No. S213100

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LORING WINN WILLIAMS,
Plaintiff and Appellant,

vs.

CHINO VALLEY INDEPENDENT FIRE DISTRICT,
Defendant and Respondent.

Court of Appeal, Fourth Appellate District, Case No. E055755
San Bernadino County Superior Court Case No. CIVRS801732

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Respondent's answer brief concedes three key points:

- The *Christiansburg Garment Co. v. Equal Employment Opportunity* (1978) 434 U.S. 412 standard applies to prevailing FEHA defendants who seek to recover attorney's fee awards. (Respondent's Brief on the Merits [RBM], pp. 37-38.)

- The imposition of costs on unsuccessful FEHA plaintiffs may "impose undue hardship" on them or amount to undue "pressure" on "modest or low income plaintiffs" (RBM, pp. 51-52) – *i.e.*, the policies underlying *Christiansburg* also apply to an award of costs to a prevailing FEHA defendant.

- Exceptions to section 1032(b) include those statutes under which "a prevailing defendant is not entitled to costs as a matter of right as stated in section 1032, but that to obtain costs, the prevailing defendant [unlike the prevailing plaintiff] must satisfy a separate standard." (RBM, p. 14.)

Given these key concessions, the issue in this case reduces to whether or not Section 12965(b) demands that a prevailing FEHA defendants must satisfy the same standard for an award of costs that must be met to receive an award of fees when the statute, itself, treats fees and costs interchangeably in the same sentence separated only by the word

"and"? If so, even Respondent concedes that Section 12965(b) must be an exception to Section 1032(b). (RBM, p. 14.)

The answer to that pivotal question must be "yes" for many reasons detailed herein. Nothing in language, logic, public policy, or principles of statutory construction supports the claim that despite identical statutory treatment, the Legislature really intended two totally separate standards to govern entitlement of a prevailing FEHA defendant to recover fees and costs. Such a construction of Section 12965(b), besides making no sense, would also conflict with the statutory construction rule that courts must "interpret related statutory provisions on the assumption that they each operate in the same manner" and not assume that the Legislature illogically intended that "one subsection of a subdivision of a statute to operate in a manner 'markedly dissimilar' from other provisions in the same list or subdivision." (*Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 960.) Indeed, this conclusion is underscored by the fact that *every* statute Respondent cites as an example of a proper exception to Section 1032(b) involves statutory language – like that at issue here – in which the Legislature treats the right to recover fees and costs *identically*; in all the examples given by Respondent, the same standard governs both fees and costs.

Finally, as described in our Opening Brief, and elaborated upon below, the same public policy considerations that led California to adopt the *Christiansburg* standard fully apply whether the issue is recovery of fees or the recovery of costs.

ARGUMENT

I. GOVERNMENT CODE SECTION 12965(b) CREATES THE NECESSARY EXPRESS EXCEPTION TO CODE OF CIVIL PROCEDURE SECTION 1032(b).

A. Respondent cannot dispute that, under *Murillo*, if a statute requires one side to make a higher showing than the other side would have to make in order to receive an award of costs, that statute is an exception to section 1032(b)'s cost recovery scheme.

Section 1032(b) concerns situations in which each side would bear the identical burden (*i.e.*, merely "prevailing") in order to be entitled to recover its costs. But as discussed in our Opening Brief on the Merits (OBM), this Court has held that when a statute "require[s] that additional conditions be satisfied before one side of the litigation may recover costs ... the[] statute may constitute [an] express exception[] to section 1032(b)." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 999; *see* OBM, pp. 21-24.) Indeed, *Murillo* noted that one specific example of a type of statute that constitutes an exception to the recovery of ordinary costs

"as a matter of right" (under Code of Civil Procedure section 1032) is if the statute requires a finding that the action is frivolous for the prevailing defendant to obtain costs. (*Ibid.*)

Murillo recognized a dichotomy for determining whether a statute constitutes an exception to section 1032(b):

1. If the statute merely provides that one party (such as a prevailing plaintiff) has a statutory right to recover fees and costs, the statute does not create an exception to section 1032(b)'s ordinary costs "as a matter of right" rule (*Murillo*, 17 Cal.4th at 990-996);
2. Conversely, if the statute addresses fee and cost recovery rights of *both* parties *and* creates a different set of rules applicable to each, then the statute does create an exception to section 1032(b)'s ordinary cost recovery rules (*Murillo*, 17 Cal.4th at 996-999; *see also* OBM, pp. 21-23.)

Though Respondent's lengthy brief discusses *Murillo* in detail, it *never disputes* either prong of the *Murillo* dichotomy. (Respondent's Brief on the Merits [RBM], p. 13, 16-18, 34-35, 53.) Rather, it actually acknowledges the second prong by agreeing that exceptions to section 1032(b) include those statutes under which "a prevailing defendant is not

entitled to costs as a matter of right as stated in section 1032, but that to obtain costs, the prevailing defendant [unlike the prevailing plaintiff] must satisfy a separate standard." (RBM, p. 14.) Thus, Respondent effectively concedes that the controlling question is simply whether or not section 12965(b) "require[s] that additional conditions be satisfied before *one side* of the litigation may recover costs"; if so, section 12965(b) is an exception to section 1032(b). (*Murillo*, 17 Cal.4th at 999 [italics added].)

