S183372

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PORFIRIO SERRANO, et al., Plaintiffs and Appellants, v. STEFAN MERLI PLASTERING COMPANY, INC., et al., Defendants.	Sup. Ct. No. S183372 Appeal No. B215837 Los Angeles County Superior Court No. BC324031
COAST COURT REPORTERS, INC., Respondent.	

ANSWER BRIEF ON THE MERITS

On Appeal from the Judgment of the Superior Court
of the State of California, County of Los Angeles

Hon. Aurelio Munoz, Judge

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INTRODUCTION

Coast Court Reporters, Inc. ("Coast") hereby responds to the appellants' Opening Brief on the Merits ("AOB") filed by Porfirio and Lourdes Serrano ("Serranos") in which they seek reversal of the Court of Appeal's decision affirming the trial court's order denying their motion for attorney fees based on Code of Civil Procedure section 1021.5, the "private attorney general doctrine."

In *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014 ("*Serrano I*"), the Court of Appeal ruled a deposition reporter may charge "a reasonable fee for expediting the making, certification, and delivery of a copy" of a deposition transcript, and a trial judge may determine whether or not that fee is reasonable. (*Id.* at p. 1038.) On remand the trial court denied Coast the expedite fees for copies of the deposition transcripts. Coast promptly returned those fees, plus interest. However, not content with that, appellants sought $50,000 in attorney fees, which the trial court correctly denied.

The trial court based its ruling on *Adoption of Joshua S.* (2008) 42 Cal.4th 945 ("*Joshua S.*"), specifically ruling the moving party was "not trying to vindicate the public's interest," but instead was

"trying to protect his own interest and in so doing, by virtue of a published opinion, he conferred a benefit to litigants." (4AA 1003.) *Joshua S.* is controlling as it explains "private attorney general doctrine" fees are available only in cases of true "public interest litigation," which does not include all litigation which just happens to have wide-ranging effects. (*Joshua S., supra* at p. 956.)

The Serranos appealed, but the Court of Appeal affirmed, applying *Joshua S.* and explaining this private litigation was not public interest litigation merely because there was a "public effect," and section 1021.5 did not apply merely by virtue of the fact the opinion was published. (*Serrano v. Stefan Merli Plastering Company, Inc.* (2010) 184 Cal.App.4th 178, 188, ("*Serrano II*").)

The essence of appellants' claim is that *Serrano I* established a legal precedent which benefitted a lot of people, thereby entitling them to private attorney general fees. This is contrary to the language of the statute, the legislative history, all prior precedent, and *Joshua S. Serrano II* should be affirmed.

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STATEMENT OF CASE AND FACTS

Facts prior to *Serrano I*

In the underlying *Serrano* case, plaintiffs' expert, Dr. Robert Audell, was deposed on the afternoon of June 26, 2006. Audell's deposition had been noticed by defendant Stephan Merli Plastering. At the conclusion of the deposition, the court reporter asked plaintiffs' attorney, Edward Idell of the Bloom firm, if he wished to order a transcript and gave him the form to do so. (1AA 154.) On June 28, 2006, Idell faxed a certified copy request order form to Coast, requesting a copy of Dr. Audell's deposition. The form included the language: "I acknowledge that by placing this order I am agreeing to provide payment in full for the above-referenced transcript(s) upon request." (1AA 169.)

On June 29, 2006, at another deposition in the *Serrano* case, the court reporter informed attorney Idell another law firm on the case "had ordered the transcript expedited, and emailed by June 30 in addition to the delivery of a hard copy," asking Idell if he also wanted his copy expedited. (1AA 147.) Idell responded he did wish the transcript expedited and provided in electronic format. Idell declared the court reporter did not discuss any expedite fee charge. (*Ibid.*)

On June 30, 2006, Coast faxed to attorney Shelley Gould of the Bloom firm an invoice for $699.21, which included an expedite charge for four-day delivery of the Audell deposition in the amount of $261.56. The fax cover sheet noted: "As per our conversation, upon fax receipt of the check being mailed today and intended to satisfy the invoice for the above-referenced deposition, the final ASCII will be emailed to Mr. Edward Idell. . . . ¶ The certified copy will be shipped today to arrive next business day." (1AA 153-154.)

Ms. Gould of the Bloom firm faxed back a letter reciting, in part:

> We did not agree to pay an expedited charge nor did we request that the transcript be expedited. Defendant Stefan Merli noticed the deposition and should bear the cost of the transcription and any expedited fee. C.C.P. § 2025.510(b). [sic] Once Defendants Stefan Merli requested that the transcript be expedited, you are obligated to provide us with a copy available at the same time. C.C.P. § 2025.510(d). The charge for making the original expedited request is to be borne solely by Defendant Stefan Merli. (1AA 156.)

The Bloom firm agreed to pay the basic charge absent the expedite fee if they were provided a "corrected invoice." (1AA 156.) Nancy Holly of Coast faxed back a letter, also on June 30, explaining the reporter's duty under Code of Civil Procedure section 2025.520, subdivision (d), noting, "The Code does not state that the court

reporter cannot charge for services associated with a copy order, only that they be made available at the same time. For example, an attorney ordering a certified copy of a transcript, who wishes to obtain a rough ASCII, a realtime hookup, and/or any other associated service may do so for a price. These services do not come free of charge simply because the party making the original request has requested and paid for such services for their use." (1AA 160-161.)

Coast concluded it would "stand by" the original invoice and directed further communications to its attorney. (1AA 161.) The Bloom firm faxed back a letter later that evening, writing it would be applying ex parte for a court order requiring Coast to provide an expedited transcript without charging expedite fees. (1AA 163.)

On July 5, 2006, the Bloom firm filed an "ex parte application re order to require Coast Court Reporters to provide an expedited copy of plaintiffs' expert Dr. Robert Audell's deposition transcript by e-mail on July 5, 2006, with a hard copy to follow to plaintiffs' counsel without charging any expedited fees to plaintiffs" and various supporting documents. (1AA 139.)

When the matter came on for a hearing, Coast and the Bloom firm agreed to have Judge Munoz resolve the matter. The court set a

briefing schedule, calendaring the matter for July 20, 2006. (1AA 171.) The Bloom firm withdrew its objection to Coast acting as deposition officer, and the parties agreed to allow the depositions to continue without payment of any fee (basic or expedited) on the part of the Bloom firm until the trial court ruled on the expedite fee issue. (1AA 174-175.)

On July 13, 2006, Coast filed its opposition. (1AA 179.) Coast contended, *inter alia*, the Bloom firm was requesting that the Superior Court impose "the Court's authority into the free market economy to adjust a charge to the requester of legal service from the provider of that legal service absent citation to any legal authority to support such an intrusion." (1AA 182.) Coast also contended its pricing policy was reasonable, within the industry standards and competitive. (1AA 183.) Coast included a declaration from Ms. Holly explaining the deposition process and its pricing policy. (1AA 192-193.) It also included evidence demonstrating the court reporters recommended by the State of California charge considerably higher prices for transcripts for administrative hearings. (1AA 197-198.)

The Bloom firm filed its opposition on July 17, 2006, contending, essentially, that it did not independently request the

expedited transcript but only wanted a copy within that time frame because defense counsel had requested it. It also contended there was no freedom to negotiate with the reporter and, therefore, no "free market." (1AA 203.)

The matter came on for hearing on July 20, 2006. The court's tentative ruling was to deny the motion because the court believed it had no authority to order the court reporter to adjust its charges, even though the court personally thought the charge excessive. (1AA 239.) The court stated it would like to give "relief" to the Bloom firm, but "I don't think I can," suggesting seeking relief in the Court of Appeal. (1AA 225.) The court noted *Urban Pacific Equities Corp. v. Superior Court* (1997) 59 Cal.App.4th 688 permitted the reporters to charge "what the traffic will bear." (1AA 16-17.) The court directed the Bloom firm to pay the bill. (1AA 229.)

After further trial court proceedings necessitated by the Bloom firm's failure to pay the bill, the court again directed payment. The Bloom firm eventually paid the funds on July 26, 2006. (2AA 229, 305-308.) The Serranos appealed. The Court of Appeal filed its Opinion in *Serrano I* on May 7, 2008. (1AA 25.) Remittitur issued August 28, 2008. (1AA 18.)

Proceedings after remand

The matter first came back on before the trial court on November 7, 2008, at which time the trial court indicated it believed appellants should "just pay whatever it cost for the first copy; whatever that cost is, as long as it's reasonable, that's all that's required." (RT A-3.) Even though that is what the Serranos had been requesting, their counsel desired to submit additional briefing on the matter. (*Ibid.*) The hearing was set for December 4, 2008. (1AA 63.)

