

Case No. S263569

IN THE SUPREME COURT OF CALIFORNIA

MICKY 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 the Court of Appeal, Second District,
Division Four, Case No. B299184
Los Angeles Superior Court, Case No. BC597769
Honorable Elizabeth Allen White

APPELLANTS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

This appeal raises an interesting question that undoubtedly will impact a parties' ability to recover costs under one of the specifically enumerated categories set forth in Section 1033.5(a) of the Code of Civil Procedure, and whether a party can rely on the catchall text of Section 1033.5(c)(4) to circumvent the required findings in subdivision (a) or the prohibitions in subdivision (b).

The Court should resist the recent attempts to broaden the legislative intent set forth in subdivision (a)(13) and hold that parties are not entitled to parallel avenues of recovery of costs using subdivision (c)(4). Contrary to the assertions in Respondents' Answering Brief on the Merits ("RAB"), the language in Section 1033.5(a) is not "broad" in nature. (*See* RAB at 8). Instead, the legislature proposed a discrete number of items where a party can recover costs in litigation. In this case, the legislature requires that costs associated with "[m]odels, the enlargements of exhibits and photocopies of exhibits, and the electronic presentation of exhibits, including costs of rental equipment and electronic formatting" are limited to those circumstances only when "they were reasonably helpful to aid the trier of fact." (Code Civ. Proc., § 1033.5, subd. (a)(13).)

Respondents miss the forest for the trees on what showing is required. They want the Court to allow trial court judges to ignore the requirements that these exhibits, models, and photocopies actually be "helpful to aid the

trier of fact.” Indeed, Respondents cling to the misguided reasoning of the Court of Appeals decision, which focused on possibilities and hypotheticals related to how a trial could unfold rather than the plain language of these words in the statute. (*See* RAB at 14). Respondents want the Court to embrace the notion that a party can recover under Section 1033.5(a)(13) simply by pointing to the fact that certain of the materials could have been models, enlargements, or photocopies of exhibits that might have been admitted or used at trial—but never were. (*See* RAB at 18). This is absurd. Documents that could never have been contemplated in the mind’s eye of a jury person cannot be considered helpful to their deliberative process. Thus, like the Court of Appeals held in *Seever*, the Court should set a floor that requires the at-issue materials be admitted and/or used to be eligible for recovery under subdivision (a) of Section 1033.5.¹

It is also true that applying Respondents’ reasoning could lead to absurd results. For example, it is possible that a party elects to construct a 3D model (demonstrative or otherwise) for their case, but in so doing, it

¹ To be clear, Petitioners are not suggesting that the trial court is prohibited from allowing a party to recover costs for those trial exhibits that were admitted at trial, but never proffered to the jury during trial. For example, the jury might find certain stipulated documents useful as they peruse exhibit binders in the jury room as they deliberate. However, there is nothing to suggest that an unadmitted exhibit—one that is never available to the jury for a multitude of possible reasons—is somehow helpful to them as the trier of fact.

actually exposes a weakness in their case. And due to this weakness being exposed, the party never shows the 3D model to the jury. But then, once in the victor's seat, Respondents' reading of the statute would allow the prevailing party to seek these costs for a model that was built (and hurts their case) but was never shown to the jury *for strategic reasons*—ending up instead in the trash. It is for this reason that the legislature applied this limiting language to subdivision (a)(13). Respondents want the Court to rewrite and broaden the plain meaning of “helpful to the trier of fact” to now concern “the form of efficiency in the trial.” (*See* RAB at 18 (quoting the Court of Appeals decision at 8).) There is nothing to suggest that the legislature had this broad, amorphous concept in mind when drafting the limited categories of specifically enumerated costs.

Respondents' further attempt to rewrite the legislative intent of subdivision (a)(13) to mean general trial “efficiencies” is also misguided as a matter of law because of the internal conflict that it creates within Section 1033.5. This reasoning is more akin to the scenario contemplated by subsection (c)(2), which expressly prohibits the recovery of costs incurred related to “conduct of the litigation” that is “merely convenient or beneficial to its preparation.” While it is arguable that it is beneficial for a party to construct trial binders at considerable cost, or mark every conceivable exhibit—including duplicates of documents that were marked as exhibits elsewhere—that does not make the conduct “reasonably necessary” as

required. As a result, the Court should not broaden these discrete categories of costs referenced expressly in Section 1033.5(a) by contorting the language to the point where it runs afoul of the prohibitions set forth in Section 1033.5(c)(2).

