

**S263569**

Case No. \_\_\_\_\_

**IN THE SUPREME COURT OF CALIFORNIA**

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SIZE IT, LLC, and MICKEY SEGAL,

*Petitioners,*

v.

ASICS AMERICA CORPORATION, ASICS CORPORATION, KEVIN WULFF,  
KENJI SAKAI, MOTOI OYAMA, and KATSUMI KATO,

*Respondents.*

Appeal from the Court of Appeal of the State of California,  
Second Appellate District, Division Four  
Case No. B299184

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**PETITION FOR REVIEW OF COURT OF APPEAL DECISION**

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**GREENSPOON MARDER LLP**

\*JAMES H. TURKEN (SBN 89618)

James.Turken@gmlaw.com

MICHAEL J. DAILEY (SBN 301394)

Michael.Dailey@gmlaw.com

BLAKE L. OSBORN (SBN 271849)

Blake.Osborn@gmlaw.com

1875 Century Park East, Suite 1900

Los Angeles, California 90067

TEL: (323) 880-4520

FAX: (954) 771-9264

*Attorneys for Petitioners*

*Mickey Segal and Size It, LLC*

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## **ISSUES PRESENTED**

1) May a party recover costs for preparing multiple sets of trial exhibits and/or closing slides that were neither published to the jury nor used at trial?

2) May a party recover travel and hotel expenses associated with (i) week-long, in-person witness preparation sessions in foreign countries in advance of defending depositions, and (ii) multiple lawyers from the same firm attending the deposition while only one lawyer defends it?

3) May a party recover foreign-language interpreter costs for depositions and trial testimony when the witness testifies that he speaks and reads English with ease?

## **WHY REVIEW SHOULD BE GRANTED**

Review is necessary in this case to provide guidance to the lower courts and to resolve an existing California circuit split that concerns the recoverability of certain litigation costs as a matter of right by a prevailing party. Moreover, guidance is necessary with regard to what fees the trial court has authority to award in its discretion under the Code of Civil Procedure (“Code”) to a prevailing party.

At issue in the Court of Appeal’s *published* decision is whether or not certain costs are recoverable by a prevailing party under the Code. The

outcome of this matter will have significant consequences to litigants—especially plaintiffs who are adverse to deep-pocketed corporations with unlimited funds to drown plaintiffs with duplicative and unnecessary litigation tactics.

By affirming the trial court’s judgment that allowed the recovery of certain litigation costs, the Court of Appeal inherently approved litigation over-lawyering by shifting certain costs to plaintiffs and blessing those tactics and accommodations borne out of convenience rather than necessity, which are required by the Code.

Supreme Court review is needed to resolve the scope of these recoverable costs as a matter of right and put to rest the circuit split on this issue.

## **FACTUAL BACKGROUND**

### **I. Trial Court: Petitioners’ Motion to Tax Costs**

On March 14, 2019, Respondents submitted a costs bill totaling \$384,773.96. *See* Appellants’ Appendix of Exhibits in Support of Opening Brief (“AA”), Ex. 1 (Memorandum of Costs) at 1. Appellants moved to tax certain of the costs being sought by the Respondents, which was heard by the trial court on June 26, 2019. *See* AA, Ex. 5 (Notice of Ruling) at 131. The trial court taxed \$81,662.13 of Respondents’ costs. *See id.* at 134. These taxed costs included Respondents’ improperly high hotel costs for extravagant hotel stays in New York City. *See id.* at 134. They also included

impermissible discovery referee fees, which comprised the bulk of the taxed costs (\$76,424.13). *See id.* The trial court refused to tax Respondents' claimed costs associated with excess photocopying charges for exhibits not admitted during trial and a slide deck that was almost entirely excluded from being presented to the jury. *See id.; infra* at Legal Discussion § I. Moreover, the trial court refused to tax Respondents' costs associated with interpreter services required by Mr. Oyama, despite his testimony that he spoke and understood English. *See infra* at § Legal Discussion § III.

As result of this reversible error committed by the trial court, this appeal followed after entry of the Amended Judgment on July 15, 2019.

## **II. The Court of Appeal's Decision**

On June 15, 2020, the Court of Appeal affirmed the Superior Court's ruling in a published decision (the "Appellate Decision")<sup>1</sup> in three key respects. *First*, the Court of Appeal acknowledged the circuit split in the case law concerning the issue of whether litigants are entitled to recover photocopying fees associated with those exhibits that are not published to the jury. *See* Appellate Decision at 2, 5-6; *compare Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557-58 (requiring exhibits be "reasonably helpful to aid the trier of fact" and excluding costs of exhibits not used at trial) and *Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th

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<sup>1</sup> A copy is attached hereto as Exhibit A.

