

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION TWO

CINDY RIVAS,

Plaintiff, Cross-defendant and
Respondent,

v.

ALTAWOOD, INC.,

Defendant, Cross-complainant and
Appellant.

E049597

(Super.Ct.No. RCVRS102218)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. David A. Williams,
Judge. Affirmed.

The NT Entertainment Law Group, Julie N. Nong and Quynn N. Ton for
Defendant, Cross-complainant and Appellant.

Gould & Associates, Michael A. Gould, Aarin A. Zeif; Law Offices of Richard A.
Jones and Richard A. Jones for Plaintiff, Cross-defendant and Respondent.

I. INTRODUCTION

A jury found in favor of plaintiff, cross-defendant, and respondent Cindy Rivas on her first amended complaint (FAC) against her former employer, defendant, cross-complainant, and appellant Altawood, Inc. (Altawood), for unlawful employment discrimination based on sex in violation of the Fair Employment and Housing Act (the FEHA). (Gov. Code, §§ 12900-12966.)¹ Altawood, a paint manufacturer, employed Rivas as a bookkeeper from February 2006 through November 26, 2006. The FAC alleged that Altawood terminated Rivas’s employment “because of her sex and/or pregnancy.”

In a special verdict, the jury found that (1) Rivas was employed by Altawood, (2) Altawood discharged Rivas from her employment based on her pregnancy, (3) Altawood acted with malice, oppression, and fraud, and (4) Altawood was liable to Rivas for \$82,777 in damages.² The trial court entered judgment in favor of Rivas on the special verdict. Altawood appeals from the judgment and postjudgment orders denying its motions for judgment notwithstanding the verdict and to set aside the judgment as void.³

¹ All further statutory references are to the Government Code unless otherwise indicated.

² The \$82,777 damages award consisted of economic damages of \$20,277, noneconomic damages of \$35,500 and punitive damages of \$27,000.

³ The record does not contain a reporter’s transcript of the jury trial, but contains reporter’s transcripts of the hearings on various pretrial and posttrial motions.

Altawood claims the trial court abused its discretion in granting Rivas leave to file the FAC because, as a matter of law, her claim that she was terminated based on her sex in violation of the FEHA was time-barred; Rivas failed to exhaust her administrative remedies with the Department of Fair Employment and Housing (the DFEH); and the FAC was a “sham pleading.” Altawood also claims that a writ of execution on the judgment in the amount of \$286,612.50 must be set aside because it included an amount for Rivas’s attorney fees after the trial court vacated the order awarding the fees.

We reject these claims. We conclude that Rivas’s claim that Altawood terminated her in violation of the FEHA “because of her pregnancy or based on sex,” was not time-barred because the allegations related back to Rivas’s original complaint, Rivas exhausted her administrative remedies concerning the claim, and the court did not abuse its discretion in granting Rivas leave to file the FAC. The validity of the writ of execution is not before this court because Altawood did not move to quash the writ in the trial court, and hence did not appeal from any postjudgment order denying any motion to quash the writ. We therefore affirm the judgment in its entirety.

II. RELEVANT BACKGROUND

A. *Overview of the FEHA and the California Family Rights Act*

Section 12940 of the FEHA provides it is an unlawful employment practice for an employer to discharge an employee based on “sex,” among other things. (§ 12940, subd. (a).) The FEHA defines “sex” as including, but not limited to, “pregnancy, childbirth, or medical conditions related to pregnancy or childbirth” (§ 12926, subd. (p)), and applies to

employers who regularly employ five or more persons (§ 12926, subd. (d)). Section 12940 of the FEHA thus prohibits an employer from discharging an employee based on sex, pregnancy, or medical conditions related to pregnancy or childbirth. A civil suit alleging a FEHA violation must be filed within one year of the date the DFEH issues a right to sue notice on the alleged violation. (§ 12960, subd. (d).)