B. Section 12965(b) requires a prevailing defendant to meet the *Christiansburg* standard for an award of attorney's fees. Given the identical statutory treatment of fees and costs – found in the same sentence of the same statute separated only by "and" – *Murillo*'s logic means that section 12965(b) is an exception to section 1032(b).

1. Respondent cannot dispute that the *Christiansburg* standard applies to a prevailing defendant's award of fees under the FEHA.

Begrudgingly, Respondent acknowledges that the *Christiansburg Garment Co. v. Equal Employment Opportunity* (1978) 434 U.S. 412 standard applies to prevailing FEHA defendants who seek to recover attorney's fee awards. (RBM, pp. 37-38.) Respondent really had no choice. Our Opening Brief made clear that the application of *Christiansburg* to prevailing defendant's fees under section 12965(b) is well settled. (OBM, p. 12; *see also Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985

["California courts have adopted this rule [*i.e.*, the *Christiansburg* standard] for attorney fee awards under the FEHA."]; *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 420; *Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, 279 ["It is now settled that the *Christiansburg* standard must be satisfied before a defendant prevailing in a FEHA action may recover attorney fees."].)[1]

Because *Murillo* holds that an express exception to section 1032(b) may be created by a statute that "require[s] that additional conditions be satisfied before one side of the litigation may recover costs" (*Murillo*, 17 Cal.4th at 999), the dispositive question on this appeal becomes this:

> Is there any legitimate reason that section 12965(b) – which undeniably requires that one side to the litigation (defendants) can only recover attorneys fees if it satisfies a higher standard than the other side (plaintiffs) have to satisfy – does not constitute "[an] express exception[] to section 1032(b)" (*Murillo,*17 Cal.4th at 999)?

The answer is of course not.

As we detailed at length in our Opening Brief, section 12965(b) treats entitlement to "attorneys fees and costs" together, in a single sentence separated only by the word "and." Nothing in language, logic, public policy

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[1] (*See also Young v. Exxon Mobil Corp.* (2008) 168 Cal.App.4th 1467, 1474; *Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 948-949; *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 865.)

or statutory construction supports the notion that despite that identical statutory treatment, the Legislature really intended that whereas a one-sided standard would govern recovery of attorneys fees, a purely egalitarian standard would govern the treatment of costs. Indeed, as we further discuss below, no statute cited by Respondent – and none that we are independently aware of – treats recovery of fees under one standard whereas recovery of costs is treated under a different standard when the statute itself provides for both fees and costs using the same language in the same sentence of the statute.

2. Basic principles of statutory construction dictate that both fees and costs be governed by the same (*Christiansburg*) standard given the identical statutory treatment of fees and costs within section 12965(b).

Respondent properly cites the governing rules of statutory interpretation:

> In construing a statute, courts first examine the words themselves, as they are the most reliable indicator of Legislative intent. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 986.) It is a fundamental canon of statutory interpretation that courts are required to accept the plain meaning of a statute *absent ambiguity* in the text. (*Barnhart v. Sigmon Coal Co.* (2002) 534 U.S. 438, 461-462.) (RBM, p. 12 [italics added].)

Respondent then ignores the only reasonable conclusion that flows from applying the foregoing rule to section 12965(b): the plain, unambiguous language of that statute requires that fees and costs be treated identically because the right to recover them derives from identical statutory language in the same sentence of the same statute.

Section 12965(b) provides, in pertinent part, that the court "in its discretion," may award "the prevailing party" "reasonable attorney's fees and costs, including expert witness fees." (*Gov. Code* §12965(b).)

Thus, section 12965(b) expressly and unambiguous provides that "reasonable fees and costs" are to be treated identically. Every step of the analysis points back to this conclusion.

- First, the prevailing party fee and cost recovery rights are defined in the same sentence sharing identical language separated only by the word "and." That statutory structure cannot reasonably be interpreted as assuming the Legislature intended fees and costs to be decided under different standards.

- Second, there is nothing within the statute's language (or structure) that suggests any intention to create two different standards – one for prevailing party fee recovery rights and another for prevailing party cost recovery rights. In fact, creating two separate standards for fees and costs

would violate the canon of statutory construction of *noscitur a sociis*, under which courts "interpret related statutory provisions on the assumption that they each operate in the same manner" and do not assume that the Legislature illogically intended that "one subsection of a subdivision of a statute to operate in a manner 'markedly dissimilar' from other provisions in the same list or subdivision." (*Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 960.)