761, 775 (holding “fees are not authorized for exhibits not used at trial”) *with Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 364-65 (finding costs associated with unused exhibits awardable) and *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 856-57 (same). It also recognized that the Code of Civil Procedure, section 1033.5, subdivision (a)(13) expressly allowed for the recovery of certain costs associated with exhibit photocopies and the presentation of exhibits “if they were reasonably helpful to aid the trier of fact.” Appellate Decision at 5. However, the Court of Appeal, in effect, struck the limiting language of this subdivision—*i.e.*, the requirement that the exhibits be reasonably helpful to the trier of fact—by holding that the exhibits not used at trial and thus not helpful to the factfinder are nevertheless recoverable under the catchall provision located in section 1033.5, subdivision (c)(4). *See* Appellate Decision at 6.

*Second*, the Court of Appeal affirmed the Superior Court’s ruling that allowed Respondents to recover costs associated with multiple lawyers to fly across the country and around the world to not only defend depositions, but to prepare witnesses for the depositions in person. Yet again, the Court of Appeal rested on the catch-all provision in section 1033.5, subdivision (c)(4). *See* Appellate Decision at 10-11. This reasoning swallowed the general rule regarding recovery of these deposition travel costs and opened the floodgates to allow multiple lawyers to travel and attend the depositions—despite only one of them being allowed to object on the record on behalf of their client or

cross-examine the deponent.

*Third*, the Court of Appeal affirmed the Superior Court’s ruling that allowed Respondents to recover costs associated with the interpreter fees for Respondent Motoi Oyama, who testified at trial that he could speak and read English *with ease*. See Appellate Decision at 11-12.<sup>2</sup> In so doing, the Court of Appeal held that the Superior Court did not abuse its discretion when it found that these costs were recoverable despite that section 1033.5, subdivision (a)(3)(B) requires a finding that the witness “does not proficiently speak or understand the English language.” The Court of Appeal, therefore, enlarged this recoverable cost to now include those who speak English with ease, but would like an interpreter out of convenience.

No petition for rehearing with the Court of Appeal was filed.

### **LEGAL DISCUSSION**

#### **1. Costs For Photocopying and Slide Decks That Are Not Shown to the Jury Should Not Be Recoverable.**

The Code explicitly states that “[m]odels, the enlargements of exhibits and photocopies of exhibits, and the electronic presentation of exhibits, including costs of rental equipment and electronic formatting, may be allowed *if they were reasonably helpful to aid the trier of fact.*” See Civ. Proc. Code § 1033.5(a)(13) (emphasis added). This explicit limiting

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<sup>2</sup> Petitioners do not object to the portion of the Appellate Decision concerning Mr. Tamai’s interpreter costs, because unlike Mr. Oyama, it was not established that Mr. Tamai could understand English proficiently.

language demonstrates that this right to recovery is limited. Indeed, the Court of Appeal in *Seever v. Copley Press, Inc.* reasoned that “exhibits not used at trial” must be excluded because they “obviously could not have assisted the trier of fact.” *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557-58. Moreover, the *Seever* court held that these exhibit costs could not be pursued under section 1033.5, subdivision (c)(4) as an end run around that limitation expressly stated in the Code. *See id.* at 1559-60 (“Because the Legislature has expressly stated in then subdivision (a)(12) what is allowed (exhibits used at trial that are reasonably helpful) and implicitly what is not, the discretion granted in section 1033.5, subdivision (c)(4), to award costs for items not mentioned in section 1033.5 is simply inapplicable.”).

Here, there is no dispute that the vast majority of Respondents’ exhibits and closing slides were not shown to the jury—and thus were not helpful. Nevertheless, the Court of Appeal held that there should be an exception related to “complicated cases” that afford the trial judge more discretion. *See* Appellate Decision at 5-6. The Court of Appeal reasoned that exhibits had to be selected in advance so it was “difficult for even the most experienced trial lawyers to divine which exhibits and demonstratives will in fact be used.” *See id.* at 6. But this analysis misses the mark and ignores the

limitation that is expressly set forth in the Code, opting instead to rely on inapposite case law that is easily distinguishable.<sup>3</sup>

In its decision, the Court of Appeal waxes poetically about the efficiencies that would be saved if all of these unused items were “reasonably helpful to aid the trier of fact.” *See* Appellate Decision at 7. Yet it ignores the inefficiencies that are inherent in a bloated exhibit list that contains documents in duplicate and triplicate, especially where the parties often select exhibits by putting all of their deposition exhibits on and simply dividing up the remainder of the list (*e.g.*, Plaintiff uses 101-200; Defendant has 201-300). Needless to say, like in this case, the vast majority of marked exhibits were not used (or were duplicates appearing in both Plaintiffs’ and Defendants’ lists). From a policy perspective, it would be disastrous to incentivize litigants to now weaponize exhibit lists (and the costs associated with preparing them) rather than take a hard look at what evidence is actually needed and limit the recovery based on what evidence is reasonably needed to persuade the trier of fact. Moreover, using this rationale, if allowed to

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<sup>3</sup> The Court of Appeal relies primarily on a First District case that allowed the recovery of exhibit costs when plaintiff voluntarily dismissed the action on the first day of trial—and therefore none of the exhibits were shown to the jury. *See Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 364. The *Applegate* court found that its case was exceptional in its finding. But, unlike here, the lack of a trial precluded the judge from invoking subdivision (a)(13). *See id.* (noting that the trial exhibits “were not used only because the action was dismissed by the opposing party on the day of trial”).

stand, parties will start policing and objecting to the lengthy list of exhibits proffered by the other side on the eve of trial to avoid potential “prevailing party” costs, adding yet another contention to be discussed and time wasted by the Court deciding whether to chop an exhibit list as the result of a party’s objection to its length.