The California Family Rights Act (CFRA) (Gov. Code, § 12945 et seq.), which is part of the FEHA, applies only to employers who regularly employ 50 or more employees within 75 miles of the worksite where the covered employee is employed (Gov. Code, § 12945.2, subd. (b)). The CFRA prohibits an employer from refusing to grant a request by an employee to take up to 12 workweeks in any 12-month period for “family care and medical leave,” provided the employee has at least “12 months of service with the employer,” and “at least 1,250 hours of service with the employer during the previous 12-month period.” (Gov. Code, § 12945.2, subd. (a).) “Family care and medical leave” includes “[l]eave for reason of the birth of a child.” (Gov. Code, § 12945.2, subd. (c)(3)(A).) After the employee has taken family care or medical leave, the employer must return the employee to the same position unless the position no longer exists because of a plant closure or unless each means of preserving the position would undermine the employer’s ability to operate its business safely and efficiently. (Gov. Code, § 12945.2, subd. (a); Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1)(A)-(B).)

B. Rivas's Allegations of Sex and/or Pregnancy Discrimination

On January 12, 2007, Rivas filed an administrative complaint with the DFEH alleging that her employer, Altawood, “fired” her on November 26, 2006, because she was pregnant. Shortly thereafter, on January 16, the DFEH issued a right to sue notice on the claim.

On March 20, 2007, Rivas filed her original civil complaint against Altawood, alleging a first cause of action for “unlawful discrimination based on childbirth” in violation of the CFRA, and a second cause of action for wrongful termination in violation of public policy. In her original complaint, Rivas alleged that Altawood hired her around February 2006 and terminated her on November 26, 2006, “due to her pregnancy.”

In March 2008, Altawood moved for judgment on the pleadings on the ground the original complaint failed to state a cause of action and was ambiguous and unintelligible. (Code Civ. Proc., § 438.) As pertinent, Altawood argued that as a matter of law Rivas was not entitled to request or take leave under the CFRA because, in her complaint, she admitted she worked for Altawood for less than one year, Altawood did not have at least 50 employees, and Rivas did not allege she gave Altawood timely or reasonable notice of her right to take leave under the CFRA. Altawood also argued that Rivas should be denied leave to amend to allege a new or different cause of action for violation of the FEHA, because no such claims were set forth in her administrative complaint, and were barred.

In response to Altawood's motion for judgment on the pleadings, Rivas filed a motion for leave to file the FAC, claiming her original complaint erroneously referred to the "CFRA" when it should have referred to the "FEHA," even though it correctly referred to the statute allegedly violated, namely, section 12940 of the FEHA. Accordingly, Rivas requested leave to file the FAC to "amend a typographical error" in her first cause of action.

In her FAC, Rivas repeated the allegations of her original complaint that when the owner of the company discovered she was pregnant, he would complain to her, telling her she was slow because she was pregnant; and that coworkers told her the owner was going to fire her because she was pregnant. By contrast to her original complaint, however, Rivas did not allege she had been denied pregnancy leave, had taken pregnancy leave, or that when she returned from pregnancy leave Altawood "illegally fired" her by failing to provide her with the same or a comparable job. Instead, Rivas simply alleged she was fired on November 26, 2006, "because of her sex and/or pregnancy."

In opposition to Altawood's motion for judgment on the pleadings, which Rivas filed after filing her motion for leave to file the FAC, Rivas argued she was not alleging in the FAC that Altawood denied her pregnancy leave in violation of the CFRA, but was instead alleging that Altawood had fired her because of her pregnancy in violation of the FEHA. Rivas also argued that the filing of the FAC would not prejudice Altawood because it had not conducted any discovery on her original complaint. On the same date,

the trial court denied Altawood's motion for judgment on the pleadings and granted Rivas leave to file the FAC.

The FAC was filed on May 5, 2008. Thereafter, Altawood filed several motions claiming that Rivas's first cause of action alleging she was unlawfully discriminated against or discharged in violation of the FEHA based on sex was time-barred, and that Rivas failed to exhaust her administrative remedies concerning the claim. These included a demurrer to the FAC, a motion for summary judgment, a motion in limine to exclude evidence of discrimination based on pregnancy, and a motion for new trial. The demurrer was overruled and the other motions were denied. The jury was not instructed on Rivas's common law cause of action for wrongful termination in violation of public policy.