- Third, this conclusion is necessarily dictated by the language of section 1033.5 (which Respondent itself cites). That statute provides in pertinent part: "When any statute of this state refers to the 'costs and attorneys fees,' attorney's fees are an item and *component of the costs* to be awarded and are *allowable as costs* pursuant to subparagraph (b) of paragraph (10) of subdivision (a)." (Code of Civil Procedure §1033.5(c)(5) [italics added].) This language underscores that when the words "costs" and "attorneys fees" are combined in a single sentence, they are indivisible and must be treated the same.

This simple exercise of statutory construction – combined with logic and simple linguistics – points to only one reasonable conclusion: cost recovery rights for a prevailing FEHA defendant must be subject to the

same *Christiansburg* standard that controls the rights of such defendants to recover fees under section 12965(b). (*See e.g.*, *Chavez*, 47 Cal.4th at 985.)

Once the *Christiansburg* standard is applied to the cost recovery rights of a prevailing FEHA defendant, then, under *Murillo*, section 12965(b) must be viewed as an exception to section 1032(b) because section 12965(b) "require[s] that additional conditions be satisfied before one side of the litigation may recover costs." (*Murillo*, 1998) 17 Cal.4th 985, 999.)

Despite this irrefutable logic, Respondent gamely tries to maintain that section 12965(b) does not create an exception to section 1032(b) for purposes of FEHA prevailing defendant cost recovery rights.[2] (RBM, pp. 17-18.) But, in doing so, Respondent overlooks a glaring internal inconsistency in its own position. Respondent *admits*, contrary to the default rule that attorney's fees are not available generally to a prevailing party, that "Section 12965(b) ... provides the *express statutory authority* necessary for an award of attorney's fees." (RBM, p. 2 [italics added].) However, the language of section 12965(b) does not specifically use the

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[2] Respondent's entire analysis of whether section 12965(b) creates a statutory exception to section 1032(b) is found in a mere two paragraphs buried in the middle of its fifty-eight (58) page brief. (RBM, pp. 17-18.) In these two paragraphs, Respondent does not even try to address the analysis of *Murillo* found in our Opening Brief. (*Ibid.*)

words comprising the *Christainsburg* test (*i.e.*, *fees are only available if* the suit was "frivolous, unreasonable, without foundation, or brought in bad faith" [*Christiansburg*, 434 U.S. at 416-417].) If, despite the absence of such words, the *Christiansburg* test is still admitted to be "*express* statutory authority necessary for an award of attorneys fees" (RBM, p.2 [italics added]), how can Respondent contend – with a straight face – that the identical language in section 12965(b) is not "*express* statutory authority" when the issue of "costs" arises?

- Third, and finally, one overriding fact compels the same conclusion. Our Opening Brief's main point was that the treatment of the words "attorneys fees and costs" in the same sentence (separated only by the word "and") demanded that the two items be treated identically. Nowhere in Respondent's 58-page brief is there a single rebuttal to that statement. No case is cited in which words in the same sentence separated by an "and" were ever treated under differing standards. Nor anywhere in our own research have we found such a case. There is no reason to think that section 12965(b) was meant to be treated differently than any other statutes in California law.

3. The very exceptions which Respondent heralds actually prove our point.

To support it argument about the Legislature's ease in making express exceptions to section 1032(b) when it desires them, Respondent collects a series of statutes in which a higher standard was imposed before a prevailing defendant could obtain costs. (RBM, pp. 13-14.)

• First, Respondent cites five different statutes which (like section 12965(b)) impose a higher burden on prevailing defendants than prevailing plaintiffs before fees and costs may be recovered. (RBM, p. 14.) But, what is striking is that in every one of these "higher burden" statutes cited by Respondent, the right to recover costs and fees is treated in the same sentence separated only by the word "and."[3] (*Ibid.*) In every one of these statutes, the Legislature treats the right to recover fees and costs *identically* – requiring the prevailing party to make the same showing to recover fees as to recover costs.[4] This is our very point. Accepting Respondent's argument would create the absurdity that section 12965(b)'s limitation on recovery of

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[3] The five statutes are: Labor Code §2673.1; Probate Code §2622.5; Government Code §§9078, 9079; and Government Code §1130.5.

[4] For example, under Labor Code section 2673.1, if it is determined that the employee acted *in bad faith*, then "the court may order the employee to pay the reasonable attorney's fees *and* costs of the contractor employer...." (*Labor Code* §2673.1 [italics added].) The identical standard ("bad faith") applies both to the award of fees and the award of costs.

attorney's fees by prevailing defendants would be treated differently than the right to recover costs despite their identical statutory treatment and despite the fact that in all other statutes dealing with a "higher burden" standard, fees and costs are treated in the same sentence and given the identical standards to meet.

- Second, Respondent acknowledges that each of these five statutes represents a proper exception to the general cost recovery rule of section 1032(a). (RBM, p. 14.) In fact, Respondent itself characterizes exceptions to section 1032(b) as "includ[ing] statutes stating a prevailing defendant is not entitled to costs as a matter of right as stated in section 1032, but that to obtain costs, the prevailing defendant must satisfy a separate standard." (*Ibid.*) As we demonstrated in above, that is precisely the intent and effect of section 12965(b) – *i.e.*, to create a higher burden before a prevailing defendant can recover fees and costs.

