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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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TROY BETTENHAUSEN et al.,

Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY,

Defendant and Appellant.

C071978

(Super. Ct. No.  
34201000079192CUBCGDS)

Defendant Ford Motor Company (Ford) appeals from an order awarding plaintiffs Troy and Jennifer Bettenhausen (collectively Bettenhausen) attorney fees. Ford orally opposed the fees motion, without success. Then it filed this appeal, depriving the trial court of jurisdiction to consider its motion to vacate the order. We shall affirm the postjudgment order awarding fees.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Bettenhausen sued Ford under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.), popularly known as California’s “lemon law.”

The jury found in favor of Bettenhausen and awarded \$50,574.19 in damages. On May 3, 2012, judgment on the verdict was entered.

Bettenhausen filed a timely memorandum of costs. Ford moved to tax, in part arguing Bettenhausen’s counsel was in San Diego, resulting in excessive travel costs. Bettenhausen defended the costs in detail.

Bettenhausen timely moved for attorney fees as follows:

Attorney hours times customary rates:	\$263,492.50
Fees anticipated for litigating fees:	5,000.00
A “multiplier” of “.3”	79,047.75
Recoverable costs and expenses:	<u>43,892.97</u>
Total:	\$391,433.22

Ford did not file a written opposition. The trial court granted the motion, except as to the duplicative request for costs and fees sought for litigating fees, awarding \$342,540.25, representing 844.3 hours of work at reasonable hourly rates (\$263,492.50), as requested, plus a 0.3 multiplier (\$79,047.75), again, as requested.

The minute order dated July 20, 2012, notes Ford’s prior counsel had moved to continue the hearing so he could file an opposition, and continues: “The Court asked [Ford’s] counsel to orally outline his objections. Thereafter the matter was argued and submitted. After hearing oral argument the Court confirmed the Tentative Ruling.”

On September 5, 2012, Ford--represented by new counsel--appealed from the fee award. On September 12, 2012, Ford moved the trial court to vacate that award. The declaration by Ford’s former counsel’s asserted he had prepared written opposition to the motion for fees, knew when it was due, left on vacation, but his secretary did not file it. He appeared by telephone, sought a continuance, and, when that was denied, “did the best [he] could . . . .”

Bettenhausen opposed the motion to vacate on several grounds, including that the filing of the notice of appeal divested the trial court of jurisdiction to consider it.

The trial court denied the motion to vacate the fee award, due to lack of jurisdiction, citing Code of Civil Procedure section 916.<sup>1</sup> No separate attack on that ruling, by way of purported appeal or mandate petition, was filed.

### DISCUSSION

Ford attacks the fee award on several grounds, claiming the trial court erroneously calculated the lodestar amount, the application of a multiplier was improper, and postjudgment litigation did not warrant a multiplier.

We presume court orders are correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

As the appellant, Ford bore the burden to provide a record supporting its claims of error. “To the extent the record is incomplete, we construe it against [Ford].” (*Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 498.)

There is no reporter’s transcript of the hearing on the motion for attorney fees, and Ford’s objections were not detailed in the minute order. However, in denying the motion to vacate, the trial court placed on the record its memory that the oral objections to the attorney fees were that they were unreasonable because of excessive travel due to Bettenhausen’s counsel’s location in San Diego, and “[t]hat was an argument that was considered by this Court in the cost motion and was rejected. So Ford did proffer that same argument when given the invitation to do so, and the Court then said, well, the analysis of that issue is the same, and ruled as it did. [¶] So Ford has had its opportunity. The fact that it neglected to file written opposition does not deprive Ford of a chance to

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<sup>1</sup> Undesignated statutory references are to the Code of Civil Procedure.

be heard, because Ford in fact was heard.” Ford’s counsel did not dispute the trial court’s recollection.