The Court of Appeal also appears to bless a party’s preparation of, but failure to use, the vast majority of closing-slide demonstratives (in this case, by Court order excluding such as irrelevant and highly prejudicial). It is, therefore, illogical for a party to successfully exclude offending closing slides from trial on the one hand, but then force that same party to now pay for the slides that even the Court agreed should not be published to the jury because they were so unhelpful and prejudicial. The notion that advanced preparation of the materials should be a factor given any weight is also irrelevant and should be disregarded. Trials do require advanced preparation in every aspect, and such helps with trial efficiency and efficacy. However, the Court of Appeal’s rationale would create a perverse incentive to litigants (especially those well-funded) to over prepare highly prejudicial, objectionable exhibits, slides and content that would never be shown to a jury in order to drive up recoverable costs. The same rationale would also allow a party to recover costs for exhibit copies made but never even used in connection with witnesses that were never called to the stand.

The Code is clear what are recoverable costs under section 1033.5, subdivision (a)(13), and Petitioners respectfully request that this Court reject the temptation to sweep in all of these categories of substantial costs under a theory that any advanced preparation is conceivably helpful to the trier of fact regardless of whether it was *actually used*. Contrary to the Court of Appeal’s assertions, discarded (or excluded) exhibits that clutter the cutting room floor do not promote “the more general concept of helpfulness in the form of efficiency in the trial.” *See* Appellate Decision at 8. Instead, they add to inefficiencies at trial, promote motions *in limine* to exclude evidence, and disincentivize attorneys from sitting down and focusing on exactly what they intend to use at trial.

Accordingly, Petitioners contend that the rationale as set forth in *Seever* should be adopted by the Supreme Court and exhibits, demonstratives, and related items under section 1033.5, subdivision (a)(13) be recoverable only if they are published to the jury.

2. **Costs For Travel Associated with Deposition Preparation In Advance of Depositions and Costs for Sending Multiple Lawyers to Merely Defend Depositions Should Not Be Recoverable.**

The Code provides that a party can recover costs associated with “travel expenses to attend depositions.” Civ. Proc. Code § 1033.5(a)(3)(C) (emphasis added). There is no express provision in the Code that allows for the recovery of expenses associated with traveling to various cities in advance to *prepare* for depositions—rather than to attend them.

Here, the Court of Appeal yet again reasoned that although the Code expressly limits this category of recovery (*i.e.*, travel fees to attend depositions), the trial court has the inherent authority to disregard this limitation under section 1033.5, subdivision (c)(4). *See* Appellate Decision at 9-10. In other words, the Court of Appeal is suggesting that Code of Civil Procedure section 1033.5, subdivisions (a)(1) – (16) are nothing more than helpful guideposts that can be overruled by the catch-all subdivision (c)(4). This rationale is flawed for two reasons.

*First*, the Code itself states that this catch-all should only be employed for items “not mentioned in *this section*.” Civ. Proc. Code § 1033.5(c)(4) (emphasis added). In this instance, costs associated with travel to attend depositions are recoverable and specifically mentioned. *See* Civ. Proc. Code § 1033.5(a)(3)(C). Thus, the Legislature expressly excluded travel not directly related to attendance at a deposition from the list of enumerated items that could fall within the catchall provision. Indeed, in this case, the travel at issue was to *different cities*.

*Second*, the Court of Appeal’s reasoning could allow a litigant to broaden any of the other categories listed in subdivisions (a)(1)-(16) in its memorandum of costs and hope that an unwitting opponent does not catch the issue in time before the memorandum becomes final. For example, a party could now assert that the court has discretion under subdivision (c)(4)

to award attorneys' fees even though the award of such fees were not authorized by contract, statute, or law as the Code requires.

The Court of Appeal also notes that there is no authority concerning the number of attorneys who are allowed to attend a deposition and seek recovery of travel expenses. *See* Appellate Decision at 10. Although the extravagant travel fees incurred by Respondents were struck by the trial court out of hand, this Court should provide guidance as to whether a prevailing party can seek travel costs for more than one lawyer to attend these out-of-town depositions, especially when it is readily apparent that only one lawyer is permitted to object or cross-examine a deponent during a deposition. And here, Respondents were awarded their costs for depositions that occurred in Japan where only one senior partner handled and defended the depositions. There was no taking of any depositions, no cross-examinations, and no exhibits to bring by Respondents— which begs the question, why was it necessary for additional attorneys to be present?

