquestionable promotes a significant public policy, §12965(b) does not have primacy over the cost-shifting framework found at §1032, *et seq*. Had the Legislature deemed it crucial to award attorney's fees to prevailing FEHA plaintiffs – even when the recovery is small enough to fall below the jurisdictional limits of limited civil cases – then it

could have made such awards mandatory. Instead, FEHA actions can be filed in either limited or unlimited courts. (Gov. Code §12965(b)).

The Court of Appeal's contention that Plaintiff could not have competently prosecuted the instant action in a limited jurisdiction court in light of the discovery limitations in limited civil cases is wrong. (Opinion at 9). The Code of Civil Procedure at §86 *et seq.* sets forth the civil procedure rules for limited jurisdiction cases. These rules provide for all types of discovery (including interrogatories, demands for production, requests for admission and expert disclosures) without limitation upon either a stipulation by the parties or a properly noticed motion and showing of good cause. (Civ. P. Code §§ 94, 95, 96). Parties can also file any type of motion in a limited jurisdiction case. (Civ. P. Code §92). And, pursuant to Code of Civil Procedure §91(c), "Any action may, upon notice motion, be withdrawn from the provisions of this article, upon a showing that it is impractical to prosecute or defend the action within the limitations of these provisions." Consequently, Plaintiff could have, and should have, designated this matter as a limited jurisdiction case.

Moreover, §1033 and §12965(b) read together work to encourage parties to rationally and realistically evaluate the merits and value of their cases as litigation progresses by providing a disincentive to unduly inflating

the value of cases. To be sure, it's hard to imagine that there would never be such an occasion where §1033 should be applied to deny a plaintiff attorney's fees under §12965(b). As such, these statutes do not conflict and they can be harmonized, without one taking precedence over the other.[11]

2. Public Policy Considerations Weigh in Favor of Applying §1033 to §12965(b)

FEHA provides a court with discretion to award reasonable attorney's fees to a prevailing party. (Gov. Code §12965(b)). The award of attorney's fees to plaintiffs who prevail in FEHA actions is designed to promote the important public policies favoring the elimination of workplace discrimination. (Flannery v. Prentice, 26 Cal.4th 572, 582-583 (2001)). Attorney's fees under §12965(b), however, are also available to a prevailing defendant. (Hon v. Marshall, 53 Cal.App.4th 470 (1997)). And, even if a

[11] Indeed, harmonizing the statutory language mandating an award of fees or costs to the prevailing party with the policies underlying §1033, courts have concluded §1033 properly applies to other statutory attorney's fees provisions. (See, e.g., Dorman v. DWLC Corp., 35 Cal.App.4th 1808, 1814-1815 (1995)(discretion over mandatory award of contract-based fees under Cal. Civ. Code §1717); see also Korech v. Roberta Hornwood, 58 Cal.App.4th 1412 (1997)(§1717 created to prevent oppressive, one-sided use of contractual fee provisions); Haworth v. Lira, 232 Cal.App.3d 1362, 1371 (1991)(discretion over mandatory award of fees and costs under Cal. Civ. P. Code §1021.9); see also Elton v. Anheuser-Busch Beverage Group, Inc., 50 Cal.App.4th 1301 (1996)(reading §1022 and 1021.9 together); Dickens v. Lee, 230 Cal.App.3d 985, 988 (1991)(discretion over mandatory award of fees and costs under Cal. Civ. Code §1942.4)).

plaintiff prevails on a FEHA claim, if the plaintiff recovers a verdict less than a defendant's §998 offer, the plaintiff is liable for the defendant's attorney's fees and costs. (Steele, 59 Cal.App.4th at 332).[12]

It is apparent from the plain language of §12965(b) that by allowing for awards of attorney's fees to a prevailing defendant that the Legislature intended for a balance to be placed on the award of attorney's fees. In other words, the Legislature did not intend a one-sided application of §12965(b) that inure only to the benefit of plaintiffs and their attorneys. Such a balance is also apparent from the Legislature's application of §998 to FEHA actions.