Coast submitted further briefing, explaining how it had arrived at the expedite fee for the copies and why that fee was appropriate and reasonable. (1AA 66-107.) The Serranos' counsel filed a brief arguing the charges were not reasonable. (1AA 108-119.) Counsel noted in a footnote they were "exploring whether there is statutory authority for an award of reasonable attorneys fees in this case . . . ." (1AA 109, fn. 1.) Counsel also sought to impose liability against Ms. Holly personally rather than the business entity, Coast Court Reporters, Inc. (1AA 120-126.) Coast and the Serranos both filed replies. (2AA 472A, 476.) Amicus Deposition Reporters Association of California also filed a brief correcting an assertion made by the Serranos (2AA 499), prompting the Serranos to file more paperwork.

(2AA 505, 513.)

The tentative ruling for the December 4, 2008, hearing was:

> This matter was remanded from the court of appeal with orders for this court to determine if any of the fees charged the Serranos were unreasonable and, if so, to order the refund to the Serranos of that amount. The court is of the opinion that charging the Serranos for the expedited transcript[s] was unreasonable. That amount was apparently $2,871.87. Coast Court Reporters is ordered to return that money to counsel for the Serranos. Additionally, because Coast has withheld that money from the date of the original payment, the Serranos are entitled to interest at the rate of 7% from the date of the original payment. (2AA 566.)

On December 4, 2008, the trial court began by noting:

> Okay. I'm not here to try and take over an industry. I'm not here to regulate an industry. I'm just concerned with this case and the expedited charges. And the Court of Appeal said you're not entitled to an expedited cost. You tried to reargue, basically, what you lost in the Court of Appeal. And if you think I'm wrong, go up there and tell Judge Croskey. (RT B-1.)

Coast's counsel pointed out the Opinion "did not say the expedited fees were unreasonable," but instead "this trial court is to determine what a reasonable expedite fee is for a certified copy." (RT B-2.) After further discussion, the court was not inclined to change its tentative ruling, and ruled none of the expedite charges were appropriate. (RT B-11.)

On December 22, 2008, Coast paid the full amount ordered.

(2AA 569-570.) However, the parties could not agree on the language for the order after the December 4 hearing so on January 9, 2009, they submitted a joint request for the trial court to resolve that dispute. (3AA 573.) The Bloom firm wanted the order to name Ms. Holly personally, rather than merely refer to Coast Court Reporters. When the trial court inquired as to why counsel cared whom the order specified since the amount already had been paid, counsel admitted, "We have contemplated filing a motion for attorney's fees on Code of Civil Procedure section 1021.5 . . . ." (RT C-4-C-5.) Coast's counsel objected that the Serranos' order included additional "language that we feel the court has never considered, certainly has never said, and is an effort to suggest that the court is trying to enforce an important right affecting the public interest or benefitting the general public or a large class of persons." (RT C-5.) The court replied, "I'm not going to award attorney fees; so I'm going to go ahead and sign Mr. Noronha's [Coast's] . . . order." (RT C-5.)

Attorney Idell argued the trial court previously had found an "unconscionable practice," but the court reiterated: "I'm not going to turn around and award a whole bunch of attorney's fees from all the reporters who were doing this. We now have uniformity and really

the people that would be suffering would be the attorneys. No." (RT C-6.) The trial court signed Coast's order. (3AA 600-601.)

Notwithstanding this clear statement of intent, on January 22, 2009, the Bloom firm did file a motion seeking attorney fees pursuant to Code of Civil Procedure section 1021.5 (3AA 604), which Coast opposed. (4AA 873, 890.) The hearing on the motion was held March 9, 2009. (RT D-1.) The Court's tentative ruling explained:

> The motion is denied. ". . . [S]ection 1021.5 does not authorize an award of attorney fees against an individual who has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public. . . ." (*Adoption of Joshua S.* (2008) 42 Cal.4th 945, 949.) Here that is exactly what occurred. Moving party was not trying to vindicate the public's interest. Rather, he was trying to protect his own interest and in so doing, by virtue of a published opinion, he conferred a benefit to litigants.

(4AA 1003.)

Notwithstanding *Joshua S.*, attorney Idell argued section 1021.5 attorney fees were appropriate because "the effect of the opinion was to affect the public interest." (RT D-1.) He also contended Coast's policies "affected their other customers," "their actions were representative of industry standards," and "this was not a situation where the actions of the Serranos were solely to vindicate

their own rights." (RT D-3.) He contended *Joshua S.* was distinguishable because that case "truly involved solely the rights between two parties. . . ." (*Ibid.*) The trial court declined to change its tentative ruling, denying the motion for attorney fees. (*Ibid.*, 4AA1002.) The Serranos appealed on April 29, 2009. (4AA 1013.) On April 28, 2010, the Court of Appeal filed its opinion, affirming that ruling, and this Court granted review.

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DISCUSSION

1. Plaintiffs Are Not Entitled to Attorney Fees Under the Private Attorney General Doctrine of Code of Civil Procedure Section 1021.5 Merely Because They Successfully Challenged Coast's Fee for Expedited Deposition Service, With that Challenge Resulting in a Published Opinion, Thereby Establishing Legal Precedent.

Although plaintiffs' statement of issues presented is somewhat difficult to decipher, the essence of their claim is that *Serrano I* established a legal precedent which benefitted a lot of people, thereby entitling them to attorney fees. They are wrong.

"California follows the 'American rule,' under which each party to a lawsuit ordinarily must pay his or her own attorney fees. [Citations.] Code of Civil Procedure section 1021 codifies the rule, providing that the measure and mode of attorney compensation are left to the agreement of the parties "'[e]xcept as attorney's fees are specifically provided for by statute.'" (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 516.) The underlying dispute over whether the trial court could determine whether or not $2,871.87 in expedite fees for copies of deposition transcripts was reasonable does not fall within either the letter or intent of the exception of section 1021.5, which provides, in pertinent part:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

An attorney fee award in this case in which a private dispute resulted in a published appellate opinion would be contrary to the legislative history of section 1021.5 and *Joshua S.* Moreover, what case authority there is which could possibly be read to support such a proposition is either inapposite, wrongly decided, or both.

A. An Analysis of the Legislative History Refutes the Contention that Establishing Legal Precedent Is a Sufficient Basis upon which to Award Section 1021.5 Fees.

Section 1021.5 "is designed 'to encourage the presentation of meritorious claims affecting large numbers of people by providing successful litigants attorneys fees incurred in public interest suits.'" (*Leiserson v. City of San Diego* (1988) 202 Cal.App.3d 725, 734.) The "private attorney general" doctrine is aptly named as it permits attorney fees to be recovered "by a private party who acts to enforce laws that public agencies are either incapable of enforcing or

unwilling to enforce." (*Nestande v. Watson* (2003) 111 Cal.App.4th 232, 240.)

Here, there is no law enforcement agency or other public agency which was charged to set rates for deposition reporters, but was not doing so, requiring the Serranos to step in.[1] There is nothing in the legislative history of the statute indicating this is the type of case envisioned by the legislature when it authorized private attorney general fees.

Section 1021.5 found its genesis in the Committee on Administration of Justice of the State Bar of California in 1974, which recommended legislation providing for discretionary awards of fees in civil cases. (Ex[2]. 1, p. 18.) This was followed by the United States Supreme Court's decision in *Alyeska Pipeline Service Co. v. The Wilderness* Society (1975) 421 U.S. 420 ("*Alyeska*") in 1975.

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Moreover, *Serrano I* did not hold an expedite fee was improper in any event; it merely held a trial judge could decide the question of the amount of the fees, expressly holding reporters may charge expedite fees: "This does not preclude a deposition reporter from charging a reasonable fee for expediting the making, certification, and delivery of a copy." (*Serrano I, supra*, 162 Cal.App.4th at p. 1038.)

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"Ex." refers to the Exhibits in Coast's Request for Judicial Notice filed in the Court of Appeal.

Alyeska prompted SB 664 in 1975, which proposed adding section 1021.5, which would "require costs and reasonable attorney's fees to be awarded to a taxpayer who successfully prosecutes a suit against public entities, as defined, when the judgment confers a substantial benefit on the public entity." (Ex. 2, p. 10.)

At the hearings on SB 664 in September 1975, the bill sponsor, Senator Song, noted he had introduced the bill in response to *Alyeska*. (Ex. 3, p. 13.) Attorney General Evelle Younger presciently described the problem which is now before this Court:

> However, the attempt in Senate Bill 664 to legislate the private attorney general concept in California contains some serious problems. Greatest of these is that it imposes on courts the responsibility for determining what is an important right and defining what is a significant benefit to a large class of persons. Where the award of attorneys' fees is authorized in such board [sic] terms, every successful plaintiff would necessarily be encouraged to litigate for attorneys' fees contending that he met the statutory requirements of public interest and significant benefit. (Ex. 3, pp. 59-60.)