Assuming any *other* objections had been raised, it was Ford’s duty (as the appellant) to provide a settled statement to support its appellate claims. “It is the burden of the party challenging the fee award on appeal to provide an adequate record to assess error. [Citations.] Here, defendants should have augmented the record with a settled statement of the proceeding. [Citations.] Because they failed to furnish an adequate record of the attorney fee proceedings, defendants’ claim must be resolved against them.” (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

Ford points to the rule that any order that may be appealed is deemed “excepted to” as set forth in section 647. Ford seems to confuse appealability with reviewability. The purpose of section 647 was to eliminate the former cumbersome process requiring formal “exceptions” to be made to preserve issues for appeal, not to relieve parties of the need to make proper objections in the trial court, to seek review of adverse rulings. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 403, pp. 460-461 [“The party is protected if he or she objects at the time of the ruling, etc., or makes a timely attack thereafter by motion”].)

As the trial court recognized, because Ford filed its notice of appeal *before* filing the motion to vacate, the trial court had no jurisdiction to consider the motion to vacate. With exceptions not here relevant, “the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.” (§ 916, subd. (a); see *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196-198.) Therefore, an order vacating the attorney fee award would have been “deemed a nullity.” (*Kinard v. Jordan* (1917) 175 Cal. 13, 16.)

Thus, to the extent Ford raises issues on appeal that were not shown to have been raised below we must assume Ford is improperly raising new theories. “A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.” (*Ernst v. Searle* (1933) 218 Cal. 233, 240-241.) “There are exceptions but the general rule is especially true when the theory newly presented involves controverted questions of fact or mixed questions of law and fact. If a question of law only is presented on the facts appearing in the record the change in theory may be permitted.” (*Panopoulos v. Maderis* (1956) 47 Cal.2d 337, 341.)

The reasonableness of attorney fees, including the hourly rate, number of hours spent, and lodestar, which may be “adjusted” to arrive at a fair market value, are *factual questions* committed to the “broad authority” of the trial court. (*PCLM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096 [contractual fee case].) Ford largely raises factual attacks not shown to have been presented to the trial court, and therefore runs afoul of settled appellate rules.

As Bettenhausen pointed out, Ford initially appeared in its briefing to argue the purely legal claim that lodestar multipliers are not available in lemon law fee awards. That claim is belied by the authority Ford cites. (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 818- 822 (*Robertson*), partly discussing *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1136 (*Ketchum*).) At oral argument, Ford clarified that its purely legal claim is that the trial court erred in failing to set forth *in its ruling* its specific analysis supporting its calculation of the lodestar amount and application of the multiplier. Ford candidly admitted during oral argument that it was aware of no legal authority supporting this claim of error, and we know of none. (Cf. *Quail Lakes Homeowners Assn. v. Kozina* (2012) 204 Cal.App.4th 1132, 1140 [trial court need not state on the record Evid. Code, § 352 factors weighed in determining whether evidence is unduly prejudicial].)

Ford also argues that an attorney's hourly rate cannot be increased due to the risk of the litigation, and increased again by a multiplier based on that same risk (*Ketchum, supra*, 24 Cal.4th at pp. 1138-1139; *Robertson, supra*, 144 Cal.App.4th at p. 822), though this theory was not raised in Ford's unfiled opposition. Ford points to a passage of the fees motion, under a heading regarding hourly rates, explaining the contingent nature of lemon law cases to justify higher "compensation," although the motion also sought a multiplier, citing *Ketchum, supra*, 24 Cal.4th 1122. This stray passage--perhaps ill-placed as Bettenhausen concedes--does not mean Bettenhausen double-counted risk in fixing the *hourly rate* and then seeking a *multiplier*, in defiance of precedent cited by Bettenhausen and by the trial court. The hourly rate was supported by declarations showing local lemon law attorneys charged similar rates. That sufficed to show the proper hourly rate, unrelated to the risk of litigation.

Finally, Ford argues the trial court wrongly applied the multiplier to litigation over costs and fees, pointing to documents related to the motion to vacate the judgment. This factual claim is forfeited for lack of objection in the trial court.

In short, we find no basis to disturb the order granting attorney fees.

Ford does not contest Bettenhausen's right to reasonable attorney fees to defend this appeal. We shall remand for the trial court to calculate those fees.

**DISPOSITION**

The order awarding attorney fees is affirmed. Ford shall pay Bettenhausen's costs of this appeal. (Cal. Rules of Court, rule 8.278.) The cause is remanded for the trial court to determine the reasonable attorney fees incurred by Bettenhausen on appeal.

DUARTE, J.

We concur:

HULL, Acting P. J.

MAURO, J.