III. DISCUSSION

A. The FAC Was Not Time-barred, and Leave to File the FAC Was Properly Granted

Altawood claims the trial court erroneously granted Rivas leave to file the FAC because its first cause of action for unlawful employment discrimination or termination based on sex in violation of the FEHA was time-barred as a matter of law. (§ 12965, subd. (d).) As Altawood points out, the FAC was filed on May 8, 2008, more than one year after the DFEH issued the right to sue notice on January 16, 2007.

For her part, Rivas argues that the allegations of the FAC were not time-barred because they were based on the same general set of facts as her original complaint, and therefore "related back" to its filing on March 20, 2007. Thus, Rivas argues, the FAC was not time-barred as a matter of law. We agree with Rivas.

1. The Relation Back Doctrine

A complaint may be amended to state a new cause of action after the limitations period has run, provided the complaint seeks recovery based “on the same general set of facts” as those alleged in the original complaint. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600.) “A new cause of action rests upon the same set of facts when it involves the same accident and the same offending instrumentality.” (*Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal.App.3d 1085, 1094.)

In other words, “[t]he relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one. [Citations.]” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409.) The relation back doctrine thus focuses on the similarity of the factual allegations in the original and amended pleadings, rather than on the rights or obligations arising from the allegations. (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 266.)

2. As a Matter of Law, the FAC Was Not Time-barred

The first cause of action of the FAC alleged that Rivas was terminated “because of pregnancy or based on sex.” Similarly, the original complaint alleged that Rivas was terminated “because she was pregnant.” Additionally, both the FAC and the original complaint alleged that Rivas was terminated on November 26, 2006, by Manuel Pedraza; when the owner of Altawood discovered Rivas was pregnant, “he would complain to her telling her she was slow because she was pregnant”; and coworkers had told Rivas that

the owner was going to fire her because she was pregnant. Both complaints also sought damages for the same injury, namely, Rivas's termination from her employment, and attorney fees and costs, all according to proof.

Accordingly, the FAC was based on the same general set of facts, the same injury, and the same offending instrumentality alleged in the original complaint (*Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at pp. 408-409), namely, that Altawood terminated Rivas on November 26, 2006, due to her pregnancy, causing her damages. The key allegation of both pleadings was that Altawood terminated Rivas due to her pregnancy, and that her termination caused her damages. The allegations of the FAC thus related back to the original complaint, and Rivas's cause of action for employment discrimination based on sex in violation of the FEHA, alleged in the FAC, was not barred by the one-year limitations period of section 12960, subdivision (d).

Altawood points out that the original complaint indicated that Altawood violated the CFRA either by denying Rivas 12 weeks of pregnancy leave, or "by failing to provide Rivas with the same or a comparable job at the conclusion of the twelve (12) week leave period," but these allegations do not appear in the FAC. The original complaint also alleged that Altawood regularly employed more than 50 employees, a requirement for the application of the CFRA (§ 12945.2), while the FAC alleged that Altawood regularly employed five or more persons, a requirement for application of section 12940 of the FEHA.

We disagree that these variations in the allegations of the two pleadings mean that the FAC did not relate back to the original complaint. Despite the original complaint's reference to the "CFRA," it specifically alleged that Altawood violated section 12940, subdivision (a), by terminating Rivas due to her pregnancy. Likewise, the FAC alleged that Altawood terminated Rivas "because of her sex and/or pregnancy." As indicated, the relation back doctrine focuses on the factual similarity of the allegations of the amended and original pleadings, not on the cause or causes of action alleged to arise from those allegations. (*Dudley v. Department of Transportation, supra*, 90 Cal.App.4th at p. 266.) The original complaint's reference to the CFRA does not detract from the substantially similar factual allegations of the original complaint and the FAC.

Kim v. Regents of University of California (2000) 80 Cal.App.4th 160 does not assist Altawood's argument. There, the plaintiff filed an amended complaint alleging a new cause of action for age discrimination, but her original complaint contained no allegations indicating she was terminated based on her age. (*Id.* at pp. 168-169.) The court thus concluded that the age discrimination claim did not relate back to the original complaint, and was time-barred. (*Id.* at p. 169.) Here, by contrast, both the original complaint and the FAC alleged that Altawood terminated Rivas based on her pregnancy in violation of section 12940, subdivision (a). Unlike the amended complaint in *Kim*, the FAC did not allege a new cause of action based on new or additional facts not alleged in the original complaint.