Now-Justice Kline, testifying as a former "public interest lawyer" and not in his then-current position as Legal Affairs Secretary (Ex. 3, p. 65), believed the language was adequate, noting "public interest litigation is in fact a very small percentage, indeed, a minuscule percentage of the cases that now are in the courts or are

likely to be in the courts." (*Id.* at pp. 66-67.) He explained that one of the main features of "public interest litigation" was that "the final judgment will be [sic] affect not only the plaintiffs who initiated the action, but a substantial number of other individuals as well. For example, in an environmental suit to enjoin the polluting of a river, the outcome will determine whether all persons who presently live near or use the river and future generations of such persons will have an unspoiled body of water to utilize and enjoy." (*Id.*, p. 67.)

Attorney Armando Menocal from Public Advocates, Inc., noted it was important the provision apply only when there is a public benefit, which "would distinguish it from covering many situations where a mere – an individual's rights [are] involved and that individual then has an option deciding whether or not to seek vindication." (Ex. 3, pp. 102-103.)

In 1976 similar legislation was introduced again, via AB 3257, which would have enacted section 1021.5 in substantially the same form as it exists presently. (Ex. 4, pp. 152-153.) Again, the bill "died in committee" in the "unfinished business file." (Ex. 5, p. 157.)

Section 1021.5 was enacted in 1977 via AB 1310 (Stats. 1997, ch. 1197, § 1), sponsored by the State Bar, which noted it was

necessary because "important claims that affect a large number of persons may go unlitigated simply because no individual litigant can afford the necessary attorney's services, or the benefit to be gained by an individual litigant is so minimal as not to justify the expense of legal services to prosecute the matter." (Ex. 10, p. 108.) In August 1997 The Legal Services Section of the State Bar had written, "The bill would have very limited application. It would doubtlessly apply to a tiny fraction of 1% of civil litigation filed in state courts. The standards that must be met in order to give the court discretion to award fees ('may' rather than 'shall' is used) will be extremely difficult to meet." (Ex. 9, pp. 166-167.) It also was described as "a more efficient way to make state and local government agencies more responsive and accountable." (*Id.* at p. 167.)

The Enrolled Bill Report from the Legal Affairs office repeated "very few cases meet all three pre-conditions set forth in the bill." (Ex. 8, p. 164.) Legal Affairs Secretary Kline specifically noted: "Another reason to sign this bill is that, in the absence of legislation such as this, the courts might develop a more liberal common law rule that would justify fees in cases beyond the scope of the bill now before you. In the minds of some people, the California courts are

currently engaged in such a process . . . ." (Ex. 8, p. 165.)

Governor Brown's signing message noted AB 1310 "enables broader citizen participation in the legal process for the purpose of enforcing public interest statutes and assuring greater responsibility in state and local institutions." (Ex. 11, p. 172.) Attorney fees would be awarded "where it is determined the final judgment results in the public at large receiving a significant benefit." (*Ibid.*)

This legislative history yields several conclusions. First, throughout the materials, it is apparent the Legislature and bill proponents were concerned with large, complicated litigation, with trials often lasting months, which fell within the general definition of "public interest litigation," such as environmental litigation. There the *judgment* itself affected more than just the private parties in the action. (See also *Joshua S., supra*, 42 Cal.4th at p. 957.) This limitation as to what is "public interest litigation" as described by one of the leading proponents of the common-law, equitable doctrine was:

> Public interest litigation, in sum, unlike most lawsuits, is not aimed at resolving private differences between the named plaintiff and the named defendant. Rather, such litigation is brought by private individuals in the hope of achieving broader results by litigating issues of extreme current importance which when resolved will affect substantial numbers of people.

(Nussbaum, *Attorney's Fees in Public Interest Litigation*, (1973) 48

N.Y.U. L. Rev. 301, 305.)

Here, the trial court's order concerning the expedite fees only affects the Serranos (and/or their counsel) and Coast. The *judgment*, or order in the instant case, will change the lives or status of no other persons. The instant case is not the type which was envisioned to fall within this legislation.

"Public interest litigation" qualifying for section 1021.5 fees must be limited to that type of case the Legislature intended, i.e. those in which the actual judgment affects a broad spectrum of the population, not cases which merely decide legal issues which may affect persons other than the litigants in the case before the court.

Also, the legislation was intended to provide very specific criteria and was intended to *narrow* the universe of types of lawsuits which could qualify for fees. These criteria were *not* meant to precisely mirror the common-law equitable doctrines which were developing. Instead, the criteria were meant as an *alternative* to the court invoking its equitable powers.

The issue here was purely a "private difference" between the Serranos, or their counsel, and Coast; there was no issue of "extreme current importance" affecting "substantial numbers of people."

Because this dispute does not fall within the types of actions contemplated by the Legislature in enacting section 1021.5, *Serrano I* cannot be said to have "resulted in the enforcement of an important right affecting the public interest." Because this case was not "public interest litigation," private attorney general fees are unavailable as a matter of law.

B. *Joshua S.* Supports the Conclusion Section 1021.5 Fees Are Not Available Merely Because Litigation Results in Legal Precedent.

The trial court and the Court of Appeal looked to *Joshua S.'s* conclusion that establishment of a legal precedent was not sufficient to justify section 1021.5 fees. (4AA 1003, *Serrano II, supra*, 184 Cal.App.4th at p. 188.) Those rulings were correct. Not only was *Serrano I* not "public interest litigation," but also publication alone cannot constitute a "significant benefit" "conferred on the general public or a large class of persons" sufficient to satisfy factor (a) of section 1021.5. That can be said of *every* case a Court of Appeal decides by published opinion.

> Although "it is a built-in consequence of [the Anglo-American principle of] stare decisis that 'a legal doctrine established in a case involving a single litigant characteristically benefits all others similarly situated'" [Citations], the doctrine of stare decisis has never been viewed

> as sufficient justification for permitting an attorney to obtain fees from all those who may, in future cases, utilize a precedent he has helped to secure.

(*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 946.)

Publication of an appellate opinion, and therefore an asserted "benefit" to the public conferred by advancing or clarifying the law, has never been sufficient by itself to justify an award of private attorney general fees. The problem with instituting such a rule is apparent upon considering the result if an opinion which meets the criteria for publication is nevertheless not ordered published. The opinion could read exactly the same as if it had been ordered published, but remain not published. Under appellants' theory the party prevailing on appeal would *not* be entitled to any private attorney general fees because the result affected no one other than the parties. This would be an absurd result, permitting a Court of Appeal to prevent a private attorney general fee award merely by not ordering an opinion published. The propriety of the award must be premised on whether the action really is "public interest litigation," not whether or not the opinion in published.

The Court of Appeal majority correctly relied on *Joshua S.*'s conclusion that private litigation which happens to establish an

important precedent does not justify section 1021.5 fees. (*Serrano II*, *supra*, 184 Cal.App.4th at p. 187, citing *Joshua S., supra,* 42 Cal.4th at p. 956.) *Joshua S.* was the follow-up case to *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, in which this Supreme Court "validated a so-called 'second parent' adoption, in which the same-sex partner of a birth mother adopted the mother's child, while the mother remained a coparent. Subsequently, the prevailing party, Annette F., sought attorney fees under the 'private attorney general attorney fee' statute, Code of Civil Procedure section 1021.5, to be paid by the losing party, Sharon S." (*Joshua S., supra,* 42 Cal.4th at p. 949.) The trial court awarded section 1021.5 attorney fees, but the Court of Appeal reversed, concluding "that because of Annette's large personal stake in the outcome of the litigation, she was not acting as an authentic private attorney general." (*Ibid.*) This Supreme Court did not decide the case on that particular issue, instead focusing on the question:

> Does section 1021.5 authorize an award of attorney fees against a litigant who has done nothing to adversely affect the rights of the public or a substantial class of people other than raising an issue in the course of litigation over private rights and interests that results in an important appellate precedent adverse to that litigant?

(*Id.* at p. 949.)

This Court summarized its holding:

> [S]ection 1021.5 does not authorize an award of attorney fees against an individual who has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public, and that therefore fees should not be awarded in the present case.

(*Joshua S., supra,* 42 Cal.4th at p. 949.)

This Court agreed with Sharon's contention "section 1021.5 attorney fees should not be imposed on parties such as herself, an individual who has only engaged in litigation to adjudicate private rights from which important appellate precedent happens to emerge, but has otherwise done nothing to compromise the rights of the public or a significant class of people." (*Joshua S., supra,* 42 Cal.4th at p. 954.) Justice Moreno pointed out the private attorney general doctrine was an exception to the American rule, premised on the fact "it is equitable to impose public interest attorney fees on parties that have done something to adversely affect the public interest." (*Id.* at p. 954.) "[I]n virtually every published case in which section 1021.5 attorney fees have been awarded, the party on whom the fees have been imposed had done something more than prosecute or defend a private lawsuit, but instead had engaged in conduct that in some way had adversely affected the public interest." (*Ibid.*)

This Court examined the legislative history, concluding section

1021.5 was meant for true "public interest litigation," i.e., "litigation designed to promote the public interest by enforcing laws that a government or private entity was violating, rather than private litigation that happened to establish an important precedent." (*Joshua S., supra,* 42 Cal.4th at p. 954.) Whether or not the litigation results in a published opinion which affects persons far beyond those involved in the litigation at issue is not controlling. "But even when an important right has been vindicated and a substantial public benefit conferred, and when a plaintiff's litigation has transcended her personal interest, we conclude that section 1021.5 was not intended to impose fees on an individual seeking a judgment that determines only his or her private rights, but who has done nothing to adversely affect the public interest other than being on the losing side of an important appellate case." (*Id.* at p. 958.)

