S 162313

IN THE

SUPREME COURT OF CALIFORNIA

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

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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

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# REPLY BRIEF RE PETITION FOR REVIEW

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PAUL VON LUTZOW, AND HARLAN WARD

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*TABLE OF CONTENTS*

*TABLE OF AUTHORITIES*

*CASES*



*STATUTES*

## I. INTRODUCTION

Rather than convince this Court that review is unnecessary by demonstrating that long-established law supports the Court of Appeal's analysis or that the issues at stake are so unique that they would not arise again, Plaintiff argues only that the Court of Appeal's decision was correct, all the while citing to the very decision that brings us before this Court. In so doing, Plaintiff's untimely[1] Answer to the Petition for Review ("Answer") confirms the need for this Court to grant review.

## II. DISCUSSION

### A. Plaintiff's Request for Depublication Underscores the Need for This Court to Grant Review

Plaintiff's request for depublication underscores the need for this Court to grant review. Indeed, in requesting this Court to de-publish the Court of Appeal's opinion, Plaintiff admits that the decision is in conflict with Steele v. Jensen Instrument Co., 59 Cal.App.4th 326 (1997):

> "[T]he Court of Appeal opined that CCP §1033 does not apply to FEHA actions and since the trial court in *Steele*, a FEHA action, exercised its discretion under §1033 to deny the prevailing party attorney's fees, the depublication of the

[1] Plaintiff filed his Answer to Petition for Review on April 23, 2008. However, the last day to file such an answer was April 22, 2008. Accordingly, this Court should not consider Plaintiff's Answer in reaching a decision on the Petition for Review.

Court of Appeal's decision would expeditiously resolve the conflict between the two cases."

(Answer at 13).

Depublication, however, will not end the decade long debate between the Courts of Appeal as to whether or not §1033 should apply to FEHA actions. Indeed, as set forth in the Petition for Review, the Courts of Appeal over the last ten years have gone back and forth as to whether or not §1033 and §12965(b) can be read in harmony with each other. (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)). Depublication will also not stop another Court of Appeal from either borrowing from an unpublished decision, as was the case here, or in breaking new ground and reaching a conclusion contrary to Steele, thus creating the conflict all over again. The time is ripe for this Court to put an end to the debate and decide 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 the Fair Employment and Housing Act.

Depublication will also fail to resolve the issue of whether a party's failure to settle a case can serve as a predominant factor for awarding attorney's fees against it under §12965(b). Just as this Court of Appeal followed the analysis of an un-published decision, another court may do the same particularly if more than one such un-published decision exists. Moreover, the Court of Appeal's analysis disregarded relevant legal authority that prohibits courts from considering a party's settlement posture in determining whether to award attorney's fees. And, by doing so, raised significant public policy concerns, including the potential for invasion of the attorney-client privilege that must be addressed immediately by this Court.

Accordingly, this Court should grant review and not simply wait for another day to address these issues.

**B. Plaintiff Fails to Assure this Court that Review is Unnecessary as to Whether §1033 is Properly Excluded From Application to FEHA Actions**

Plaintiff's analysis of whether §1033 to applies to FEHA actions is limited exclusively to quoting from the Court of Appeal's decision, and, as such, suffers from the same defects as the Court of Appeal's analysis. In

point of fact, Plaintiff asserts that the Court of Appeal's decision was correct as it properly "rested its decision on the clear, unambiguous and distinct objectives of these two cost-shifting statutes...." (Answer at 5).

As set forth in the Petition for Review, by confining the analysis to whether the public policies supporting §1033 and §12965(b) are in conflict with each other, Plaintiff and the Court of Appeal are putting the proverbial "cart before the horse." Well-established cannons of statutory construction state that statutory interpretation always begins with 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. (Moyer v. Workmen's Comp. Appeals Bd., 10 Cal.3d 222, 230 (1973)). 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, then the court is to strive to harmonize them so as to give effect to each statute. (Collection Bureau of San Jose v. Rumsey, 24 Cal.4th 301, 310 (2000)).

Here, both Plaintiff and the Court of Appeal completely ignore the fact that §12965(b) is part of a cost-shifting statutory scheme and should be interpreted within the context of that scheme. Indeed, the general rule in California is that parties are to bear their own costs, including attorney's

fees. (Civ. P. Code §1021). Furthermore, the right to recover costs, including attorney's fees, exists solely by virtue of statute. (Civ. P. Code §§ 1021, 1032, 100.5(a)(10)(B); Murillo v. Fleetwood Enterprises, Inc., 17 Cal.4th 985, 989 (1998)). Consequently, it is within this statutory scheme that both §1033 and §12965(b) must be interpreted. Had the Legislature intended to exclude FEHA from this cost-shifting framework, it could have done so. Instead, in 1990, the Legislature amended §1033.5 to specifically include statutory attorney's fees as an item of costs. (See Civ. P. Code §1033.5, Annotated, Legislative History Notes). Accordingly, §12965(b) must be read in conjunction with the §1033.