Altawood notes that the trial court, in its minute order granting Rivas leave to file the FAC, did not expressly find that the FAC related back to the original complaint. This does not mean that leave to file the FAC was erroneously granted, as Altawood suggests—without citing any supporting authority. As Rivas points out, a court must deny a motion for leave to amend a complaint to add a new cause of action when the limitations period for alleging the new cause of action has expired, *unless* the amended complaint relates back to the original complaint. (*Austin v. Massachusetts Bonding & Insurance Co.*, *supra*, 56 Cal.2d at pp. 599-600.) In granting leave to file the FAC, the trial court implicitly, necessarily, and correctly concluded that the FAC related back to the original complaint.

3. The FAC Was Not a “Sham,” and Leave to File It Was Properly Granted

Altawood also claims the trial court abused its discretion in granting Rivas leave to file the FAC on the ground its allegations were a “sham,” or designed to avoid defective allegations in the original complaint. We disagree.

Altawood invokes the rule that “‘where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them[, t]he court may examine the prior complaint to ascertain whether the amended complaint is merely a sham.’ [Citation.] The rationale for this rule is obvious. ‘A pleader may not attempt to breathe life into a complaint by omitting relevant facts which made his previous complaint defective.’ [Citation.] Moreover, any inconsistencies with prior pleadings must be explained; if the

pleader fails to do so, the court may disregard the inconsistent allegations. [Citation.]”
(*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.)

Altawood argues that Rivas never explained why she alleged in her original complaint that she was denied 12 weeks’ pregnancy leave, when her FAC dropped that allegation and alleged only that she was terminated due to her pregnancy. There was, however, no need to explain the pregnancy leave allegations because these allegations were entirely consistent with the FAC’s key allegation that Rivas was fired due to her pregnancy. Indeed, the key allegation of *both pleadings* was that Rivas was terminated due to her pregnancy. Thus, there was no need to hide or ignore the pregnancy leave allegations in order to “breathe life” into the FAC’s allegation that Rivas was fired due to her pregnancy *in violation of section 12940, subdivision (a) of the FEHA*.

Indeed, the key difference between the two pleadings was not factual; it was legal. The original complaint alleged that Rivas was denied pregnancy leave *and* terminated due to her pregnancy in violation of the CFRA, while the FAC dropped the pregnancy leave allegations and alleged *only* that Rivas was terminated due to her pregnancy in violation of section 12940, subdivision (a) of the FEHA. In this context, the prior pregnancy leave allegations were superfluous to but consistent with the allegations of the FAC.

B. Rivas Exhausted Her Administrative Remedies Regarding Her Claim for Wrongful Termination Based on Sex or, More Specifically, Pregnancy

Altawood also claims that Rivas’s claim for wrongful termination based on sex in violation of the FEHA was barred as a matter of law because she failed to exhaust her administrative remedies regarding the claim. We disagree.

Before a plaintiff may bring a civil action for a FEHA violation, he or she must first exhaust his or her administrative remedies by filing a verified complaint with the DFEH, setting forth the factual basis of the alleged violation or the “particular act made unlawful by the [FEHA].” (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724; § 12960, subd. (b)).⁴ The administrative complaint must be filed with the DFEH within one year of the date the alleged violation occurred, subject to exceptions not applicable here (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492; § 12960, subd. (d)), and the plaintiff must obtain a “right to sue notice” from the DFEH before filing a civil complaint on the alleged violation (*Blum v. Superior Court* (2006) 141 Cal.App.4th 418, 422; § 12965, subd. (b)).⁵

⁴ Section 12960, subdivision (b) provides, in pertinent part: “Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, . . . *that shall set forth the particulars thereof* and contain other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign, and file a complaint.” (Italics added.)