Joshua S. is on point. Here, the underlying litigation was a personal injury case in which Coast was not even a party. In the course of that case, the Serranos – through their counsel – claimed they were being charged too much by a private court reporter, Coast, for expedited copies of deposition transcripts, in the amount of $2,871.87. "Coast had agreed to provide the copies to the Serranos

on the condition that the Serranos and Coast would be bound by the trial court's ruling as to the reasonableness of the fees." (*Serrano I, supra,* 162 Cal.App.4th at p. 1020.) Judge Munoz believed the Serranos should not be charged extra for expedited copies, but felt constrained to do anything about it because of existing precedent.

The Serranos sought and obtained appellate relief from the Court of Appeal, which held that, under the circumstances of this case in which there had been no contract between the reporter and the non-noticing counsel, and the reporter had agreed to submit the matter to the trial judge for decision; the trial court *did* have the authority to determine if a fee charged by the deposition reporter for a copy of a transcript was reasonable. (*Serrano I, supra,* 162 Cal.App.4th at pp. 1038-1039.)

This dispute concerned $2,871.87 and one court reporting service in one personal injury case. This was not a class action in which a litigant or group of litigants sued a large court reporting agency or a group of court reporters, alleging unfair business practices. This falls squarely within *Joshua S.'s* definition of someone "raising an issue in the course of litigation over private rights and interests that results in an important appellate precedent

adverse to that litigant." (*Joshua S., supra,* 42 Cal.4th at p. 949.)

Moreover, Coast did nothing "wrong," nor did it do anything "to compromise the rights of the public or a significant class of people." (*Joshua S., supra,* 42 Cal.4th at p. 954.) It engaged in no "conduct that in some way had adversely affected the public interest." (*Ibid.*) Coast did nothing that "compromised public rights." (*Id.* at p. 958.) It merely sent the Bloom firm a bill, seeking prompt payment for a copy of a deposition transcript, since it had no prior business relationship with that firm. (1AA 93.) The Bloom firm requested its copies be prepared on an expedited basis, as had the noticing party. Consistent with common practice, Coast charged the Bloom firm an additional fee for this expedited service, which was far less than half the expedite fee charged the noticing party. (1AA 86.) This was a simple business transaction, not a massive violation of the rights of a broad spectrum of Californians. The Court of Appeal and the trial court correctly found *Joshua S.* controlling. That ruling should be affirmed.

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C. The *Serrano II* Dissent Is Flawed.

The dissenting justice emphasized the fact Coast was a deposition officer and, therefore, had various statutory duties, which the dissent believed had been violated. (*Serrano II, supra,* 184 Cal.App.4th at pp. 191-192, dis. opn. of Croskey, J.) The dissent's factual and legal premises are flawed.

First, this case does not involve the violation of a "statutory duty," only a fee dispute in the context of deposition reporting services. More fundamentally, there are a whole panoply of "statutory duties," the asserted violations of which give rise to litigation. "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights." (Civ. Code, § 1708.) Virtually all civil litigation is premised upon the damage to the person or property of another or violation of rights. There is no authority for the proposition that, just because a "duty" is set forth in some statute, an asserted violation of that duty may give rise to section 1021.5 private attorney general fees.

Factually, the dissent's premise that Coast held "a necessary transcript hostage while demanding an unreasonable fee" (*Serrano II,* supra, 184 Cal.App.4th at p. 194) is contrary to the record. As the

majority noted, "the fee Coast charged was not unreasonable until the trial court ruled it so, and once the dispute arose between Coast and the plaintiffs, Coast waived its fee and provided the deposition transcripts pending resolution of the disagreement with the trial court." (*Id.*, at p. 190, fn. 3.) Not only are appellants precluded from arguing otherwise because they did not assert this fact was wrong in their petition for rehearing (Cal. Rules of Court, rule 8.500(c)(2)), the majority was correct.

The Audell deposition was taken June 26, 2006. Both counsel requested their copies of the deposition be expedited and sent to them by June 30, 2006. (1AA 93, 140.) On June 28, 2006, the Bloom firm faxed to Coast its order for the certified transcript. (1AA 169.) Coast faxed its invoice, which included the $261.56 expedite fee, to the Bloom firm on June 30, 2006. (1AA 93.) Later that same day, the Bloom firm faxed Coast a letter stating that it had not agreed to an expedite charge, "nor did we request that the transcript be expedited" so the Bloom firm did not want to pay the expedite charge. (1AA 156.) Still on June 30, Coast faxed back a letter stating that its understanding of the Code of Civil Procedure was that it was required to make the transcript available at the same time to all parties, not that

it was required to provide expedited copies to other parties without an expedite charge. (1AA 160-161.) Coast reaffirmed it was "happy to put your certified copy order to the head of the queue and deliver it on an expedited basis, but there is an additional charge, commensurate with the certified copy order page rate, associated with this special request." (1AA 161.) Still later that same day, June 30, the Bloom firm gave Coast ex parte notice it would, on Wednesday, July 5, 2006, be seeking an ex parte order that the deposition be provided "without charging any expedited fees to Plaintiffs." (1AA 163.) When the matter came on for hearing on July 5[3] Coast delivered the copy of the transcript to the Bloom firm, and the parties agreed to submit the fee dispute to the trial court. (1AA 171.)

Therefore, Coast did not "hold the transcript hostage." Not even one day had elapsed between the payment request and the Bloom firm's ex parte notice, which apparently was faxed at 8:30 p.m. on the Friday before a holiday weekend. (1AA 164.) Coast delivered the transcript in court the next court day, the date the Bloom

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Coast requests this Court take judicial notice that June 30, 2006, was a Friday, and July 4 was Tuesday, so the intervening days comprised the 4th of July holiday weekend. (Evid. Code, § 451, subd. (f).)

firm had set for the hearing. The dissenting justice's basis for concluding Coast did something "wrong" is not supported by the record.

Additionally, Coast demonstrated not only that the expedite fee it charged was consistent with other similar agencies, but also that services authorized by government agencies charged far higher expedite fees. (1AA 83, 86, 88-91.) Plaintiffs even agreed to pay some amount of expedite fee. (1AA 144.) The trial court never found any "statutory violation;" it merely believed – contrary to the *Serrano I* opinion – that Coast was not entitled to *any* amount of expedite fee from the Bloom firm, apparently accepting the Bloom firm's "just push the print button again" argument, although there was no evidence at all in support of that theory. Coast had detailed what was required to prepare a *certified* copy, which was what had been requested, not a mere photocopy. Moreover, Coast explained the additional work required on nights and weekends if an expedited transcript was required. (1AA 84.) The Bloom firm never refuted any of this evidence. The dissent's conclusion that there was some implied finding the expedite fee was illegal, and therefore, Coast did something "wrong," is not supported in the record.

Legally, the dissent is not on firm ground either. Coast's initial position that the trial court could not regulate the amount of the expedite fee was consistent with existing case law (*Urban Pacific Equities, supra*, 59 Cal.App.4th 688), with which the trial court agreed at that time, ruling initially for Coast. (1AA 189, 234.) Coast should not be faulted or penalized for relying on existing case law, with which the Court of Appeal subsequently disagreed. (*Serrano I, supra,* 162 Cal.App.4th at pp. 1037-1038.)

The dissent also looked to cases in which the asserted "wrongdoing by the defendants" was "against their own customers." (*Serrano II, supra,* 184 Cal.App.4th at pp. 191-193, dis. opn. of Croskey, J.) Reliance on these cases was flawed. First, as set forth above, the question is whether the *judgment* affects a broad spectrum of people. Here, the order only affected the Serranos and Coast, which distinguishes this case from those upon which the dissent relies. Second, those cases were class actions. *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, was a class action brought by "representative members of a class of persons in California who purchased Leatherman tools" (*Id.* at p. 673) pursuant to "the false advertising law (Bus. & Prof. Code, §§ 17500, 17533.7),

the unfair competition law (§ 17200 et seq.), and the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.) as the result of Leatherman's labeling and advertising its products as 'Made in the U.S.A.,' when parts of those products were manufactured outside the United States." (*Id.* at p. 672.) It was not an action against Leatherman by one customer. *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407 (overruled on another ground in *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1153, fn. 6) also concerned a class action. (*Id.* at p. 1412.) By definition, a successful class action benefits "a large class of persons." (Code Civ. Proc., § 1021.5.) These cases do not support the proposition that the *Serrano I* decision benefitted a large class of persons within the meaning of section 1021.5.