4. Likewise, Respondent's detour into the amendments to section 12965(b) backfires.

We believe that section 12965(b)'s text is clear that FEHA attorney's fees and costs recovery rights are to be assessed under the same standards given the identical language that is used. However, even if we do accept Respondent's invitation to consider the legislative amendments to section

12965(b) (RBM, pp. 6-11), the exercise simply confirms that a prevailing FEHA defendant must satisfy the *Christiansburg* standard to recover its costs.

The starting point is the following principle:

> The Legislature is deemed to be aware of judicial decisions already in existence and to have enacted or amended a statute in light thereof. When a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it. (*Stavroupolos v. Superior Court* (2006) 141 Cal.App.4th 196.)

Here, after its enactment in 1980, section 12965(b) was amended in 1998 and again in 1999. (Stats. 1980, c. 992, § 4; Stats. 1998, c. 931 (S.B. 2139), § 183, eff. Sept. 28, 1998; Stats. 1999, c. 591 (A.B. 1670), § 12.) When the statute was amended in 1998 and in 1999, there was only one California appellate decision on this point: C*ummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383. *Cummings* held that a prevailing FEHA defendant must meet the *Christiansburg* standard for recovery of *either* fees or costs. (*Id.* at 1387-1390.) The presumption is that "the Legislature was aware of this judicial construction and approved of it." (*Stavroupolos*, 141 Cal.App.4th at 196-197.) Thus, if anything, the Legislative amendments to section 12965(b) weigh firmly in favor of finding that the Legislature approved of *Cummings*' holding that a

prevailing FEHA defendant must meet the *Christiansburg* standard for an award of ordinary costs.[5]

The 1998 amendment to section 12965(b) is significant for yet another reason: the Legislature overruled *Davis*' holding that a prevailing FEHA plaintiff could not recover expert witness fees that had not been ordered by the court. (*Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1017.) In enacting that amendment, the Legislature *confirmed* its intent that section 12965(b) provides cost recovery rights different than – *i.e.*, as an exception to – the normal cost recovery rules embodied in sections 1032 and 1033.5.

5. Respondent's contention that this Court has held section 12965(b) is not an exception to section 1032(b) misreads *Davis* and *Chavez*.

Citing *Davis* and *Chavez*, Respondent asserts that this Court has already held that section 12965(b) does not create an exception to section 1032(b). (RBM, pp. 26-33.) Not true.

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[5] Following the 1999 amendments, a split of authority developed. The Legislature's amendments in light of the split of authority cannot support either party's position. Thus, and for the reasons detailed in the text, the only positive support the amendments provide is to our position.

Applying a deft sleight of hand, Respondent states that *Davis* considered whether section 12965(b) was in conflict with section 1032. (RBM, pp. 27.) In fact, the Respondent's Brief goes so far as to claim that *Davis* "held that the costs awardable to a prevailing party under Section 12965(b) are defined and determined by *Section 1032 and 1033.5*." (RBM, p. 27 [italics added] & p. 31 [stating *Davis* "determined that costs in Section 12965(b) are defined and determined by Sections 1032 and 1033.5"].) Respondent concludes this misleading version of *Davis*' holding by proclaiming "this Court rejected Davis' argument that Section 12965(b) and *Sections 1032 and 1033.5* conflict and that Section 12965(b) must prevail as the more specific statute." (RBM, p. 28 [italics added].)

Davis did no such thing.

First, it *never* addressed whether section 12965(b) creates an exception to section 1032(b) – the issue before us. In fact, it could not have addressed whether section 12965(b) creates an exception to section 1032(b) because the issue before it involved a *prevailing plaintiff's* right to recover certain types of costs – not a *prevailing defendant's* obligation to meet a higher burden before being entitled to recover any of its costs. (*Davis*, 17 Cal.4th at 439 ["Plaintiff seeks to recover the fees of several experts not ordered by the court."].) There has never been any dispute that a prevailing

FEHA plaintiff is entitled to an award of certain costs – whether viewed from the perspective of section 12965(b) or section 1032(b). Conversely, the only dispute in our case is whether a *prevailing FEHA defendant's* right to costs are governed by the "as a matter of right" provisions of section 1032(b) or whether section 12965(b) creates an exception to section 1032(b) requiring a prevailing FEHA defendant to meet a higher burden than a prevailing plaintiff. Thus, *Davis*, which had no reason to consider this issue, cannot be considered authority for the claim that section 12965(b) does *not* create an exception to section 1032(b)'s cost provision when applied to a prevailing FEHA defendant.