The application of §1033 to §12965(b) furthers this balance and gives effect to §12965(b)'s presence within the Code of Civil Procedure's cost-shifting framework. As indicated above, §1033 is designed to encourage a plaintiff to pursue litigation in the appropriate forum and to deter a plaintiff from exaggerating the value of a case. (2 Witkin, Cal. Procedure, Jurisdiction §30). "When litigants bring cases in [unlimited jurisdiction courts] which properly belong in [limited jurisdiction courts] it

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[12] The basic premise of §998 is that plaintiffs who reject reasonable settlement offers and then obtain less than the offer should be penalized for continuing the litigation. The harsh result of §998 is that the plaintiff not only loses the right to recover his costs, but must also pay the defendant's post-offer costs. (Meister v. Regents of Univ. of Calif., 67 Cal.App.4th 437, 450 (1998)).

wastes judicial resources and drain clients' wallets. By doing so, they invoke the more extensive and expensive procedures the judicial system reserves for higher stakes cases." (Valentino v. Elliott Sav-On Gas, Inc., 201 Cal.App.3d 692, 701 (1988)).

Section 1033 also does not run afoul of the public policies supporting FEHA action as it only provides a court with discretion to deny costs, including attorney's fees, if the plaintiff recovers a judgment that could have been rendered in a limited jurisdiction court. (Civ. P. Code §1033(a)). A denial of fees and costs is not mandatory. Furthermore, §1033 does not apply to a party who reasonably and in good faith files an action as an unlimited civil case, but is surprised by an unexpectedly low verdict. (Valentino, 201 Cal.App.3d at 701-702).[13]

Judicially expanding §12965(b) such that §1033 cannot serve as a basis for denying attorney's fees removes a legislatively imposed check placed on plaintiff's attorneys in pursuing civil actions. In support of this expansion, the Court of Appeal reasoned that applying §1033 to deny

[13] Additional factors to the considered in the exercise of its discretion under §1033 are the plaintiffs' assessment of their chances of recovery beyond the jurisdiction of the courts of lesser jurisdiction, their reasonable and good faith assessment of the recovery, and the amount of costs incurred. (Greenberg v. Pacific Tel. & Tel. Co., 97 Cal.App.3d 102, 108 (1979); Dorman v. DWLC Corp., 35 Cal.App.4th 1808, 1816 (1995)). Consideration of these additional factors in the instant case would militate against an award of attorney's fees. (See RT at 51:21-53:2).

attorney's fees to a prevailing FEHA plaintiff simply because the recovery is modest would thwart the purposes underlying FEHA and discourage attorneys from taking meritorious FEHA cases unless the damages would be large.

Such encouragement, however, should not come at the cost of providing an opportunity for abuse of the availability of fees. Here, Defendants contend that Plaintiff repeatedly lost at every turn for over five years until he finally prevailed on one claim in the instant action, yet he seeks attorney's fees for his unsuccessful pursuits. While the Court of Appeal characterized this unsuccessful period of litigation as a battle waged for five years against a recalcitrant Defendant, perhaps Plaintiff's claims were merely over-stated. And, perhaps Defendants' success over these five years was a more accurate reflection of the value and validity of Plaintiff's claims, then the nearly $880,000 Plaintiff seeks in attorney's fees.

And, if overall success is an important factor in determining reasonable fees,[14] and if a party can be denied fees for unreasonably inflating a fee request,[15] then why shouldn't a court have the discretion to

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[14] [15] PLCM Group, Inc. v. Drexler, 22 Cal.4th 1084, 1095 (2000).

See Serrano v. Unruh, 32 Cal.3d 621, 635 (1982); Ketchum v. Moses, 24 Cal.4th 1122, 1137 (2001).

deny attorney's fees where a plaintiff has unreasonably inflated his lawsuit in the first instance?