The *Serrano II* dissent is flawed on these several grounds and should be rejected by this Court.

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D. The Portion of *Los Angeles Police Protective League* on Which Appellants Rely Was Decided Incorrectly and Should Be Disapproved.

The question here is whether a published opinion can transform this case into an "action which has resulted in the enforcement of an important right affecting the public interest" because publication confers "a significant benefit . . . on the general public or a large class of persons." Appellants' authority for its position is buried in footnote 33 on pages 22 and 23 of its Opening Brief, in which it cites three cases as ostensible authority for the proposition section 1021.5 fees are available after appeal even if those fees would not have been available for the trial court action, asserting: "If the litigation becomes broader or issues are injected by the Court, even belatedly, so that all of the elements of § 1021.5 exist concurrently, a case will qualify for fees from that point forward as long as all the elements exist concurrently." The cited cases either do not support this assertion or are fundamentally flawed.

Appellants cite *Mounger v. Gates* (1987) 193 Cal.App.3d 1248, *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, and *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287. *City of Sacramento* does not have anything to do

with this principle at all. That case concerned whether a trial court had erred in denying a successful defendant section 1021.5 fees on the dual bases that a district's special tax "presumably" would have been declared invalid regardless of Mr. Drew's participation, and that Drew had "belatedly" raised the prevailing legal theory. The court of appeal held the court had erred. (*Id.* at p. 1292.) This is not relevant to this case.

Mounger was brought by an officer and the Los Angeles Police Protective League. (*Mounger v. Gates, supra,* 193 Cal.App.3d at p. 1251-1252.) Division Seven of the Second Appellate District cited *Los Angeles Police Protective League* for the proposition a case may not warrant a fee award in the trial court but on appeal the case may involve "legal issues" "which could justify an award for the lawyers' efforts during that phase of the proceedings." (*Id.* at p. 1258.) However, again, *Mounger* was "public interest litigation" so really is of no assistance to plaintiffs here. It also dealt with violations of Government Code section 3300 (*Id.* at p. 1251), so it fell within *Joshua S.'s* requirement the party assessed fees do "something wrong" as well.

More importantly, *Mounger* relied purely on the comment in

Los Angeles Police Protective League, (*Mounger v. Gates, supra,* 193 Cal.App.3d at p. 1258, fn. 10) in which that court did note attorney fees for the appellate phase of litigation may be appropriate even if fees for trial court work are not. (*Los Angeles Police Protective League v. City of Los Angeles, supra*, 188 Cal.App.3d at p. 17.) However, that conclusion is flawed on multiple levels and should be disapproved.

Los Angeles Police Protective League concerned the imposition of a parking fee by the Los Angeles City Council without first "complying with the 'meet and confer' provisions of the Meyers-Milias-Brown Act (Govt. Code, § 3500 et seq.)." (*Los Angeles Police Protective League v. City of Los Angeles, supra*, 188 Cal.App.3d at p. 5.) On its face, this qualifies as "public interest litigation" because it concerns public employees, governmental entities, collective bargaining and enforcement of a specific statute. Moreover, the Court of Appeal noted its prior decision had vindicated an important right, and that matter met the criteria for private attorney general fees. (*Id.* at pp. 12-13.) Therefore, *Los Angeles Police Protective League* did not concern a case in which the trial court proceedings did not constitute "public interest litigation." Any comment in that case to

the extent that publication of an opinion somehow transforms non-public interest litigation, which would not have met section 1021.5's criteria if concluded at the trial court level, into public interest litigation after appellate proceedings so as to provide attorney fees for the prevailing party is dicta, not true authority for that proposition. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 598; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 850.)

> It is a foundational principle that: "'[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.'" [Citations.] "A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and in those in the case under consideration."

(*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157.)

Because *Los Angeles Police Protective League* qualified as public interest litigation from the outset, it is not authority for the proposition that a party is entitled to section 1021.5 attorney fees merely because of the publication of an appellate opinion.

Moreover, *Los Angeles Police Protective League* cited no authority at all for that proposition, which is found first in the fourth

full paragraph of page 10, which then continues on to page 11, and then is reiterated in the second full paragraph on page 17, immediately before the "Disposition." (*Los Angeles Police Protective League v. City of Los Angeles, supra,* 118 Cal.App.3d at pp. 10, 11, & 17.) No legal authority is presented in these paragraphs, demonstrating the conclusion is not only dicta, it also is without legal foundation and, therefore, not entitled to "any precedential significance." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 840, fn. 61.) Because of the lack of analysis, its "authoritative status is undermined." (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 358.) The reasoning "on which a prior decision purports to be based" is a relevant factor "in determining whether the decision should be followed under the doctrine of stare decisis." (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 235; disapproved on other grounds in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1248.) Because this portion of *Los Angeles Police Protective League* is not premised on any legal authority whatsoever, it should be disapproved.

Moreover, *Los Angeles Police Protective League* itself rejects this proposition when it states: "The fact we or some other appellate

court decides to publish an opinion does not conclusively establish the underlying action 'vindicated an important right.'" (*Los Angeles Police Protective League v. City of Los Angeles, supra,* 188 Cal.App.3d at p. 12.) Continuing, the court concluded: "Admittedly, the fact of publication does not reach the level of a 'prima facie showing' the right was important. Nonetheless, it goes some distance in that direction." (*Ibid.*) Therefore, this case is internally inconsistent on this point and expressly declaims the proposition for which it has been cited.

Also, because *Los Angeles Police Protective League* is from an intermediate appellate court, it is "in no way binding" on this Supreme Court "which is free at any time to overrule lower court interpretations of questions of law and reach a different conclusion." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 689, fn. 28; see also *Worthley v. Worthley* (1955) 44 Cal.2d 465, 472.)

Mounger and *Los Angeles Police Protective League* also are inconsistent with *Joshua S.* If the party is not the type of party envisioned by the Legislature to be subject to an attorney fee award, then an award may not be imposed, whether or not the case involves issues at the appellate level which may affect a class of people

beyond the litigants in that case. This Supreme Court rejected the claim that a case which would not justify an award of private attorney general fees prior to an appeal is transformed into a private attorney general fee case if the issues on appeal could have a more wide-ranging effect, explaining that, there, Sharon "simply raised an issue in the court of that litigation that gave rise to important appellate precedent decided adversely to her." (*Joshua S., supra,* 42 Cal.4th at p. 957.) *Mounger* and *Los Angeles Police Protective League* are inconsistent with this pronouncement and should be disapproved on this ground as well.

Because *Los Angeles Police Protective League* rests on a foundation of sand and is inconsistent with *Joshua S.*, it, and any cases relying on it, should be disapproved. Because there is no other authority supporting plaintiff's theory that a case which does not merit attorney fees at the trial level can be transformed into public interest litigation justifying section 1021.5 fees after appeal, the Court of Appeal's ruling should be affirmed.

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2. Appellants' Interpretation of *Joshua S.* and Its Application in *Serrano II* Is Flawed.

Appellants claim Coast contended *Joshua S.* "rewrote" section 1021.5, with which contention the lower courts agreed. (AOB 1, 5, 22, 32.) First, Coast never contended this, nor do appellants supply any record citation for such a contention. Although difficult to decipher, appellants' argument appears to be that the discussion in *Joshua S.* of the difference between "private litigation" and "public interest litigation" is meaningless, even criticizing this Court's language in footnote 45 at page 31. The distinction is not meaningless. As set forth above, the Legislature did not intend section 1021.5 fees to be available in all types of litigation merely because that litigation results in appellate precedent.

Appellants argue the Court of Appeal misapplied *Joshua S.* because the "private litigation" language was not the *ratio decidendi* of that case. (AOB 33.) They are wrong. Reading the language of *Joshua S.* in light of the facts and issues raised (*Camarillo v. Vaage* (2003) 105 Cal.App.4th 552, 565; 5 Witkin, Cal. Procedure (5th Ed. 2008) Appeal, § 510, p. 574), the distinction between private litigation and public interest litigation was part of the *ratio decidendi*

of that decision. This discussion is found under the key heading "Sharon's Litigation In Not Within the Scope of Section 1021.5," (*Joshua S., supra*, 42 Cal.4th at pp. 954-957), not in some prefatory or ancillary portion of the decision. This Court was analyzing the type of litigation which could give rise to section 1021.5 fees, which analysis was applied correctly in this case.

Even if the only "*ratio decidendi*" of *Joshua S.* was the conclusion a litigant must have done something "wrong" to harm the public in order to be assessed section 1021.5 fees, the distinction between private litigation and public interest litigation is not "nothing." "A correct principle of law may be announced in a given case, although it may not be necessary to there apply it, because of other principles upon which the case then under consideration may be disposed of." (*San Joaquin and Kings River Canal and Irrigation Co. v. County of Stanislaus* (1908) 155 Cal. 21, 28.) This principle "loses nothing of its force as such because it was not applied" (*Ibid.*) and should be applied definitively here.