Moreover, these costs must be balanced in light of subdivisions (c)(2) and (3) of Section 1033.5, which require the costs be necessary and reasonable rather than “merely convenient or beneficial” to a party. Because a second lawyer in attendance is not permitted to raise any objections or question a witness, it is readily apparent that their attendance is not reasonably necessary (especially when they could be appearing by phone or LiveNote stream, and communicating electronically with their colleague

physically present at the deposition, which is often the method employed when both individuals are in the same deposition room).

As a result, the Court should strike these additional costs associated with the deposition travel preparations and costs associated with multiple lawyers attending the depositions.

**3. Interpreter Fees Should Not Be Awarded to Parties who Can Speak English with Ease.**

The Code allows for the recovery of interpreter fees only in two discrete instances: (i) “fees of a certified or registered interpreter for the *deposition* of a party or witness who does not proficiently speak or understand the English language,” and (ii) “Court interpreter fees for a qualified court interpreter authorized by the court for an indigent person. . . .”. *See* Civ. Proc. Code § 1033.5(a)(3)(B) & (a)(12) (emphasis added). Here, the Court of Appeal allowed Respondent Oyama to recover interpreter fees for both his deposition and trial despite never finding either discrete instance met.

*First*, Mr. Oyama is the Chief Executive Officer of ASICS Corporation, and the record is clear that Mr. Oyama spoke and wrote English *with ease*. *See* Appellate Decision at 13. Further, Respondents never made the required showing that he “did not proficiently speak or understand the English language.” *See* Civ. Proc. Code § 1033.5(a)(3)(B). Indeed, Mr. Oyama’s own trial testimony directly refuted these points and Respondents have merely illustrated that he uses an interpreter out of convenience. *See* Appellate Decision at 12-13. As a result, the trial court did not have authority

to allow him to recover his interpreter fees under section 1033.5, subdivision (a)(3)(B), and the Court of Appeal should not have affirmed such a decision.

*Second*, the Court of Appeal also erred by granting Mr. Oyama his trial interpreter fees because he did not make the required showing under Section 1033.5, subdivision (a)(12). Moreover, the Court did not have discretion to waive the requirements set forth in subdivision (a)(12), which mandates that he be indigent and represented by a pro bono attorney for these fees to be recovered. As the court cautioned in *Seever*, the Legislature implicitly limited under what circumstances interpreter fees are recoverable. Therefore, the Court did not have discretion to enlarge these categories that were thoughtfully considered by the Legislature. *See Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1559-60.

The Court of Appeal also cast aside the Code's requirement that these interpreter fees be reasonable. *See* Appellate Decision at 13-14, fn. 2. However, any such costs "*shall* be reasonable in amount." Civ. Proc. Code § 1033.5(c)(2) & (3). The Legislature mandated that this is not optional. Here, Respondents have not made the requisite showing that these fees, totaling tens-of-thousands of dollars were reasonable because his testimony lasted no more than three days total.<sup>4</sup>

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<sup>4</sup> Petitioners did not seek expert testimony on this point for purposes of the cost motion, but the amount of these fees incurred illustrates that the trial court abandoned its gatekeeping function and allowed these extravagant fees to stand without any meaningful scrutiny.

As a result, the Court should disallow Mr. Oyama from recovering his private interpreter fees for both his deposition and trial testimony.

**CONCLUSION**

For the reasons stated above, Petitioners respectfully request the Supreme Court grant this Petition for Review.

Dated: July 27, 2020

Respectfully submitted,

GREENSPOON MARDER LLP



By \_\_\_\_\_

James H. Turken  
Michael J. Dailey  
Blake L. Osborn  
Attorneys for Petitioners  
Size It, LLC and Mickey Segal

**CERTIFICATE OF COUNSEL**

I, Michael J. Dailey, counsel for Petitioners Size It, LLC and Mickey Segal hereby certifies that the Petition to which this certificate is attached contains 3185 words, as counted by the word processing system used to prepare it. This count is exclusive of the cover, tables of contents and authorities, and this certificate.

Executed on July 27, 2020, at Los Angeles, California.



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Michael J. Dailey

# **EXHIBIT A**

CERTIFIED FOR PUBLICATION  
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR

COURT OF APPEAL – SECOND DIST.

FILED

Jun 15, 2020

DANIEL P. POTTER, Clerk

Los Angeles County S. Veverka Deputy Clerk

Super. Ct. No. BC597769

MICKEY SEGAL and SIZE IT,  
LLC,

Plaintiffs and Appellants,

v.

ASICS AMERICA  
CORPORATION, ASICS  
CORPORATION, KEVIN WULFF,  
KENJI SAKAI, MOTOI OYAMA,  
and KATSUMI KATO

Defendants and Respondents.

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Greenspoon Marder, James H. Turken and Rebecca Lawlor Calkins for Plaintiffs and Appellants.