B. Section 12965(b) Should Not Be Judicially Expanded to Allow for Attorney's Fee Awards Because of a Party's Settlement Posture

After expanding §12965(b) such that §1033 cannot serve as a basis for denying attorney's fees, the Court of Appeal, without citing any supporting legal authority, further expanded the availability of attorney's fees under §12965(b) by concluding that a party's failure to settle a case can serve as a basis for awarding attorney's fees against it. (Opinion at 10). Such a holding, however, is it odds with case law that establishes that it is improper to consider a party's settlement posture in determining whether to award attorney's fees. Furthermore, such a holding is at odds with public policy considerations, including the public policy behind the confidentiality of settlement discussions.

1. A Party's Settlement Posture Is Not an Appropriate Factor to Consider in Determining Whether to Award Attorney's Fees

There is no legal authority that provides for an award of attorney's fees, or for even setting the amount of attorney's fees, in light of a party's

settlement posture. Relevant legal authority does, however, establish that a party's settlement posture is not an appropriate factor to consider in determining whether to award attorney's fees. (See, e.g., Hsu v. Abbara, 9 Cal.4th 863 (1995); Greene v. Dillingham Const. N.A., Inc., 101 Cal.App.4th 418, 426 (2002); Neptune Society Corp. v. Longanecker, 194 Cal.App.3d 1233, 1251 (1987)).

In Greene, the Court held that it was not proper for a court to rely on informal settlement negotiations and hindsight to determine whether attorney's fees should be awarded. (Greene, 101 Cal.App.4th at 426). Otherwise, plaintiffs with meritorious FEHA claims and defendants disputing unmeritorious FEHA claims may be improperly dissuaded from pursuing their right to a jury trial. (See id.). Thus, a defendant's decision to not make a pre-trial settlement offer is not a valid factor for the trial court's consideration in determining whether to award attorney's fees to a prevailing FEHA plaintiff. (Id.).

Similarly instructive is this Court's decision in Hsu v. Abbara. In determining prevailing party status for an award of attorney's fees under Civil Code §1717, this Court held that a court may not invoke equitable considerations unrelated to litigation success, such as the parties' behavior during settlement negotiations. "To admit such factors into the 'prevailing

party' equation would convert the attorney fees motion from a relatively uncomplicated evaluation of the parties' comparative litigation success into a formless, limitless attack on the ethics and character of every party who seeks attorney's fees...." (Hsu, 9 Cal.4th at 877; see also Neptune Society Corp. v. Longanecker, 194 Cal.App.3d 1233, 1251 (1987)(a purported settlement offer does not supply a legal basis to award attorney's fees under Civil Code §1717)).

The foregoing rules and policies should have been applied in this case, but were not. Instead, the Court of Appeal's opinion created an opposite and conflicting rule. The Court of Appeal's holding also conflicts with the preclusion of such information for purposes of establishing liability as set forth in Evidence Code §§1152 and 1154, as well as Evidence Code §1115 *et seq.* The preclusion of such information serves the public policy of encouraging settlement and compromise as parties can rest assured that any offers of settlement or refusal to disclose such offers cannot later be used against them. (See, e.g., Evid. Code §1152, Law Revision Commission Comments, 1965 Enactment; Evid. Code §1154, Law Revision Commission Comments; Evid. Code §1115, Law Revision Commission Comments, 1997 Addition; Evid. Code §1116, Law Revision Commission Comments, 1997 Addition; Evid. Code §1126, Law Revision Commission

Comments, 1997 Addition; Evid. Code §1128, Law Revision Commission Comments, 1997 Addition; see also Greene, 101 Cal.App.4th at 425-426 (disclosure of settlement offers for purposes of determining an award of attorney's fees would frustrate the public policy favoring settlement; federal case law in accord)).