Appellants then claim this Supreme Court erred in employing the private litigation/public interest litigation distinction instead of discussing the "statutory elements" of section 1021.5. (AOB 33.)

This misses the point that, if litigation is not the type meant to be encompassed within section 1021.5, then there is no need for a specific analysis of the statutory elements. Additionally, this distinction is relevant to the introductory portion of the statute, i.e., "an important right affecting the public interest," rather than the subsequent enumerated factors, which are the focus of the "statutory elements." Determining whether or not litigation is of the type meant to be covered by section 1021.5 is not inconsistent with an analysis of these elements.

Appellants continue this flawed argument by contending *Serrano II* "confuses" the "important right" and "substantial public benefit"[4] analyses. (AOB 34.) Not so. Again the "important right affecting the public benefit" language precedes the other requirements, the first of which is conferring a "significant benefit. . . on the general public or a large class of persons." These are separate concepts to be analyzed separately. Appellants seek to read out the

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[4] The statute does not refer to conferring a "substantial public benefit," as appellants contend. (AOB 34.) It speaks of conferring a "significant benefit" on "the general public or a large class of persons."

introductory portion of the statute, instead launching immediately into an analysis of the enumerated factors. This is improper. "[S]ignificance should be given to every word, phrase [and] sentence" in a statute." (*Dubois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388.) "An interpretation that renders statutory language a nullity is obviously to be avoided." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 357.) *Serrano II* is correct in not "reaching the significant benefit element" (AOB 34), because this case did not result "in the enforcement of an important right affecting the public interest."

Appellants then appear to contend that their challenge to the expedite fees resulted in an "enforcement of an important right affecting the public interest" because they were "enforcing" a statute concerning which the Legislature intended statewide effect. (AOB 34.) There are multiple problems with this assertion. First, it is not clear what statute appellants claim they were "enforcing" by refusing to pay their bill and thereafter appealing the trial court's ruling that it did not have the authority to inquire into the reporter's fees. Indeed, *Serrano I* did not rule they were "enforcing" any statute at all. *Serrano I* looked to Code of Civil Procedure section 2025.570,

subdivision (a), which permitted third parties to obtain a copy of a deposition transcript "on payment of a reasonable charge set by the deposition officer," and construed section 2025.520, subdivision (c), permitting a party or the deponent to obtain a copy of the transcript, as including the same "reasonable charge" language and thereafter held the trial court could determine whether that charge was reasonable in certain circumstances. (*Serrano I, supra*, 162 Cal.App.4th at pp. 1036-1038.) There was no statute stating that the trial court could determine the amount of the court reporter's fees, nor is there to this day. Neither is there a statute setting the amount of a private court reporter fees. Appellants' entire premise of "enforcement" of some statute is flawed because there was, and is, no statute which was "enforced."

Moreover, even in cases in which there is some statute at issue, the Legislature always intends statutes to apply to everybody. A statute not meant to be applied to the entire population would be prohibited as a bill of attainder. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 525.)

Appellants then contend *Serrano II* improperly combines the "significant benefit criteria" with the "important right criteria," citing

Beasley v. Wells Fargo Bank, supra, 235 Cal.App.3d 1407. *Beasley* concerned class action litigation brought by Wells Fargo's credit card customers. Wells Fargo had argued the litigation "did not result 'in the enforcement of an important right affecting the public interest' (§ 1021.5) because it vindicated only the private rights of Wells Fargo cardholders, rather than benefitting the public as a whole, and thus there was no public interest at stake." (*Id.*, at p. 1417.) The court rejected that claim, explaining:

> This argument confuses the question whether there was an important public interest at stake with the question whether a "significant benefit" has been "conferred on the general public or a large class of persons . . . ." (§ 1021.5, subd. (a).) The significant benefit criterion calls for an examination whether the litigation has had a beneficial impact on the public as a whole or on a group of private parties which is sufficiently large to justify a fee award. This criterion thereby implements the general requirement that the benefit provided by the litigation inures primarily to the public. [Citation.] In contrast, the question whether there was an important public interest at stake merely calls for an examination of the subject matter of the action -- i.e., whether the right involved was of sufficient societal importance.

(*Id.* at p. 1417.)

Here, neither criterion is met. The subject matter of the action, i.e., the right involved, was the Bloom firm's contention it did not have to pay a $261.56 expedite fee for a deposition transcript. This is not a claim of much societal importance. Although appellants claim

the entire civil justice system was at stake, Coast always has contended that the trial court had the authority to order Coast to deliver the transcript to the Bloom firm *without any payment at all*; it was only the authority of the trial court to set the amount of expedite fee which Coast challenged. As the Court of Appeal noted: "Coast merely raised the argument that it, not the trial court, had the right to regulate the fees it charged." (*Serrano II, supra,* 184 Cal.App.4th at p. 189; See also 3AA 772.) As for the "significant benefit criterion," the only "benefit" which arguably could have been bestowed on the public or a large class of persons is the asserted "benefit" derived from the publication of the appellate opinion which is insufficient as discussed above.

Appellants' next contention dealing with "the general concept of enforcement" (AOB 35) is, frankly, unintelligible, so Coast will not respond to it.

Appellants then contend limiting section 1021.5 attorney fee awards to "cases where the government may, but never has time or resources to, enforce the important right, will gut the statute." (AOB 35-36.) This is nothing less than an argument this Court should do away with the American rule and hold an award of private attorney

general attorney fees is proper whenever an "important right" is enforced. Section 1021.5 awards "private attorney general" fees for a reason: it is meant to compensate private parties for undertaking litigation which could have been brought by an attorney general or similar governmental enforcement agency, but that agency declines to do so. (*Woodland Hills Residents Assn., Inc. v. City Council, supra*, 23 Cal.3d at pp. 933-934; *Nestande v. Watson, supra*, 111 Cal.App.4th at p. 240.)

Appellants seek to eliminate most of the language of the statute, instead replacing it with a statute awarding attorney fees whenever an "important right" is vindicated. Not only may a court not "rewrite the statute to conform to an assumed intention that does not appear in its language" (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 253); a court certainly may not rewrite the statute to embody an intention expressly *not* intended by the legislature. If appellants desire a statute awarding fees for litigating "important rights," they need to take that request to the Legislature, not this Supreme Court.

Moreover, who is to decide what rights are "important," and which are not? A person innocently standing on a street corner who

is run over by a drunk driver and left paralyzed certainly would believe that receiving monetary compensation for injuries vindicates an "important" right. So does a businessman who obtains a civil judgment after being defrauded in a business transaction, or a real property owner who succeeds in having title adjudicated. The answer is that the Legislature has decided which rights qualify as "important" rights so as to qualify for private attorney general fees. The Legislature has decided those rights must not only be "important," but also must be rights "affecting the public interest." Appellants' attempt to eliminate the American rule in California must be rejected.

Additionally, *Serrano II* did not "per se" disqualify two-private-party litigation as being ineligible for a fee award. (AOB 36-37.) It ruled *this particular* litigation was not eligible for a fee award because it "was a private business disagreement between plaintiffs and Coast only – not the entire deposition reporting industry – over the fees one side of the arrangement sought to charge the other side for services provided in the course of a larger personal injury lawsuit." (*Serrano II, supra*, 184 Cal.App.4th at p. 189.) Because "[t]he proceeding in *Serrano I* settled only plaintiffs' and Coast's private rights," the "trial court acted within the bounds of reason in

denying plaintiff's attorney fees request." (*Ibid.*) The Court of Appeal further determined de novo that *Serrano I* did not meet section 1021.5's requirements. (*Id.* at pp. 189-190.) Nowhere in *Serrano II* did the Court of Appeal hold that, as a matter of law, litigation between two private parties can *never* result in a section 1021.5 fee award, nor has Coast contended as much. It is the nature of the right and the parties affected by the judgment which are the primary focus of the inquiry. Appellants' argument is a red herring which must be rejected.

Appellants also continue their refrain that this dispute was aimed at correcting an "industry practice." (AOB 38.) Not so. Holly only declared that the method of calculating the expedited charges was the "industry standard," and that the $2.65 per page charged the Serranos for the expert deposition copy was consistent with the "industry standard page rate" of $2.50 to $2.75 per page. (1AA 86.) This was not a lawsuit challenging "industry standards"; it was an effort by the Bloom firm to obtain an expedited copy of the deposition transcript without paying the expedite fee.

This argument is repeated in footnote 52 at page 38 in which the Serranos contend Coast "sought justification by industry

standards and lost." Just because Coast pointed out that its fees were consistent with those of other court reporters – and lower than many authorized by the State of California to transcribe administrative hearings (1AA 88-91) – this does not mean the litigation was undertaken to challenge the practices of an entire industry. If that were the case, then every time a party provided evidence of comparable pricing for similar goods and services, but a court later ruled those prices unreasonable; the prevailing party would be entitled to attorney fees, surely an unwarranted result.