Sidley Austin, Jack S. Yeh, David R. Carpenter, Alexis Miller Buese, Collin P. Wedel, and Rara Kang for Defendants and Respondents.

## INTRODUCTION

Plaintiffs and appellants Mickey Segal and Size It, LLC (collectively, Size It) appeal from the trial court's order granting in part and denying in part their motion to tax costs. Size It contends the trial court erred by refusing to tax costs associated with: (1) photocopies of exhibits and the creation of closing argument demonstratives; (2) travel expenses for defense counsel to attend the depositions of defendants Motoi Oyama and Katsumi Kato, as well as fact witness Shiro Tamai, which were taken in Japan; and (3) interpreter fees for Oyama's and Tamai's depositions, as well as Oyama's trial testimony.

We conclude Size It has not shown the trial court abused its discretion. Accordingly, we affirm. We acknowledge a split in authority over whether costs incurred in preparing models, blowups, and photocopies of exhibits not used at trial may be awarded under Code of Civil Procedure<sup>1</sup> section 1033.5, subdivision (a)(13). We publish to explain why we have concluded they may and include our pragmatic take on why having well-prepared counsel is "reasonably helpful to aid the trier of fact"—the test for cost recovery under the statute.

## BACKGROUND

Size It brought an action for fraud against defendants and respondents ASICS America Corporation, ASICS Corporation, Kevin Wulff, Kenji Sakai, Oyama, and Kato (collectively, ASICS). Following a trial, the jury rendered a verdict in ASICS's favor.

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<sup>1</sup> All further undesignated statutory references are to the Code of Civil Procedure.

ASICS filed a memorandum of costs, seeking to recover \$384,773.96. Among the costs it sought to recover were: (1) \$34,166.79 for preparing photocopies of exhibits, exhibit binders, and closing argument demonstratives referencing exhibits; (2) \$6,327.47, representing defense counsel's travel expenses for attending depositions in Japan of Oyama, Kato, and Tamai; and (3) \$29,240 in interpreter fees incurred at Tamai's and Oyama's depositions and during Oyama's trial testimony.

In response, Size It filed a motion to tax costs. Size It contended ASICS improperly sought costs falling into "various categories of expenses that are not allowed as a matter of law," were unreasonable, and "were not reasonably necessary in defending this litigation."

Following a hearing, the trial court granted Size It's motion in part and denied it in part. Although the court taxed ASICS's costs by \$81,722.13, the court declined to tax the costs for the three categories discussed above. Consequently, the court entered an amended judgment in ASICS's favor, awarding ASICS \$303,051.83 in costs.

Size It timely appealed.

## DISCUSSION

### **I. Applicable Statutory Framework for Costs and Standard of Review**

Pursuant to section 1032, subdivision (b), "a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." "[S]ection 1033.5 sets forth the items that are and are not allowable as the costs recoverable by a prevailing party under section 1032[.]" (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52.) Specifically, section 1033.5, subdivision (a) enumerates the items that are allowable as costs, while

subdivision (b) lists the items for which costs may not be recovered. (§ 1033.5, subs. (a) & (b).) Under section 1033.5, subdivision (c)(4), however, cost items that are neither permitted under subdivision (a) nor prohibited under subdivision (b) may nevertheless be “allowed or denied in the court’s discretion.” (§ 1033.5, subd. (c)(4); see also *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 363-364 (*Applegate*).) All costs awarded, whether expressly permitted under subdivision (a) or awardable in the trial court’s discretion under subdivision (c), must be “reasonably necessary to the conduct of the litigation” and be “reasonable in amount.” (§ 1033.5, subs. (c)(2) & (3).)

“Generally, the standard of review of an award of costs is whether the trial court abused its discretion in making the award. [Citation.] However, when the issue to be determined is whether the criteria for an award of costs have been satisfied, and that issue requires statutory construction, it presents a question of law requiring de novo review. [Citation.]” (*Berkeley Cement, Inc. v. Regents of University of California* (2019) 30 Cal.App.5th 1133, 1139.) ““The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can be reasonably deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” [Citations.]” (*Brawley v. J.C. Interiors, Inc.* (2008) 161 Cal.App.4th 1126, 1137-1138 (*Brawley*).)

## **II. Exhibit Photocopies and Demonstratives**

Under section 1033.5, subdivision (a)(13), costs for “[m]odels, the enlargements of exhibits and photocopies of exhibits, and the electronic presentation of exhibits, including

costs of rental equipment and electronic formatting, may be allowed if they were reasonably helpful to aid the trier of fact.”

Size It contends the trial court erred as a matter of law in refusing to tax the costs ASICS incurred in photocopying exhibits, preparing exhibit binders, and creating closing argument demonstratives because most of ASICS’s exhibits were not admitted into evidence. Consequently, Size It argues, ASICS was not entitled to recover costs for preparing a majority of these materials under section 1033.5, subdivision (a)(13), as most of them were not shown to the jury, and thus were not “reasonably helpful to aid the trier of fact.”