Plaintiff and the Court of Appeal also fail to address the sound public policy considerations that weigh in favor of reading these statutes in harmony with each other. Read together, §1033 and §12965(b) 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. Furthermore, §1033 does not run afoul of the public policies supporting FEHA actions 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. Indeed, §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).[2] Thus, the application of §1033 to FEHA actions would not discourage attorneys from taking meritorious cases.

By failing to take on the legal analysis demonstrating the far-reaching errors in the Court of Appeal's analysis, Plaintiff fails to convince this Court that review is unnecessary. Consequently, this Court should grant review.

### C. Plaintiff Fails to Convince This Court That §12965(b) Has Not Been Judicially Expanded to Allow for Awards of Attorney's Fees in Light of a Party's Settlement Posture

Plaintiff asserts that the Court of Appeal's analysis regarding the appropriateness of awarding attorney's fees did not rest upon the City's settlement posture, but rather upon the intricacy of the litigation. (Answer at 7). And, that Plaintiff's "fees were a product, in part, of the "City's vigorous and long-continued resistance to Chavez' claim...." (Answer at 7). Plaintiff even quotes this Court stating, "'government cannot litigate

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[2] 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)).

tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.'" (Answer at 7-8).

Yet, nowhere within Plaintiff's argument, or the Court of Appeal's analysis, is there any citation to any conduct by Defendants that would demonstrate Defendants unreasonably escalated the litigation by: filing frivolous motions; obstructing discovery; running to court at every opportunity; delaying the trial; etc. Rather, the only "unreasonable tactic" identified by Plaintiff and the Court of Appeal was Defendants' failure to settle the case. (Answer at 8).

As set forth in the Petition for Review, sound public policy counsels against the inclusion of a party's settlement posture in the attorney's fees analysis. Indeed, the true reasons behind a party's settlement posture are oftentimes cloaked by the attorney-client privilege and there is simply no sound public policy reason to support an invasion of this sacrosanct privilege to justify an award of attorney's fees. Furthermore, 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. And, the practical effects of introducing such a factor into the attorney's fees analysis would simply be un-workable. For example, whose settlement offer is to be analyzed for reasonableness?

Just the defendants' offer? Or is the unreasonableness of a plaintiff's offer also to be taken into consideration?

By misconstruing the Court of Appeal's analysis, Plaintiff fails to convince this Court that §12965(b) has not been impermissibly expanded to allow a party's failure to settle to serve as a predominate factor for awarding attorney's fees against it. Accordingly, this Court should grant review.

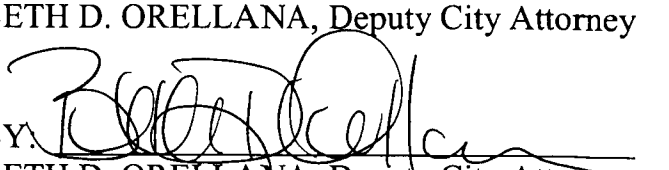
## III. CONCLUSION

For all the foregoing reasons, this Court should grant review and answer in the negative each of the issues presented in the Petition for Review.

DATED: May 2, 2008

RESPECTFULLY SUBMITTED:

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

BY: 
BETH D. ORELLANA, Deputy City Attorney

Attorneys for Petitioners CITY OF LOS ANGELES, GLENN KREJCI, PAUL VON LUTZOW and HARLAN WARD

## 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 Reply Brief re Petition for Review was produced using 13-point Times New Roman font (including footnotes) and contains 1,863 words, as counted by the Microsoft Word word-processing system used to generate the brief.

DATED: May 2, 2008

RESPECTFULLY SUBMITTED:

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BY: 
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Attorneys for Petitioners CITY OF LOS ANGELES, GLENN KREJCI, PAUL VON LUTZOW and HARLAN WARD

## PROOF OF SERVICE

I, WENDY HIGHTOWER, declare as follows:

I am over the age of 18 years and am not a party to this action. My business address is 200 North Main Street, 700 City Hall East, Los Angeles, California, 90012, which is located in the county where the service described below took place.

On May 2, 2008 I served the foregoing document, described as **REPLY BRIEF RE PETITION FOR REVIEW**, on all interested parties as follows:

**[XX] BY MAIL** - I served the foregoing document by placing a true copy thereof in sealed envelopes and caused such envelopes to be deposited in the mail at Los Angeles, California, with first class postage thereon fully prepaid, to the addressees listed below. I am readily familiar with this Office's business practice for collection and processing of correspondence for mailing. Under that practice, mailing is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation or postage meter date is more than one (1) day after the date of deposit for mailing affidavit. The addressees so served are as follows:

[Attorneys for Plaintiff/Appellant]
Rochelle Evans Jackson, Esq.
Law Office of Rochelle Evans Jackson
333 City Boulevard West, 17th Floor
Orange, CA 92868

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

**[XX] BY PERSONAL SERVICE** - ( ) I delivered by hand or (**XX**) I caused to be delivered said document, via messenger service with delivery time prior to 5:00 p.m. on the date specified above, to the office of the following addressee:

Clerk of the California Supreme Court
Los Angeles Office
Ronald Reagan Bldg., 2nd Floor
300 South Spring Street
Los Angeles, CA 90013

I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 2, 2008, at Los Angeles, California.

Wendy Hightower
WENDY HIGHTOWER