The trial court first specifically stated it was not ruling on the industry as a whole. (RT B-1.) Then, in denying the fee request, it ruled: "Moving party was not trying to vindicate the public's interest. Rather, he was trying to protect his own interest and in so doing, by virtue of a published opinion, he conferred a benefit to litigants." (4AA 1003.) This is a factual finding supported by substantial evidence and, therefore, binding on the reviewing courts. (*Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 734.) Because the Serranos' premise that the litigation was an "enforcement proceeding[] initiated to redress its statutory violation" (AOB 38) is directly contrary to this finding, it must be rejected.

Appellants point to a single case which can be characterized as "private party litigation" in which section 1021.5 fees were awarded, *Bartling v. Glendale Adventist Medical Center* (1986) 184 Cal.App.3d 97. However, *Bartling* was not "regular" civil litigation between two parties. Instead, it concerned that court's prior holding "that a competent, nonterminally ill adult patient has a *constitutionally based right* to refuse and/or to terminate medical treatment." (*Id.* at p. 99, emphasis added.) Moreover, *Bartling* did not hold that plaintiff was entitled to attorney fees. All it held was that the two reasons given by the trial court were erroneous and, because there was no reporter's transcript, the matter had to be remanded so the trial court could consider the request, applying the correct principles. (*Id.* at pp. 103-104.)

Appellants then argue the social utility of permitting private attorney general fees in smaller cases between private parties. (AOB 40.) That plea should be directed to the Legislature, not this Court. Moreover, Business and Professions Code section 17200 covers "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . . ," and if a plaintiff prevails under that statute, the successful plaintiff may apply for

section 1021.5 fees in the appropriate case. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1179-1180.) Additionally, attorney fees are available for violations of the Unfair Trade Practices Act (Bus. & Prof. Code, § 17000 et seq.) pursuant to Business and Professions Code section 17082. Therefore, the Legislature has created incentives for parties and attorneys to bring "litigation attacking lower level improper practices." (AOB 40.) No additional remedies need be created by this Court.

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3. Appellants Did Not "Enforce" an "Important Right Affecting the Public Interest."

Beginning at page 41, appellants claim they enforced an important right affecting the public interest when they refused to pay the $261.56 expedite fee and then sought and obtained a reversal of the trial court's ruling it could not set the amount of the reporter's fee.

Appellants begin by arguing the standard of review is de novo. (AOB 41-42.) Although that is true of legal issues, it is not true of all issues. A trial court's denial of an award of attorney fees is reviewed for abuse of discretion. (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 82.) The trial court's factual findings, here that the Serranos and the Bloom firm were acting to protect their own interests (4AA 1003), are reviewed for substantial evidence. (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 4004, 409.)

Appellants are incorrect in their assertion the Court of Appeal "purported to apply in part a deferential abuse of discretion standard to the importance of its own prior decision." (AOB 43.) *Serrano II* first applied the deferential standard (*Serrano II, supra,* 184 Cal.App.4th at pp. 185-186), a de novo analysis concerning the effect of *Serrano I.* (*Id.* at p. 189.) Appellants' discussion at pages 43 and

44 appears to take issue with the Court of Appeal ruling on both bases, but does not explain why that is relevant or what bearing it has on the issues before this Supreme Court.

Appellants then argue *Serrano I* resulted in an important right affecting the public interest because it had wide-ranging effects and, furthermore, that publication alone establishes the case affected the public interest. (AOB 45 & 52.) They read the ruling in *Serrano I* much too expansively. Again, all *Serrano I* held was that, under specific circumstances in which "(1) there is no relevant contractual relationship between the deposition reporter and the nonnoticing party relating to the cost of a copy of the deposition transcript and (2) court intervention is required to ensure that the deposition reporter provide a copy of a deposition transcript to a nonnoticing party in a pending action where the reporter has either refused to provide such a copy or is willing to do so only on the condition that the nonnoticing party pay what it believes to be an unreasonable fee," the trial court can determine the reasonableness of the fee. (*Serrano I, supra,* 162 Cal.App.4th at p. 1038.) This does not "affect all future depositions, all copies, all copy fees," etc. as appellants claim.

Moreover, the authority upon which appellants rely does not

stand for the proposition for which it is cited. *Protect Our Water v. County of Merced* (2005) 130 Cal.App.4th 488 was textbook public environmental litigation in which the plaintiffs had "filed a petition for writ of mandamus setting aside a conditional use permit" concerning mining operations. The trial court had denied the petition, which the plaintiffs ("POW") successfully appealed. However, the Court of Appeal did not reverse on the merits but reversed because the administrative record was legally inadequate. (*Id.* at p. 491.) The plaintiffs then sought section 1021.5 fees, which the trial court denied, prompting another appeal. (*Id.* at pp. 492-493.) The Court of Appeal reversed, explaining that the plaintiffs were successful parties, even though the reversal had been obtained on a procedural basis. (*Id.* at p. 494.)

The Court of Appeal then wrote that POW's mandate petition "also had a significant positive impact upon the interests of the public," noting in a footnote: "Publication of the Opinion alone supports a conclusion that the result was of significant statewide public interest." (*Protect Our Water v. County of Merced, supra,* 130 Cal.App.4th at p. 495 & 495, fn. 8.) However, that court did not state that *publication alone* justifies private attorney general fees. This

was a case which already fell within the established category of public interest litigation because it was environmental litigation. Footnote 8 went on to note, "if an opinion is published because it satisfies the criteria for publication under rule 976 et seq. of the California Rules of Court, such status is probative of whether the decision clearly vindicates an important public right," citing *Leiserson v. City of San Diego, supra,* 202 Cal.App.3d 725, and *Los Angeles Police Protective League. Leiserson* is interesting because it supports Coast, not the Serranos.

Mr. Leiserson, a news cameraman, was arrested while photographing a jetliner crash scene and then sued San Diego. The trial court found for the defendants, "reasoning the police acted properly in ordering Leiserson away from the crash site and arresting him for failing to comply with that order." The appellate court affirmed the lower court's decision based on the "traditional right to exclude the press from crime scenes," but also ruled the media could not be kept away from disaster sites which were not crime scenes. (*Leiserson v. City of San Diego, supra,* 202 Cal.App.3d at pp. 730-731.) Leiserson sought section 1021.5 fees, claiming the favorable portion of the opinion "had resulted in enforcing an important right

affecting the public interest and conferring significant benefits on both the general public and the California news media." (*Id.* at p. 731.) The appellate court ruled he was not a successful party within the meaning of section 1021.5, partially because "Leiserson confined his tort action prayer to civil damages for himself, never requesting a declaration of access rights to the press at disaster sites as conferred by Penal Code section 409.5, subdivision (d). By tactical design, the litigation was not intended to promote the rights of the media by obtaining a judicial declaration of those rights." (*Id.* at p. 738.) Although publication of the opinion was "probative of whether Leiserson has satisfied the substantial benefit concept underlying the private attorney general rule," (*Id.* at p. 737), it was not dispositive.

Leiserson supports Coast because the Serranos and the Bloom firm only sought to not pay an expedite fee, which only benefitted themselves, not all California litigants as a group. Publication is only a relevant consideration if the case otherwise qualifies for private attorney general fees. If the case does not "fit into the public interest litigation box," then publication is irrelevant. Moreover, publication is relevant to the "significant benefit" question (i.e., factor (a) of section 1021.5), not the question of whether or not litigation has

"resulted in the enforcement of an important right affecting the public interest." If that threshold requirement (preceding factor (a)), is not established, then the court need not look to whether the litigation conferred a "significant benefit" on the general public.

United States v. Michigan (6th Cir. 1991) 940 F.2d 143, dealt with a consent decree and Michigan's prison system and is irrelevant, as is *Funbus Systems, Inc. v. California Public Utilities Commission* (9th Cir. 1986) 801 F.2d 1120, which dealt with the Bus Regulatory Reform Act and the authority of the Interstate Commerce Commission. Therefore, appellants again have failed to cite any authority in support of their central proposition publication alone is sufficient to entitle them to section 1021.5 fees.

Appellants then contend they are entitled to private attorney general fees because *Serrano I* was "based on important or fundamental underlying constitutional and statutory principles of due process of law." (AOB 46.) Appellants must be reading some other opinion because *Serrano I* was not premised on any particular provision of the Constitution. This is a frivolous claim.

Appellants then return to one of their oft-repeated red herring arguments, which is that *Serrano I* dealt with "favoring one's own

litigant business customers over non-customer litigants." (AOB 47.) Providing favorable rates to a reporter's regular customers was unauthorized in California before this case, and remains so after. (Code Civ. Proc., § 2025.510, subd. (b).) Moreover, the Bloom firm was charged "less than one-half the cost of the original transcript" (1AA 86) charged the requesting party, so they were charged less, not more, than Coast's "regular customer." This case has nothing to do with improper fee shifting. The discussion at page 47 of the Opening Brief is irrelevant.