As noted above, there is a split in authority on whether costs related to exhibits ultimately not used at trial are recoverable. In the cases on which Size It relies, the reviewing courts interpreted the language in section 1033.5, subdivision (a)(13) requiring exhibits be “reasonably helpful to aid the trier of fact” to “exclude[] as a permissible item of costs exhibits not used at trial, which obviously could not have assisted the trier of fact. [Citations.]” (*Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557-1558 (*Seever*); see also *Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 775 (*Ladas*) [holding “fees are not authorized for exhibits not used at trial” under section 1033.5, subdivision (a)].) Moreover, in *Seever*, the court further held costs for exhibits not used at trial are not awardable in the trial court’s discretion under section 1033.5, subdivision (c)(4). (*Seever, supra*, 141 Cal.App.4th at pp. 1559-1560.) The *Seever* court reasoned that by allowing costs associated with exhibits only where they are “reasonably helpful to aid the trier of fact” under section 1033.5, subdivision (a)(13), the Legislature intended to preclude courts from exercising discretion to award

costs for these items when the conditions in subdivision (a)(13) are not met. (*Ibid*, italics omitted.)

By contrast, in the cases cited by ASICS, the reviewing courts held costs related to exhibits not used at trial may be awarded under section 1033.5, subdivision (c)(4). (*Applegate, supra*, 23 Cal.App.4th at pp. 364-365; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 856-857 (*Benach*)). These courts reasoned costs associated with unused exhibits were awardable in the trial court's discretion because "[a]n experienced trial judge could recognize that it would be inequitable to deny as allowable costs exhibits which a prudent attorney would prepare in advance of trial." (*Applegate, supra*, 23 Cal.App.4th at p. 364; *Benach, supra*, 149 Cal.App.4th at p. 856.)

We decline to follow the cases cited by Size It. In our view, interpretation of section 1033.5, subdivision (a)(13) must reflect the reality of how complicated cases are tried. As the *Benach* and *Applegate* courts acknowledged, prudent counsel must prepare exhibits and demonstratives well in advance of trial. Given that trials are unpredictable, however, it is difficult for even the most experienced trial lawyers to divine which exhibits and demonstratives will in fact be used. Consequently, it is in counsels' (and their clients') interests to come to trial with copies of all exhibits and demonstratives reasonably anticipated for use in hand. Indeed, an applicable local rule requires the pretrial exchange and pre-marking of all exhibits that might be used at trial (other than for impeachment). (Super. Ct. L.A. County, Local Rules, rule 3.52.) Moreover, as in this case, the trial court's own procedures often *require* counsel to pre-mark and prepare multiple copies of their exhibits, placing them into separate binders, which are given to opposing counsel, placed on the stand

for review by witnesses, given to the judicial assistant or clerk, and given to the trial judge for use in trial.

Counsel's pretrial preparation of exhibit photocopies and demonstratives reasonably anticipated for use at trial expedites the proceedings. For example, it allows for efficient examination of witnesses and facilitates prompt resolution of evidentiary issues. This is especially important in lengthy jury trials, where common courtesy and respect for the jurors' time and sacrifice requires that courts adopt policies and procedures to expedite the proceedings.

Exhibit binders allow trials to proceed more quickly, thus they are "reasonably helpful to aid the trier of fact[.]" Even if the binders contain exhibits never offered or admitted at trial, their preparation facilitates trial proceedings and helps avoid wasting the jurors' time. Similarly, precious time is saved if counsel prepares digitized copies in advance of all potential exhibits and demonstratives. In lieu of binders, monitors are placed on the bench and witness stand, allowing the judge and the witness to view the documents. Images of admitted exhibits and appropriate demonstratives can also be viewed by the jury on large monitors, projection screens, or other devices. The alternative to preparing comprehensive pre-marked hardcopy and/or digitized collection of potential exhibits is to waste everyone's time by using the old school method: counsel fumbles about finding the desired exhibit, shows it to opposing counsel, hands copies to the clerk—including one for the judge, asks to approach the witness to show the document to the witness, does so, and then proceeds with examination. This is the cumbersome procedure that must be followed for documents that have not been pre-marked prior to

trial. (See Super. Ct. L.A. County, Local Rules, rules 3.149, 3.150, 3.151, & 3.155.).

Likewise, having all possible closing argument demonstratives at the ready saves time. Counsel can close immediately after the last witness has testified, rather than requiring dead time while counsel prepares. This, too, is helpful to the trier of fact—especially if the trier of fact is a jury—because the jurors’ time is precious. Most demonstratives used in closing argument (apart from replicas of exhibits introduced at trial) are not admissible, yet surely they aid the jury, and it would make no sense to exclude these from inclusion in recoverable costs.

We owe jurors our respect and gratitude. Without their willingness to serve, the cherished right to jury trial would be lost. Judges and lawyers need to treat jurors with the courtesy and dignity they deserve. This includes being mindful of their time by starting proceedings on time, reducing juror down-time, properly informing them of the trial schedule, keeping to that time schedule to the extent reasonably possible, and streamlining proceedings.