⁵ The exhaustion requirement “serves the important policy interests embodied in the [FEHA] of resolving disputes and eliminating unlawful employment practices by conciliation [citation], as well as the salutary goals of easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order

[footnote continued on next page]

On January 12, 2007, Rivas filed a verified administrative complaint with the DFEH, alleging that Altawood “fired” her on November 26, 2006 due to her “pregnancy.” A right to sue notice was issued on January 16, 2007. The administrative complaint contained several preprinted lines next to preprinted words, allowing Rivas to indicate the reason or reasons she was fired. As Altawood points out, Rivas did not check the line next to the word “sex,” but instead checked the line next the word to “other,” and specified she was fired due to her “pregnancy.” The administrative complaint also stated: “I was fired for my pregnancy.” Rivas did not amend the administrative complaint to allege she was fired due to her “sex” as opposed to her “pregnancy” within one year of November 26, 2006, the date the alleged unlawful employment practice or termination occurred.

Altawood argues that the administrative complaint failed to exhaust Rivas’s administrative remedies concerning her claim that she was wrongfully terminated based on her *sex* in violation of the FEHA, because it did not allege she was fired based on her sex but instead alleged she was fired based on her pregnancy. As indicated, however, the FEHA provides it is an unlawful employment practice for an employer to discharge an employee based on “sex” (§ 12940, subd. (a)), and defines “sex” as including “pregnancy, childbirth, or medical conditions related to pregnancy or childbirth”

[footnote continued from previous page]

and monitor corrective measures, and providing a more economical and less formal means of resolving the dispute [citation].” (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 83; see also *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613, 1617; § 12930 [listing functions, powers, and duties of the DFEH].)

(§ 12926, subd. (p)). Thus, by alleging she was terminated due to her pregnancy, Rivas effectively alleged she was terminated due to her sex. The administrative complaint was therefore sufficient to exhaust Rivas's remedies concerning her claim that she was unlawfully terminated based on sex in violation of the FEHA.

By contrast, *Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116 involved an administrative complaint that alleged a hospital engaged in gender discrimination based on unequal pay, but did not allege that the hospital or any other party had harassed the plaintiff based on her age (*id.* at pp. 1121-1123). Nor did the complaint allege a pattern of continuing discrimination or retaliation. (*Id.* at p. 1123.) The *Yurick* court concluded that the plaintiff did not exhaust her administrative remedies concerning her age harassment claim, which she alleged in her civil complaint, because the administrative complaint did not encompass the age harassment claim. (*Ibid.*) *Yurick* is distinguishable from the present case because Rivas's claim that she was terminated based on her pregnancy necessarily encompassed her claim, alleged in her FAC, that she was terminated based on her sex. (§§ 12940, 12926, subd. (p).)

Lastly, Altawood argues that Rivas failed to exhaust her administrative remedies because her administrative complaint was not filed against the proper party. The administrative complaint named "Altawood, Inc." as Rivas's employer. Altawood claims, however, that Rivas's employer was "Altaworld Staffing, Inc." or "Altaworld," not Altawood, Inc.

In support of its argument, Altawood points to various evidence in the appellant's appendix, including a federal W-2 (wage and tax statement), Altaworld's payroll register, and a "Waiver of Coverage" form signed by Rivas—all of which Altawood claims demonstrate as a matter of law that Altaworld was Rivas's employer. This claim bears little discussion. In its special verdict, the jury found that "Rivas [was] employed by Altawood, Inc.," and Altawood did not include a reporter's transcript of the jury trial proceedings in the record on appeal. The judgment is presumed correct, and Altawood's selective presentation of evidence to support its claim is insufficient to demonstrate otherwise. (See, e.g., *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) Nor is the issue of whether Altaworld was Rivas's employer a "pure question[] of law" which this court may determine based on undisputed facts. Indeed, the record shows that Herbert Gleicke, the sole shareholder of Altawood, admitted in his deposition that Rivas was employed by Altawood. Perhaps that and other evidence convinced the jury that Altawood was Rivas's employer.

C. The Validity of the July 9, 2010 Writ of Execution is Not Before This Court

Altawood claims that a \$286,612.50 writ of execution issued on July 9, 2010 is invalid because it included \$207,486 in attorney fees, without an order or notice to Altawood that the court had awarded the attorney fees. As we explain, the validity of the writ is not properly before us.