Lastly, Respondents' argument that the trial court's award of these costs was also justifiable under Section 1033.5(c)(4) also fails. While it is true that the trial court retains discretion to award certain additional costs, such as mediation costs, this section is also limited to those "items not mentioned in this section. . . ." In other words, the trial court is not empowered to broaden the items set forth in subdivision (a) using this catchall language because they were already mentioned in this section. To grant the trial courts this power would eviscerate the threshold inquiry that requires the trial court to first discern whether the items were actually "helpful to the trier of fact" as required by the express language of the Code. While it is true that certain of the appellate courts have been slowly broadening the scope of subdivision (c)(4) to swallow the other items that are expressly referenced in Section 1033.5(a), it is imperative that the Court now adds clarity and a common-sense approach to carrying out the legislature's intent and limits the scope of subdivision (c)(4) to those items that are not mentioned elsewhere in this section 1033.5.

Accordingly, this Court should reverse the Court of Appeal's Decision and hold that exhibits, demonstratives, and related items under

section 1033.5, subdivision (a)(13) may be recoverable only if they are available to the jury for review during trial or jury deliberation—a threshold inquiry that must be met before any trial court could conceive that these items were “helpful to the trier of fact.”

ARGUMENT

It is true that “language [of a statute] must be construed ‘in the context of the statute as a whole and the overall statutory scheme, and we give significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.’” (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 (quoting *People v. Canty* (2004) 32 Cal.4th 1266, 1276).)

Thus, the Court must examine the “usual and ordinary meaning” of the legislature’s words in Section 1033.5 of the Code of Civil Procedure. (*C.f., id.*) *First*, the Court must examine whether the costs being sought here for materials that were never published to or ever available to the jury were somehow “helpful to the trier of fact” as required by subdivision (a)(13). *Second*, the Court must examine whether the legislature intended a parallel path to their recovery under subdivision (c)(4) for these costs that are unquestionably mentioned in subdivision (a)(14).

In addition, the Court must “avoid[] a construction that would lead to absurd consequences” that the legislature did not intend. (*See Smith, supra*, 39 Cal. 4th at p. 83.)

A. Subdivision (a)(13) Requires The Trial Court To Find That Copies of Exhibits, Demonstratives or Models were “Reasonably Helpful” to the Jury—A Finding That Cannot Occur If They Were Either Not Admitted, Expressly Excluded, Or Purposefully Not Used.

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).)

Respondents want the Court to rewrite this Code section to read that these costs “may be allowed if *it is conceivable that* they were reasonably helpful to aid the trier of fact.” They argue that these *methods* of showing these items to the jury—*i.e.*, via “models, photocopies, or electronic display” is sufficient to find that all of these costs are recoverable. (RAB at 18-19.) That flawed reasoning would lead to the type of absurd result that the Court cautioned against in *Smith v. Superior Court*. For example, if the Court were to adopt Respondents’ reasoning, a party could recover sums for enlargements that it purposefully did not use for whatever reason because of the fact that other documents were enlarged. This certainly cannot be what the legislature intended. Similarly, a party should not be allowed to recover sums for objectionable content that it created that was expressly excluded from the jury’s view by the trial court. It would be absurd to allow the party

to recover the money spent on this inappropriate content based solely on the concepts that they employ methods of presentation that benefit the party.

Respondents attempt to recast precedent to support their conclusions is also misplaced. For example, in *Chaaban*, the appellate court was not forced to analyze whether the \$589.50 in copying charges were appropriate because the parties' requests were limited to those exhibits that were *actually* admitted into evidence. (*See Chaaban v. Wet Seal, Inc.* (2012) 203 Cal. App. 4th 49, 59 (noting that recovery was not limited to audiovisual presentation of these admitted exhibits because “[i]n addition, copies of those exhibits admitted into evidence went into the jury room.”).) Here, Respondents want the Court to allow them to recover costs for documents that were never shown to the jury or allowed in the deliberation room.

Respondents also argue without any authority that the legislature's use of “reasonably helpful” in lieu of “used” or “admitted” or “some other side of preconditions” is somehow evidence that the legislature intended a broad swath of items to be recoverable. (*See RAB* at 25.) That is not true. Instead, the plain and ordinary meaning of the Code language indicates that the legislature requires the trial court to hear objections that certain exhibit copies, enlargements, or models were not in fact “helpful to the trier of fact.” In other words, just because a document is marked as an exhibit or stipulated to admission, does not automatically render it helpful. For example, oftentimes main agreements are used at various depositions—marked

multiple times throughout the discovery process. And, they are often attached to key correspondence as separate documents as well. It is conceivable that a party would object if a prevailing party tried to recover costs for marking the same contract fifteen times, which can occur when parties are scrambling to put together exhibit lists in the weeks before trial.