Davis did hold that there was no conflict between *section 12965(b) and section 1033.5* on the specific issue of whether expert witness costs were recoverable. But this holding, and the conclusion that the allowable costs in a FEHA case are governed by section 1033.5, do *not* suggest that section 12965(b) is *not* an exception to section 1032(b). Section 1033.5 simply defines the specific types of cost items which are allowable. (*Code of Civ. Proc.* §1033.5.) But the question of "what cost items are allowable?" (*i.e.*, section 1033.5) is a separate question from "what statute enables or authorizes a party to obtain those costs" (*i.e.*, section 12965(b) versus section 1032(b)) and what standards of recovery are imposed thereby

(*i.e.*, mere "prevailing party" versus a higher burden for prevailing defendnats).[6]

Moreover, other language from *Davis* makes clear that this Court recognized that, in FEHA cases, prevailing party cost recovery rights are derived from section 12965(b) (rather than from the general cost recovery provision of section 1032(b)). This, again, underscores why section 12965(b) should be considered an exception to section 1032(b). As *Davis* explained, "Code of Civil Procedure section 1033.5 was intended to give a more precise meaning to the term 'costs' in existing fee-shifting statutes – *including Government Code section 12965, subdivision (b)* – by defining which items of costs are allowable and which are not." (*Davis*, 17 Cal.4th at 443-444 [italics added].) *Davis* thus directly acknowledged that, in FEHA cases, the parties' rights to recover costs derive from section

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[6] For this reason, Respondent's assertion that "Sections 1032 and 1033.5 are harmonious with Section 12965(b)" (RBM, pp. 18-21) is another half-truth. We agree that section 12965(b) is harmonious with section 1033.5; the former gives rise to an entitlement to costs while the latter defines those costs that may be recovered (other than expert witness fees that are directly provided for in section 12965(b)). However, as we establish in the text that follows, *Davis* recognizes that section 12965(b) is the authority for a cost award in a FEHA case. This, of course, suggests that section 12965(b) is an exception to section 1032(b). (*Davis*, 17 Cal.4th at 439 & 443-444.)

12965(b) (whereas section 1033.5 merely defines which items of cost can be recovered).

Nor did *Chavez* remotely hold that section 12965(b) fails to create an exception to section 1032(b). (RBM, pp. 32-33.) Rather, the issue in *Chavez* was whether a *prevailing plaintiff's right to attorney's fees* under section 12965(b) could be defeated, in the court's discretion, under Code of Civil Procedure section 1033(a), if the case could have effectively been handled as a limited jurisdiction action *and* the plaintiff's attorney should have realized long before trial that the damages sought did not justify an unlimited jurisdiction action. (*Chavez*, 47 Cal.4th at 991.) For numerous reasons detailed in the opinion, this Court held that it could. (*Ibid.*) Nothing about the question of whether section 1033(a) may apply in a FEHA action (to justify a denial of attorney's fees to a prevailing plaintiff) addresses – much less answers – the entirely distinct question of whether section 12965(b) creates an exception to section 1032(b) for purposes of a prevailing defendant's cost recovery rights.[7]

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[7] For the same reason, *Holman v. Altana Pharma U.S., Inc.* (2010) 186 Cal.App.4th 262 does not advance Respondent's position. (RBM, pp. 33-36.) There, the appellate court simply held that, while section 12965(b) authorizes prevailing party expert witness cost recovery rights, Code of Civil Procedure section 998 could be used to trump the general entitlement to expert witness costs under section 12965(b). (*Holman*, 186 Cal.App.4th at 281-283.)

II. OUR OPENING BRIEF ESTABLISHED THAT *CUMMINGS* IS CORRECT AND *PEREZ* AND ITS PROGENY ARE NOT. NOTHING IN THE RESPONDENT'S BRIEF ALTERS THIS COMPELLING CONCLUSION.

Our Opening Brief detailed why the decisions that reached the opposite result of *Cummings* were poorly-reasoned. (OBM, pp. 9-13 & 24-31.) We also showed why the policy rationale underlying the *Christiansburg* rule fully applies to the issue of awarding costs to a prevailing FEHA defendant in cases not involving frivolous or unreasonable actions. (*Ibid.*)

Respondent does not rebut – indeed, even address – many of our specific points. Instead, head planted firmly in the ground, Respondent stubbornly persists in quoting from the cases we discredited while ignoring all the evidence that they are incorrect.

Thus, for example, Respondent continues to embrace *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, which our Opening Brief exposed as the genesis of the ill-conceived theory that prevailing FEHA defendants should receive costs "as a matter of right" under section 1032(b) rather than satisfying the requirements of section 12965(b) which is an exception to section 1032(b). (OBM, pp. 24-30.)

Among other things, we pointed out that:

• *Perez* failed to follow *Murillo*'s recognition of what features in a cost statute render the statute an exception to section 1032(a). (OBM, pp. 24-25.) Respondent entirely ignores this point, presumably hoping that it will be forgotten. Therefore, we reiterate it now.