1. Relevant Background

On July 23, 2009, the trial court heard and granted Rivas's postjudgment motion for attorney fees in the amount of \$207,486, after denying Altawood's motion to disqualify the trial judge, David A. Williams, from presiding over the motion for attorney fees and other posttrial motions. (Code Civ. Proc., § 170.1.) On August 5, 2009, this court ordered proceedings before Judge Williams stayed pending this court's determination of Altawood's petition for a writ of mandate, or further order of this court. On August 7, 2009, two days after the stay order was issued, an order granting Rivas's motion for \$207,486 in attorney fees was filed. On January 21, 2010, the trial court heard and granted Altawood's motion to set aside the August 7 order.

On February 3, 2010, the trial court signed and filed a written order stating: "Altawood, Inc.'s Motion to set aside the attorney fee order signed on 8/7/09 is GRANTED. The 8/7/09 attorney fee order was signed during a stay issued by the Appellate Court. The attorney's fees awarded in the amount of \$207,486.00 pursuant to Plaintiff's Motion for Attorney's Fees heard on July 23, 2009 has not been vacated. The Court will re[-]sign an order granting attorney's fees in the amount of \$207,486.00 when this Court has jurisdiction."

On February 8, 2010, this court issued an order stating: "Both Altawood, Inc. and Cindy Rivas have filed appeals from the August 7, 2009, order granting a motion for attorney's fees and both have acknowledged that that order has recently been vacated by the trial court. Consequently the appeals of both Altawood, Inc. and Cindy Rivas from

the August 7, 2009, order are DISMISSED. Cindy Rivas's request for a suspension of the appeal is DENIED. The trial court retains jurisdiction to award or tax costs, including attorney fees, after an appeal is taken. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 368-369.) Therefore, the jurisdiction of this court need not be suspended, as appellant Rivas suggests, in order that a new order granting attorney's fees be entered.

“If a new order granting attorney fees has been entered in this case before the date of this order, appellants may serve and file a file-stamped copy of the judgment or order and a motion to vacate the dismissal and reinstate the appeal with the clerk of this court, on or before 15 days following the date of this order. (See Cal. Rules of Court, rule 8.104(e).) Otherwise, a new notice of appeal should be filed once an appealable order has been entered in the trial court.”

On April 13, 2010, this court issued a partial remittitur regarding its February 8, 2010, order, which stated, in pertinent part: “[T]he original opinion or decision entered in the above entitled cause on February 08, 2010, and this opinion or decision has now become final as to Altawood's appeal from the July 23, 2009 order deemed as taken from the order filed August 7, 2009 for attorneys fees”

On May 10, 2010, the clerk of the superior court returned Rivas's proposed writ of execution on the judgment under cover of document titled “Notice of Return of Document(s),” stating: “Writ of Execution is returned by Court for the following reason(s): Amount does not match judgment amount. Please fix and resubmit.”

On June 25, 2010, the clerk of the superior court issued a document titled “Request for Further Action” to Judge Williams, stating the following: “Plaintiff submitted a writ [of execution] for \$299,902.90. Judgment shows that the amount is for \$82,777.00. They are stating that there was an order for attorney fees on 8/7/09 and that is why the judgment amount is \$299,902.90. There was an appeal filed and orders filed on the appeal and a partial remittitur. I am confused as to whether the attorney fees still stand. Please advise.”

On July 1, 2010, Judge Williams responded to the clerk’s request for further action by writing the following on the request form: “Court Order.” “Denied. [¶] They did get the big A.F. [¶] Ok to issue writ.” On July 9, 2010, the clerk issued a writ of execution in the amount of \$286,612.60. Apparently Rivas levied on the writ by placing a keeper in Altawood’s place of business and by filing a notice of lien in the present action.

2. Analysis

Altawood requests that this court “vacate” the July 9, 2010 writ of execution and “confirm” the trial court’s January 26, 2010, order vacating its August 7, 2009, order on the attorney fee award. In effect, Altawood asks this court to quash the writ of execution on the ground it was improperly issued without a written, served order directing the payment of the attorney fees.