Accordingly, we disagree with *Seever* and *Ladas*. Courts should not ““read into the statute allowing costs a restriction which has not been placed there.”” [Citation.]” (*LAOSD Asbestos Cases* (2018) 25 Cal.App.5th 1116, 1124.) But by limiting the application of section 1033.5, subdivision (a)(13) to materials used at trial, the *Seever* and *Ladas* courts did just that. The meaning of the phrase “reasonably helpful to the trier of fact” is broader than the limited notion of helpfulness in the specific task of finding facts, and encompasses as well the more general concept of helpfulness in the form of efficiency in the trial in

which the trier of fact is asked to perform that task. For the reasons discussed above, we hold costs incurred in preparing models, blowups, and photocopies of exhibits may be awarded under section 1033.5, subdivision (a)(13), even if these materials were not used at trial. For the same reasons, we also conclude these costs may be awarded under section 1033.5, subdivision (c)(4).

The trial court therefore did not err in refusing to tax the costs ASICS incurred in creating exhibit photocopies and closing argument demonstratives, even though many were not used at trial.

### **III. Deposition Travel Expenses**

Size It contends the trial court should have taxed the travel expenses ASICS's counsel incurred in defending three depositions taken in Osaka, Japan, because ASICS improperly sought expenses for sending two lawyers to Kobe, Japan, to prepare deponents for depositions a week before they took place. Specifically, Size It contends ASICS's request for these expenses exceeded the scope of section 1033.5, subdivision (a)(3)(C) because this provision permits recovery of travel expenses for only one lawyer's attendance at a deposition, and does not allow for recovery of travel expenses associated with counsel's preparation of a deponent prior to his or her deposition. ASICS counters Size It's contentions are unsupported by legal authority and, in any event, the travel expenses were properly awarded in the trial court's discretion under section 1033.5, subdivision (c)(4). We agree with ASICS.

Under section 1033.5, subdivision (a)(3)(C), a prevailing party may recover "[t]ravel expenses to attend depositions" as

costs (§ 1033.5, subd. (a)(3)(C).) As ASICS points out, Size It has not cited—and we cannot find—any authority to support its assertion that travel expenses may not be awarded for more than one lawyer’s attendance at a deposition. Further, Size It does not explain how its proffered limitation on costs awardable is supported by the statute’s plain language or legislative history. Thus, Size It appears to do nothing more than ask us to read into section 1033.5, subdivision (a)(3)(C) a restriction that does not exist. This we cannot do. (See *LAOSD Asbestos Cases, supra*, 25 Cal.App.5th at p. 1124.)

Size It’s argument is also unavailing because it would require us to interpret section 1033.5, subdivision (a)(3)(C) in a manner that does not reflect the reality of how complicated cases are prepared for trial. It is common for a party to send more than one attorney to take or defend a deposition. Indeed, in this case, ASICS and Size It each sent two attorneys to attend the depositions held in Japan. Thus, it makes little sense to restrict recovery of travel expenses under this statute to those incurred by one lawyer’s attendance at a deposition.

Additionally, even assuming ASICS was not entitled to recover all the travel expenses associated with the depositions taken in Japan under section 1033.5, subdivision (a)(3)(C)—such as the expenses regarding the deponents’ pre-deposition preparation in Kobe—Size It does not appear to dispute ASICS’s contention that the court could properly award these costs in its discretion under section 1033.5, subdivision (c)(4). Indeed, Size It does not reference subdivision (c)(4) while challenging the court’s award of travel expenses in its opening brief. Nor did Size It file a reply brief to address the arguments based on subdivision (c)(4) presented in ASICS’s brief.

In any event, we conclude the travel expenses at issue were properly awardable under section 1033.5, subdivision (c)(4). The depositions of Oyama, Kato, and Tamai were noticed by Size It and ordered to be taken in Japan. All of the deponents lived in Kobe, and two of them were defendants. Based on ASICS's unchallenged evidence, each of the depositions involved complex topics and issues. Given these circumstances, and the fact that Size It also sent two attorneys to attend these depositions, the trial court could reasonably conclude it was appropriate for ASICS to send two attorneys to Kobe to prepare the deponents for their depositions a week before they were taken, and to defend these depositions.

Accordingly, the trial court did not abuse its discretion when it refused to tax ASICS's travel expenses associated with the depositions in Japan.

#### **IV. Interpreter Fees**

##### **A. Deposition Interpreter Fees**

Size It argues the trial court erred in awarding ASICS costs for interpreter fees incurred at Oyama's and Tamai's depositions. In particular, Size It contends the court lacked authority to award these costs under section 1033.5, subdivision (a)(12), which permits recovery of interpreter fees only "for an indigent person represented by a qualified legal services project . . . or a pro bono attorney[.]" (§ 1033.5, subd. (a)(12).) Consequently, Size It asserts, because the record lacks evidence demonstrating Oyama and Tamai were indigent, or that they were represented by pro bono counsel, the court should have taxed these costs. ASICS responds the court properly awarded the deposition interpreter fees under section 1033.5, subdivision (a)(3)(B), which allows for

recovery of interpreter fees “for the deposition of a party or witness who does not proficiently speak or understand the English language.” (§ 1033.5, subd. (a)(3)(B).) Again, we agree with ASICS.