Perez's reasoning for why it refuses to find "that section 12965(b) states an exception to the general rule of Code of Civil Procedure section 1032(b)" was that section 12965(b) "does not expressly *disallow* recovery of costs by prevailing defendants." (*Perez*, 111 Cal.App.4th at 679 [original italics].) But *Perez* read *Murillo* too narrowly. While one way in which a statute may be an exception to section 1032(a) is if it *expressly disallows* costs to one side, *Murillo* also held that there is another way in which a statute may be an exception to section 1032(b) – if it "require[s] that *additional conditions be satisfied* before one side of the litigation may recover costs...." (*Murillo*, 17 Cal.4th at 999 [italics added].) Thus, the fact that section 12965(b) "does not expressly *disallow* recovery of costs by prevailing defendants" could not be dispositive of whether the statute is an exception to section 1032(b). Indeed, Respondent concedes this very point by expressly acknowledging that exceptions to section 1032(b) "include statutes stating a prevailing defendant is not entitled to costs as a matter of

right as stated in Section 1032, but that to obtain costs, the prevailing defendant must satisfy a separate standard." (RBM, p. 14.)

• Furthermore, *Perez* recognized that "it is clear that section 12965(b) governs the costs at issue" in a FEHA case. (*Perez*, 111 Cal.App.4th at 679.) But, as our Opening Brief pointed, there is a direct conflict between *Perez*'s holding that section 1032(a)'s cost provision ("as a matter of right") governs a FEHA action and *Perez* acknowledging that in a FEHA case section 12965(b) is the controlling cost statute. (OBM, pp. 25-26.) Given that the statute giving rise to the right to recover costs is section 12965(b), and *not* section 1032(a), two conclusions logically follow:

1. There can be no presumption that costs be awarded to a prevailing defendant "as a matter of right" because section 12965(b) states that the court may "in its discretion" award "fees and costs" to the prevailing party – rather than doing so "as a matter of right"; and

2. The right to recover fees and costs must be governed by the same standards considering that section 12965(b) uses identical language for both fees and costs. Therefore, because the court, while exercising "its discretion" under section 12965(b), is constrained by the *Christiansburg* standard regarding an award of fees to prevailing FEHA defendants, its statutory discretion must likewise be

constrained by the *Christiansburg* standard regarding an award of costs to prevailing FEHA defendants.

In short, *Perez*'s recognition that sections12965(b) not section 1032(b)) is the controlling statute for FEHA cost recovery rights is fundamentally at odds with its rejection of *Cummings*.

Ironically, *Perez* (and Respondent) criticize *Cummings* for "lumping together" the discussion of whether the *Christiansburg* standard applies to both fees and costs under section 12965(b). (*Perez*, 111 Cal.App.4th at 680 ["In *Cummings*, the court did not segregate the two parts of the award [fees and costs] in applying *Christiansburg*, but overturned them together."]; *accord* RBM, p. 46 ["[I]n *Cummings*, the discussion of attorney's fees and costs were not segregated; they were *lumped* into one."] [original italics].) But, if as *Perez* concedes, section 12965(b) is the controlling statute that creates the cost recovery right in FEHA cases, then *Cummings* was correct in analyzing fees and costs identically because the controlling statutory language treats them identically (covering them in the same sentence separated only by an "and").

It was the Legislature – *not Cummings* – that "lumped together" fees and costs. *Cummings* simply interpreted the statute in a manner consistent

with that "lumping together." It did so in a way that was true to both the legislative language and the underlying policies of the FEHA.

Besides the foregoing matters ignored by the Respondent's Brief, we made certain additional points in our Opening Brief that Respondent chose to ignore.

For instance, *Perez* reasoned that costs in FEHA actions are (supposedly) *not* substantial enough to trigger the policy justifications that underlie the *Christiansburg* standard. (*Perez*, 111 Cal.App.4th at 681.) Respondent parrots this contention. (RBM, pp. 39.)

But in doing so, Respondent turns a blind eye to our persuasive rebuttal to this claim. The core policy underlying *Christiansburg* is "to encourage the vigorous enforcement of rights protected under [anti-discrimination law] in part by 'mak[ing] it easier for a plaintiff of limited means to bring a meritorious suit.'" (*Marquart v. Lodge 837, Intern. Ass'n of Machinists and Aerospace Workers* (8th Cir. 1994) 26 F.3d 842, 848.) Our Opening Brief debunked the false notion that FEHA costs cannot be large enough that potential exposure to having to pay them would chill plaintiffs from bringing FEHA actions, and thereby "undercut the efforts of [our Legislature] to promote the vigorous enforcement of the provisions of" our FEHA. (*Christiansburg*, 434 U.S. at 422; *see* OBM, pp. 27-29.)

Rather, they can be (and often are) very substantial – and even more so when considered in light of the likely income of a FEHA plaintiff.[8] (OBM, pp. 27-29.) Indeed, Respondent concedes as much. (RBM, pp. 51-52; *see* Discussion at Section (III) below.)

In short, viewed from any front, *Perez* simply provides no support for holding that prevailing FEHA defendant cost recovery rights are governed by section 1032(b) instead of section 12965(b)'s discretionary provision.