Respondents also try and recast *Seever* as somehow being unworkable in practice. In *Seever*, the Court of Appeals found that a trial court could not award costs for unadmitted and unused exhibits. (*Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557-58.) Respondents allege that a court would have to analyze whether exhibits were useful for aspects of a cause of action when discharging its duties pursuant to Section 1033.5. (*See* RAB at 28.) There is nothing to suggest that to be the case, and that certainly did not occur in *Seever*. Instead, *Seever* held that there was an absolute floor to recovery—*i.e.*, at a minimum, the prevailing party must have been able to show that the exhibits, demonstratives, or models were at least available to the jury.

B. Subdivision (c)(4) Prohibits The Court From Broadening the Contours of Subdivision (a)(13) as an End Run Around Those Express Limitations

There is also nothing to suggest that a party can side-step the requirements of those items referenced in subdivision (a) by pointing to subdivision (c)(4), a catchall provision that is meant to grant the trial court discretion for those “[i]tems not mentioned in this section.” (*See* Cal Civ.

Proc., § 1033.5(c)(4).) It is true that some courts mistakenly rely on this section for those items expressly referenced in subdivision (a)(13).² But, the fact remains that the legislature did not intend subdivision (c)(4) to be an opportunity to recover costs for those items that were expressly referenced in subdivision (a) or allow those costs that were expressly prohibited in subdivision (b).

No authority suggests that the legislature meant to allow recovery of any items referenced in subdivisions (a) or (b) via the catchall remainder provision in subdivision (c). Here, Respondents are asking the Court to create these parallel paths to recover these costs, which would require the Court to ignore the limiting language in subdivision (c)(4). If the legislature wanted to vest the trial court in unfettered authority, then the language “[i]tems not mentioned” in Section 1033.5 would be mere surplusage. It is well-settled that the Court cannot cast these words aside in favor of an alternative reading. (*See Woosley v. California* (1992) 3 Cal.4th 758, 775-76 (“If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.”) (internal quotation

² For example, in *Benach v. Cty. of Los Angeles*, the Court of Appeals reasoned that exhibit costs were governed by subdivision (c)(4) rather than subdivision (a)(13). (*See Benach v. Cty. of Los Angeles* (2007) 149 Cal. App. 4th 836, 856.)

omitted).) As a result, these items expressly enumerated in Section 1033.5(a)(13) are incapable of being recovered under subdivision (c)(4) because of this limiting language that cannot be ignored.

C. Even if the Court Were To Allow These Costs Under Subdivision (c)(4), None of Them Are Allowed Because they Were Not “Reasonably Necessary” As Required by Subdivision (c)(2)

If the Court allows the trial courts to broaden the expanse of these limited photocopying and related costs allowed in subdivision (a)(13) by applying subdivision (c)(4) to these costs (and it should not), there must still be a finding that these costs were “reasonably necessary” to the litigation rather than simply “convenient or beneficial to its preparation.” (Cal. Civ. Proc., § 1033.5(c)(2).) No such finding can occur in this case because the trial was won without the assistance of any of these superfluous materials. The Court of Appeal’s opinion focused on the efficiency of these items and the beneficial effects they could have had on the trial, which is certainly true.

There is little doubt that these exhibits probably benefited Respondents in some tangential way, but that is insufficient. For example, the sheer amount of Respondents’ marked exhibits kept Petitioners’ counsel busy analyzing the hundreds of unused exhibits for objections and motions *in limine* to prevent them from prejudicing the jury. And, the method of preparing these unused and/or inappropriate demonstrative slides, enlargements, and copies—again, many that were specifically excluded by the Court—would also likely have been convenient during trial if the court

allowed them to be shown to the jury. But that did not happen. There is no finding in the record to suggest that any of these items—all of which were either purposefully excluded from the jury’s view by counsel or the trial court—were “reasonably necessary,” because they were not. If they were somehow necessary, then any firm that did not employ all of these tactics would not be able to try a case, and that is obviously not the case.

CONCLUSION

Accordingly, Petitioners ask the Court to [1] adopt the floor set in *Seever* and require the trial court to first inquire as to whether the materials were actually available to the jury—the first step in determining whether the materials were actually “helpful”; and [2] hold that none of the allowed items referenced in subdivision (a) or prohibited in subdivision (b) are recoverable pursuant to subdivision (c)(4). This Court should therefore reverse the Court of Appeal’s Decision and hold that Respondents are not entitled to recover these costs.

Dated: January 19, 2021

Respectfully submitted,

GREENSPOON MARDER LLP



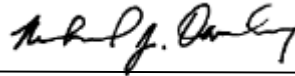
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CERTIFICATE OF WORD COUNT

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 2694 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 January 19, 2021, at Los Angeles, California.



Michael J. Dailey

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Superior Court Case No. BC597769
Court of Appeal, Second Appellate District Case No. B299184

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) ss
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STATE OF CALIFORNIA
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