Furthermore, this unprecedented expansion of §12965(b) also erodes this Court's prior holdings regarding the availability of attorney's fees under §12965(b). Specifically, this Court has held that attorney's fees can be denied where special circumstances would render an award unjust. (Serrano v. Unruh, 32 Cal.3d 621, 635 (1982)("Serrano IV"); Ketchum v. Moses, 24 Cal.4th 1121, 1137 (2001)). One such special circumstance is where the prevailing party has requested an unreasonably inflated fee. (Serrano IV, 32 Cal.3d at 635; Ketchum, 24 Cal.4th at 1137).

Here, after amending his motion twice, Plaintiff finally requested a lodestar of $435,467.75 and a multiplier of 2.0 for a total fee request of $870,935.50. Plaintiff's fee request included such things as time spent towards his unsuccessful pursuit of liability in the preceding five years, despite never having requested attorney's fees or costs before the prior courts[16] and which accounted for approximately 60% for the total fee

[16] In fact, as set forth above, the Ninth Circuit ordered each party to bear their own costs. (Chavez, 2004 U.S. App. LEXIS 20603 at 7).

request; billing in half-hour increments; billing at an attorney's rate for secretarial and clerical tasks; claiming time for work that was grossly inflated and by including the last minute, unsupported request for a 2.0 multiplier in response to the Court granting an extension of time for Defendants to oppose Plaintiff's motion.

Defendants' opposed Plaintiff's motion identifying these, as well as other, problematic billing practices, and requested the trial court to exercise its discretion and deny a fee award altogether, or, at a minimum, reduce the fee to a reasonable amount. Ignoring these arguments and potential basis for denying attorney's fees, the Court of Appeal focused exclusively on the fact that Defendants failed to reach a settlement with Plaintiff and held that it would be unjust to deny Plaintiff any fees where the City flatly resisted all settlement discussion and never made a substantive settlement offer. (Opinion at 10).

The effect of such a holding is that whenever a defendant has failed to reach a settlement, a plaintiff will not be discouraged from making an unreasonable attorney's fees demand as the only consequences from such misconduct would either be a windfall if the court awards the full request or a reduction of the fee request to what should have been asked for in the first instance. (Serrano IV, 32 Cal.3d at 635). Consequently, the Court of

Appeal has diminished this Court's prior interpretations of the scope of §12965(b) and placed a party's settlement posture as a predominant factor in determining whether to award attorney's fees.

2. Public Policy Considerations Also Weigh Against The Expansion of §12965(b) to Include a Party's Settlement Posture as a Predominant Factor in Awarding Attorney's Fees

The primary concern against the expansion of §12965(b) to include a party's settlement posture as a predominant factor in awarding attorney's fees is the invasion into the attorney-client privilege that such an analysis would entail. The true reasons behind a party's settlement posture are oftentimes cloaked by the attorney-client privilege. Parties should not be forced to disclose such privileged communications in response to a party's motion for attorney's fees. There is simply no sound public policy reason to support such an invasion.

Furthermore, as indicated above, to admit such a factor into the prevailing party analysis would convert the attorney fees motion from a relatively uncomplicated evaluation of the parties' comparative litigation success into a limitless attack on the ethics and character of the involved parties. Indeed, while a court may view a party's settlement position as

"recalcitrant," the posture may actually be a response to a number of influencing factors, particularly for public entities, that lead to the failure of reaching a settlement. For example, a settlement might not be reached because of any one or more of the following factors: the necessary support to approve a settlement by various public committees is lacking; the public is outraged by a settlement recommendation to a public committee; the party's settlement request is unreasonably high and out-of-line with similar cases, the timing of the settlement discussions coincide with low budget reserves.

Furthermore, unlike private corporations, public entities are also bound by a legal obligation to not waste tax-payer dollars. The Court of Appeal's decision, however, places a conflicting burden on public entities to make "substantial" settlement offers in actions where they are a defendant in order to avoid attorney's fees, or at a minimum, from appearing "recalcitrant" and causing a greater amount of fees to be awarded then what would have been awarded had the public entity made a "substantial" offer that was rejected by the plaintiff.