The remaining cases Respondent relies upon are no more useful to its position than was *Perez*.

For instances, *Knight v. Hayward Unified School District* (2005) 132 Cal.App.4th 121, 135 merely followed *Perez* uncritically, offering no independent analysis. We made this point in our Opening Brief (OBM, p. 30) and Respondent implicitly concedes it by discussing *Knight* and *Perez* together. (RBM, pp. 39-40.)

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[8] Our Opening Brief pointed out the stark reality that even modest FEHA costs like those found in *Hatai v. Dept. of Transportation* (2013) 214 Cal.App.4th 1287 ($31,000) or *Ogunsanya v. Abbott Vascular, Inc.* (2013) 2013 WL 6498495 (over $26,000) would likely spell economic ruin for a typical FEHA plaintiff whose median annual pre-tax family income is $48,415 (single income) or $63,030 (dual income).

Likewise, *Hatai* did nothing but follow *Perez* uncritically and it, too, offered no independent analysis. (*Hatai*, 214 Cal.App.4th at 1299.) This explains why even Respondent devotes a mere sentence to it. (RBM, p. 41.)

Contrary to Respondent's suggestion, *Baker v. Mulholland Security and Patrol, Inc.* (2012) 204 Cal.App.4th 776 does *not* hold that a prevailing FEHA defendant may recover ordinary costs without making a *Christiansburg* showing. (RBM, pp. 40-41.) The "first impression" issue in *Baker* was "the applicability of the *Christiansburg* standard to the recovery of *expert witness fees*, as opposed to ordinary litigation costs, by a prevailing FEHA defendant." (*Baker*, 204 Cal.App.4th at 783 [italics added].) *Baker* acknowledged that there was a split in authority on the standard for a prevailing defendant to recover ordinary costs, but it did not need to reach the issue. (*Id.* at 783-784.) Rather, *Baker* decided the narrower question of the standard for recovery of expert witness costs. (*Ibid.*) On this point, it held that a prevailing defendant did need to make a *Christiansburg* showing to obtain such costs. (*Id.* at 783.) Thus, *Baker* is hardly support for Respondent's position given that it *actually held* certain section 12965(b) costs are subject to the *Christiansburg* standard when sought by a prevailing FEHA defendant.[9]

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[9] The purported "fifth" case was the appellate court's decision in (continued...)

At bottom, Respondent's alleged "five cases" boil down to one incorrectly decided case plus a couple of others that reflexively followed it.

III. RESPONDENT ACKNOWLEDGES THAT THE IMPOSITION OF COSTS AGAINST AN UNSUCCESSFUL FEHA PLAINTIFF MAY BE ECONOMICALLY CRIPPLING. BUT ITS PROPOSED SOLUTION ("SCALING") FAILS TO SOLVE THE PROBLEM.

While candidly making a key concession, Respondent buries it near the end of its brief. Respondent admits that the imposition of costs on unsuccessful FEHA plaintiffs may "impose undue hardship" on them or amount to undue "pressure" on "modest or low income plaintiffs." (RBM, pp. 51-52.)

This very concern is one of the fundamental policy rationales underlying the *Christiansburg* standard. Subjecting a discrimination plaintiff in a non-frivolous action to the risk of an economically ruinous (cost or fee) judgment against him or her "would substantially undercut the efforts of [our Legislature] to promote the vigorous enforcement of the provisions of" the FEHA. (*Christiansburg*, 434 U.S. at 422.)

(...continued)
this case, which even Respondent acknowledges is no longer valid authority given the grant of Review by this Court. (RBM, p. 39 at fn. 22.)

Indeed, any responsible attorney must at the outset of litigation advise the potential litigant about the risks and benefits of pursuing the proposed action. If Respondent's view were adopted by this Court, the initial consultation with the potential client would require that the client be advised that "as a matter of right" the employer can obtain a potentially economically destructive cost judgment against the employee simply should the employee not prevail (no matter that the case was non-frivolous and reasonably brought in good faith). The *potential exposure* to economic ruin can be expected to chill all but the most principled prospective FEHA plaintiffs from taking such a risk in order to vindicate their FEHA rights. As already noted, the economic reality is that most employees could not responsibly subject their families to such enormous economic risk.

Respondent cannot help but acknowledge these real concerns. (RBM, pp. 51-52.) It therefore offers a proposed solution – but, on examination, that solution simply melts away. Respondent suggests that the chilling effect of these economic realities can be addressed through the possibility that, *after-the-fact*, a judge may, in his or her discretion, apply a downward "scaling" of the prevailing defendant costs based on a showing by the employee of a financial inability to pay. (RBM, pp. 51-52; *see also Knight*, 132 Cal.App.4th at 136; *Holman*, 186 Cal.App.4th at 283.) But this

possible after-the-fact solution does nothing to address the very real problem of the prospective deterrent effect of the threat of significant financial exposure on the employee's decision of whether or not to pursue a non-frivolous action. It is the *risk or threat* that a staggering cost judgment could be awarded (despite the employee's good faith in bringing the action) that will likely deter FEHA plaintiffs from standing-up for their rights. Because *Christiansburg* was predicated on the need to *encourage* possible plaintiffs to step forward, Respondent's proposed after-the-fact fix ignores this reality.