As an initial matter, we note that even if the interpreter fees incurred at Oyama’s and Tamai’s depositions were not awardable under section 1033.5, subdivision (a)(12), Size It does not dispute ASICS’s contention that these costs could alternatively be recovered under section 1033.5, subdivision (a)(3)(B). Size It also does not challenge the court’s ruling awarding ASICS interpreter fees for Tamai’s deposition under this provision, having found “it [was] not established that [Tamai] could speak or understand the English language with ease.” Nor does Size It identify any evidence in the record indicating Tamai was proficient in English. Thus, we conclude Size It has not shown the court erred in declining to tax the interpreter fees for Tamai’s deposition.

With respect to the interpreter fees for Oyama’s deposition, however, Size It suggests the court’s award of costs was improper because Oyama testified at trial he could speak and read English. While Size It correctly observes Oyama did testify he “speak[s] and read[s] English with ease,” Size It’s argument is unavailing because the record contains ample other evidence to support a finding that Oyama could not “proficiently speak or understand the English language.” At trial, Oyama testified Japanese was his first language, and explained he was testifying with an interpreter to ensure he could “hear the questions as accurately as possible” and “answer [the questions] accurately with appropriate expressions.” He also testified that while he could speak, read, and write English, he regularly conducts business

with the assistance of English interpreters to “avoid making mistakes when [he is] speaking” and to “confirm what [he is] hearing.”

When reviewing a trial court’s decision for an abuse of discretion, “we cannot reweigh evidence or pass upon witness credibility.” (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.) Additionally, when more than one inference can be reasonably deduced from the facts, we have no authority to substitute our decision for that of the trial court. (*Brawley*, 161 Cal.App.4th at p. 1137.) Thus, because the record reasonably supports the court’s finding that Oyama’s deposition interpreter fees were properly awardable under section 1033.5, subdivision (a)(3)(B), the trial court did not abuse its discretion in refusing to tax these costs.

#### **B. Trial Interpreter Fees**

Finally, Size It contends the court abused its discretion in awarding ASICS costs for Oyama’s interpreter fees at trial. In support of its argument, Size It again emphasizes Oyama testified he speaks English with ease. In response, ASICS maintains the record reflects Oyama was not proficient in the English language, and therefore the fees were properly awardable in the trial court’s discretion under section 1033.5, subdivision (c)(4).

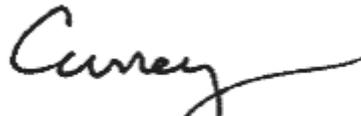
For the same reasons we concluded the court did not abuse its discretion declining to tax the costs for Oyama’s deposition interpreter fees under section 1033.5, subdivision (a)(3)(B), we conclude the court also did not err in refusing to tax the costs for his trial interpreter fees under section 1033.5, subdivision (c)(4).<sup>2</sup>

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<sup>2</sup> Though not entirely clear, Size It also appears to assert the trial court erred in refusing to tax the interpreter fees at

**DISPOSITION**

The order granting in part and denying in part the motion to tax costs is affirmed. ASICS is awarded its costs on appeal.

  
CURREY, J.

We concur:

  
MANELLA, P.J.

  
WILLHITE, J.

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issue because the amount sought (\$29,240.00) is unreasonable. Because Size It's assertion is unsupported by reasoned argument or citation to authority, however, we conclude it has been forfeited and decline to consider it. (*Benach*, 149 Cal.App.4th at p. 852.)



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Silvia Cerna

STATE OF CALIFORNIA  
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA  
Supreme Court of CaliforniaCase Name: **Size It, LLC and Mickey Segal v. ASICS America Corporation, et al.**Case Number: **TEMP-XXRVO7HW**

Lower Court Case Number:

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Michael Dailey Greenspoon Marder LLP 301394	michael.dailey@gmlaw.com	e-Serve	7/27/2020 1:17:18 PM
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David R. Carpenter 230299	drcarpenter@sidley.com	e-Serve	7/27/2020 1:17:18 PM
Jack S. Yeh	jyeh@sidley.com	e-Serve	7/27/2020 1:17:18 PM
Alexis Buese Miller	alexis.buese@sidley.com	e-Serve	7/27/2020 1:17:18 PM
Collin P. Wedel 278461	cwedel@sidley.com	e-Serve	7/27/2020 1:17:18 PM
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7/27/2020

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Date

/s/Silvia Cerna

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Signature

Turken, James (89618)

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Last Name, First Name (PNum)

Greenspoon Marder LLP

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Law Firm