Finally, the practical effects of introducing such a factor into the attorney's fees analysis would simply be un-workable as is proven by the instant case. Specifically, whose settlement offer is to be analyzed for

reasonableness? In the instant case, the Court of Appeal held that attorney's fees must be awarded after only considering the City's settlement offer, which the Court of Appeal characterized as lacking in substance. There is absolutely no discussion by the Court of Appeal regarding the Plaintiff's settlement demand and its implied reasonableness. Additionally, from whose perspective should a settlement offer be analyzed for reasonableness? Here, its Defendants' contention that Plaintiff repeatedly lost at every turn, back and forth between the California and federal courts for over five years, until he finally prevailed on one claim in the instant action. The Court of Appeal, on the other hand, viewed this same scenario as a battle waged by Plaintiff for five years against a recalcitrant Defendant. Is the Defendants' offer to waive fees and costs a more accurate assessment of the validity and value of Plaintiff's claims since Plaintiff only recovered $11,500? Or, is Plaintiff's five-year war to recover $11,500 at a cost of $880,000 more accurate?

VI. CONCLUSION

For all the foregoing reasons, this Court should reject the judicial expansion of §12965(b) by the Court of Appeal, answer in the negative each of the issues presented, reverse the decision of the Court of Appeal and

reinstate the trial court's order denying Plaintiff's motion for attorney's fees.

DATED: July 14, 2008

RESPECTFULLY SUBMITTED:

ROCKARD J. DELGADILLO, City Attorney
PAUL L. WINNEMORE, Deputy City Attorney
BETH D. ORELLANA, Deputy City Attorney

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CERTIFICATE OF WORD COUNT

Petitioners' counsel of record hereby certifies, pursuant to Rule 8.504(d)(1) of the California Rules of Court, that the text of the foregoing Opening Brief on the Merits was produced using 13-point Times New Roman font (including footnotes) and contains 6,864 words, as counted by the Microsoft Word word-processing system used to generate the brief.

DATED: July 14, 2008

RESPECTFULLY SUBMITTED:

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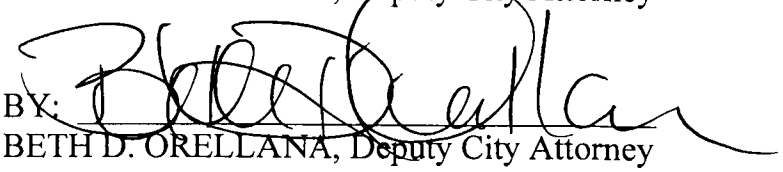
BY: 
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PROOF OF SERVICE
(VIA VARIOUS METHODS)

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 700 City Hall East, 200 North Main Street, Los Angeles, California 90012.

On July 14, 2008, I served the foregoing documents described as **OPENING BRIEF ON THE MERITS** on all interested parties in this action by placing copies thereof enclosed in a sealed envelope addressed as follows:

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[X] BY PERSONAL SERVICE - I caused each envelope to be sent via messenger service, 200 North Main Street, 700 City Hall East, Los Angeles, California 90012-4131.

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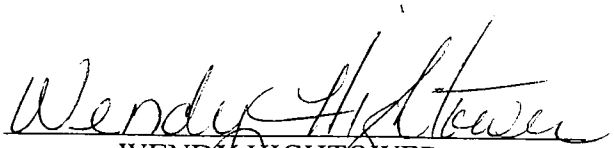
The Honorable Rolf M. Treu
Judge Presiding, Department 58
c/o Superior Court Clerk
111 North Hill Street
Los Angeles, CA 90012

[ ] BY FACSIMILE TRANSMISSION - I caused the document to be transmitted to the offices of the addressee via facsimile machine at telephone number on the date specified above at 5:30 p.m. The document was sent by fax from telephone number (213) 978-8216 and the transmission was reported complete and without error. A true copy of the Transmission Report is attached to the mailed or personal or both proof(s) of service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 14, 2008, at Los Angeles, California.



WENDY HIGHTOWER