IV. THE FACT THAT SOME OTHER CIVIL RIGHTS OR CONSUMER PROTECTION STATUTES PERMIT PREVAILING DEFENDANTS TO RECOVER ORDINARY COSTS SAYS NOTHING ABOUT WHETHER SECTION 12965(b) IS AN EXCEPTION TO SECTION 1032(b).

Respondent concludes by noting that some other consumer or civil rights statutes permit prevailing defendants to obtain costs as matter of right. (RBM, pp. 53-58.) So what?

The fact that the Legislature or Congress chose to subject certain plaintiffs to ordinary cost awards "as a matter of right" tells us nothing about whether Section 12965(b) creates an exception to Section 1032(b).

Respondent's argument simply ignores the differences in the language and structure of Section 12965(b) compared to the other cited statutes.

For example, Respondent cites to the "lemon law" statute construed in *Murillo*. (RBM, pp. 53-54.) But, unlike Section 12965(b), that statute simply provided for one-sided attorney's fees which, as we explain in Section (I)(A) above, *Murillo* held is insufficient to create an exception to Section 1032(b). (*Murillo*, 17 Cal.4th at 990-996.)

Respondent next discusses at length (RBM, pp. 54-57) the fact that some federal courts have held that a prevailing Title VII defendant may recover its costs under the general federal cost rule (F.R.C.P. 54). Our Opening Brief explained why, if we are to resort to comparisons to federal statutes, the more appropriate comparison is to the federal Americans with Disabilities Act (rather than Title VII of the Civil Rights Act of 1964) and that federal courts have held that a prevailing defendant in an Americans with Disabilities Act case must meet the *Christiansburg* standard to obtain a cost recovery. (OBM, pp. 16-19.)

The bottom line is that whether or not Section 12965(b) creates an exception to Section 1032(b) is a matter of *California law* governed by *Murillo*. However the federal courts have handled an analogous issue in construing *different* statutes cannot change the fact that for the reason we

detail herein, California law, and in particular this Court's decision in *Murillo*, dictate that Section 12965(b) must be considered an exception to Section 1032(b).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be reversed. Because there was no finding that this action was frivolous within the meaning of *Christiansburg*, costs should not have been assessed against Mr. Williams.

DATED: April 1, 2014

Respectfully submitted,

The deRubertis Law Firm, APC

Pine & Pine

By_____

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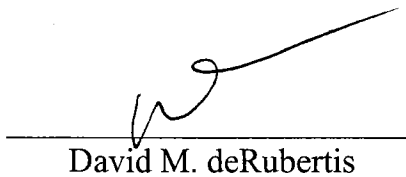
CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(c)(1), and in reliance on the word count feature of the Word Perfect software used to prepare this document, I certify that this Petition for Review contains 6,563 words, excluding those items identified in Rule 8.520(c)(3).

DATED: April 1, 2014



David M. deRubertis

PROOF OF SERVICE

Case Name: Loring Winn Williams v. Chino Valley Independent Fire District
Supreme Court Case Number: S213100
San Bernardino County Superior Court Case Number: CIVRS801732
Court of Appeals Case Number: E055755

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4219 Coldwater Canyon Avenue, Studio City, CA 91604. On the below executed date, I served upon the interested parties in this action the following described document(s): **REPLY BRIEF ON THE MERITS**

/_____/ MAIL: by placing a true copy thereof enclosed in a sealed envelope with First Class prepaid postage thereon in the United States mail at Studio City, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013a(1):

/**XXX**/ OVERNIGHT DELIVERY: by causing it to be mailed by a method of overnight delivery with instructions for delivery the next business day with delivery fees paid or provided for in the United States mail at Studio City, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013(c):

/_____/ PERSONAL SERVICE: by delivering a true copy thereof by hand to the person or office, indicated, at the address(es) set forth below:

/_____/ FAX & ELECTRONIC TRANSMISSION: by transmitting a true copy thereof by hand to the person or office, as indicated, at the address(es) telefax number(s) & email(s) set forth below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 1, 2014 at Studio City, California.

Mary Kupelian

PROOF OF SERVICE (CONT.)

Case Name: Loring Winn Williams v. Chino Valley Independent Fire District
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San Bernardino County Superior Court Case Number: CIVRS801732
Court of Appeals Case Number: E055755

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Clerk of the Court **COURT OF APPEAL** **Fourth Appellate District, Division Two** 3389 Twelfth Street Riverside, California 92501	***(1 copy)***
Clerk of the Court **San Bernardino Superior Court** **ATTN: Judge Janet M. Frangie** 8303 Haven Avenue Rancho Cucamonga, CA 91730	***(1 copy)***