As we explain, we agree that the writ was improperly issued, but the question of its validity is not before us. Thus, we make no order or disposition affecting the writ.

First, as Altawood points out, the trial court’s August 7, 2009, order granting Rivas \$207,486 in attorney fees was vacated, and no further order granting the fees was subsequently issued or mailed to Altawood. (Code Civ. Proc., § 664.5.)⁶ Accordingly, Altawood did not receive notice of entry of an order granting the attorney fees after the August 7 order was vacated.

Yet Altawood was entitled to such notice, because an order awarding attorney fees is an appealable order (*People v. Bhakta* (2008) 162 Cal.App.4th 973, 981; Code Civ. Proc., § 904.1, subd. (a)(2)) and the parties understood that any appeal of the attorney fee award—by either party—required entry of a new order awarding the fees. As this court stated in its February 8, 2010, order dismissing both parties’ appeals from the vacated August 7, 2009, order, “a new notice of appeal should be filed once an appealable order has been entered in the trial court.”

The trial court’s July 1, 2010, communication to the clerk of the superior court that it was “okay” to issue the writ of execution was not an order awarding the attorney fees. Nor was the communication served on Altawood. Before requesting the writ, Rivas should have requested that the court issue an order awarding the attorney fees and should have served that order on Altawood.

⁶ Under Code of Civil Procedure section 664.5, a judgment or order submitted for entry must be mailed to all parties who have appeared in the action, and the original notice of entry of the judgment or order must be filed with the court together with the proof of service. In other words, “[n]otice [of entry of judgment] must be in writing.” (*Tri-County Elevator Co. v. Superior Court* (1982) 135 Cal.App.3d 271, 276.)

Indeed, the issuance of the writ without an order awarding the fees violated the enforcement of judgments law. (Code Civ. Proc., § 699.010 et seq.) The law provides that a writ of execution “shall be issued by the clerk” “after entry of a money judgment.” (*Id.*, § 699.510, subd. (a).) The term “judgment” includes “order” (*id.*, § 680.230) and “money judgment” means “that part of a judgment that requires the payment of money” (*id.*, § 680.270; see also *Salveter v. Salveter* (1936) 11 Cal.App.2d 335, 337 [“It is a fundamental rule that a writ of execution must be founded upon a valid and subsisting judgment”]).

Simply put, the writ was improperly issued because there was no written, served, and appealable order directing the payment of attorney fees to support its \$286,612.50 sum. The writ ostensibly included a substantial portion, if not all, of the \$207,486 in attorney fees, because the judgment on the special verdict was only for \$82,777, and the clerk sought and obtained the trial judge’s “okay” to issue the writ on the fees.

Rivas argues that the issue of whether the writ of execution was properly issued or valid is moot because it expired 180 days after its issuance (Code Civ. Proc., § 699.510, subd. (a)); the July 23, 2009 minute order awarding the attorney fees is a valid order for purposes of the writ; and Altawood has waived the issue of whether the writ was properly issued because “[t]here is no evidence in the record that Altawood moved to quash the writ of execution in the Trial Court. Moreover, Altawood failed to appeal the issu[ance] of the writ of execution by the Trial Court.”

We agree that Altawood’s remedy was to move to quash the writ of execution in the trial court on the ground it was improperly issued without an order directing payment of the attorney fees. (See Eisenberg et al., Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2011) ¶¶ 6:612 to 6:616, pp. 6D-70 to 6D-71.) Altawood did not do this, however. Had Altawood made such a motion and had the trial court denied it, Altawood could have appealed from the order denying the motion, and this court could have reviewed *that* order. (Code Civ. Proc., § 904.1, subd. (a)(2).)

As it is, however, this court is without jurisdiction to “vacate” the writ or “confirm” the trial court’s order vacating its August 7, 2009, order directing payment of the attorney fees, as Altawood requests. Altawood has appealed only from the judgment and postjudgment orders denying its motions for judgment notwithstanding the verdict and to set aside the judgment as void. The judgment and appealed postjudgment orders do not encompass the question of the validity of the writ.

IV. DISPOSITION

The judgment is affirmed. Rivas shall recover her costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P.J.

RICHLI
J.