Similarly, the various "rights" asserted at pages 48 through 51 have nothing to do with the issues in this case. They did not form a rationale for the *Serrano I* decision. Moreover, again, Coast consistently argued the trial judge had the authority to order Coast to deliver the transcript *without payment of the expedited fee at all* (3AA 772), so the Serranos' right to access to the courts was protected. Indeed, that was a far superior remedy from the Serranos' standpoint than the one clarified in *Serrano I.* Similarly, appellants' railing against "monopolies" (AOB 53) is irrelevant because there was no evidence at all this one tiny court reporting agency was anything like a monopoly, which requires evidence the business entity has a

predominant market share and, therefore, can "'control prices or exclude competition.'" (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 678.) The only evidence established court reporting was a competitive business in which prices generally fell within a common range. (1AA 86.) That is not a "monopoly." Appellants submit neither evidence nor law in support of its point. Additionally, the Bloom firm was free to object to the use of Coast but waived its right to do so. (Code Civ. Proc., § 2025.320, subd. (e), 1AA 175.)

Additionally, the Serranos had a statutorily-authorized remedy, of which they failed to avail themselves. Assuming they were indigent and could not pay for the transcripts, they, or their counsel, could have notified Coast of this at the outset. They would have been entitled to *free* transcripts, paid for by the Transcript Reimbursement Fund. (Bus. & Prof. Code, §§ 8030.2 & 8030.4.) The Fund specifically covers regular, customary expedite charges, up to $2,500 per case. (Bus. & Prof. Code, § 8030.6, subd. (b)(2).) This also defeats the claim for attorney fees because the Serranos cannot establish the "necessity" of "enforcement" through the procedural mechanism they chose. (Code Civ. Proc., § 1021.5, factor (b).)

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4. The Lower Courts' Rulings Are Consistent with the Recent *Whitley* Decision.

Appellants close with a comment on whether or not their motivation was relevant, contending all that is relevant is whether or not the burden was disproportionate to the recovery. (AOB 54-55.) This contention is somewhat related to this Court's recent opinion in *Whitley v. Maldonado* (2010) 50 Cal.4th 1206, which resolved the issue of whether "nonfinancial, nonpecuniary personal interests in the litigation" could "serve to render a litigant ineligible for attorney fees." (*Id.* at p. 1211.) This Court explained neither the legislative history nor the statutory language looked to a "litigant's initial subjective motivation" for bringing a public interest lawsuit. (*Id.* at pp. 1219, 1124.) Therefore, that plaintiff was not precluded from obtaining section 1021.5 fees merely because she "was subjectively motivated by her brother's welfare. . . ." (*Id.* at p. 1226.) *Whitley* pertained to factor (b), "the necessity and financial burden on private enforcement" so is not directly controlling concerning the issues presently before this Court here. However, several portions of the opinion are relevant.

First, throughout the opinion, this Court repeatedly uses the

term "public interest litigation," noting the purpose of section 1021.5 was to compensate "litigants and attorneys who step forward to engage in public interest litigation. . . ." (*Whitley v. Maldonado*, *supra,* 50 Cal.4th at p. 1211.) It referred to, "[t]his emphasis on remediating the infeasibility of public interest litigation" (*Id.* at p. 1218), and "[t]he theme of the financial feasibility of public interest litigation. . . ." (*Id.* at p. 1219.) The opinion referred to the motivation for bringing "a public interest lawsuit. . . ." (*Ibid.*) These and the other references to "public interest litigation" demonstrate the underlying case must "fit into the public interest litigation box" as a prerequisite to section 1021.5 fees.

Even though *Whitley* answered the original question upon which this Supreme Court had granted review in *Joshua S.,* in *Joshua S.* this Court explained that question need not be answered if the litigant "is not the type of party on whom private attorney general fees were intended to be imposed." (*Joshua S., supra,* 42 Cal.4th at p. 953.) So, too, in the instant case, the question of "motivation" need not be addressed if the legal proceeding is not the type of litigation concerning which attorney general fees were not intended to be imposed.

Additionally, although *Whitley* ruled subjective motivation was not a controlling factor in deciding the "financial burden of private enforcement" (*Whitley v. Maldonado*, *supra,* 50 Cal.4th at p. 1221), it did not hold that motivation was completely irrelevant in determining whether or not the action was "public interest litigation" to begin with. Here, the trial court did mention appellants' "motivation" to the extent it noted they were "not trying to vindicate the public's interest. Rather, he was trying to protect his own interest and in so doing, by virtue of a published opinion, he conferred a benefit to litigants." (4AA 1003.) This ruling did not pertain to the "financial burden" factor; instead it was a finding which confirmed this was not "public interest litigation" at all. Therefore, the lower courts' rulings in this case are consistent with *Whitley.*

Moreover, counsel may take cases out of personal interest, intellectual curiosity, a sense of one's duty to one's fellow man, for the publicity value, or because counsel has some spare time. This does not transform any particular case into public interest litigation within the meaning of section 1021.5. Appellants' claim they are entitled to private attorney general fees simply because they claim they spent a huge amount of time litigating over a minor sum of

money is without authority and must be rejected.

Finally, it is not enough that one factor may be present. "As section 1021.5 states the criteria in the conjunctive, each of the statutory criteria must be met to justify a fee award." (*County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637, 648.) If the court finds just one of the criteria is *not* met, "it is unnecessary to make findings concerning the remaining criteria." (*Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 81.) It is irrelevant that the appeal cost more than the $2,871.87 at stake because other requirements were not met. Appellants' reliance on this factor is misplaced.

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5. Appellants Misrepresent Substantial Portions of the Record in an Attempt to Support their Claim.

Any claim by appellants their "facts" are not in dispute (AOB p. 21, fn. 30) is purely fiction. Coast noted in the trial court that appellants attempted to rely on a plethora of manufactured facts and suppositions, untethered to the reality of this case. (4AA 880.) Far from being a situation in which the "facts" were not in dispute, Coast disputed virtually all of appellants' "facts," and there is no indication the trial court accepted *any* of Serranos' alleged factual assertions as true. Moreover, the Court of Appeal adopted Coast's version of the facts in the opinion. Appellants did not bring any claimed factual errors to the Court of Appeal's attention, requiring this Court to reject appellants "facts." (Cal. Rules of Court, rule 8.500(c)(2).) Because appellants' claims are based on a fatally-flawed version of the facts, those claims must be rejected.

A. Appellants Improperly Rely on Estimates, Assumptions and Speculation in Attorney Declarations.

The vast majority of the "evidence" appellants relied upon originally was presented in the form of a twenty-six page narrative declaration signed by attorney Monroe (3AA 625-651) and a similar

three-page declaration signed by attorney Idell. (3AA 652-654.) Both declarations are replete with statements not supported by reference to any evidence within the "personal knowledge" of either attorney. Appellants subsequently relied on this "evidence" in their briefs in the Court of Appeal and this Supreme Court. Such "evidence" must be disregarded.

Attorney declarations containing arguments and statements lacking personal knowledge are improper. (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 30, fn. 3.) The Monroe declaration contains numerous "estimates"; statements indicating that Monroe "fairly estimated"; and indications that the statements are either "assumed," "extrapolated," or "appeared." (3AA 626, 628, 641, 642, 646.) These statements are not based upon personal knowledge, nor is attorney Monroe an expert on the court reporting industry so as to be qualified to opine on the subject. Additionally, appellants' "estimates" pertaining to claimed court reporting industry expedite fee income (AOB 19) have no evidentiary support. These guesses stem from Idell's declaration (2AA 486-488) in the motion to determine the reasonableness of reporter fees and then are echoed in the section 1021.5 attorney fee motion. (3AA 625-628, 641-642.)

Relying on these declarations, appellants' Opening Brief is replete with unsupported "estimates," unverified claims made as assertions and assumptions that are not substantial evidence in support of their arguments and are intended to make this case appear bigger than it is. (*See* AOB 7, 18, 19, 20.) All such statements must be disregarded.

Moreover, since Appellants *lost* at the trial court, it can be concluded that the trial court rejected these declarations, which ruling is binding on appeal. (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.)

The improper Monroe and Idell declarations form the basic underpinning of appellants' entire argument by asserting the fiscal "estimates" of the effect of the *Serrano I* decision on the court reporting community. (AOB 7, 18, 19.) Appellants also relied upon these declarations in the underlying attorney fee motion. (3AA 617-618.) These "estimates" represent pure guesswork, provide no evidentiary support for appellants' position and are merely an attempt to inflate the importance and effect of the issues presented in this case. (3AA 625-651, 652-657.) This Court must disregard them.

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B. Appellants Present Inaccurate Claims of Statutory Violations.

In an attempt to backdoor the requirement for a showing of a violation of a statutory or constitutional right on the part of a party from whom section 1021.5 attorney fees are requested, appellants continually claim Coast's actions were found to be in violation of the law, despite the fact that no such finding ever was made by any court. (*See* AOB 8, 10, 15, fn. 24, 16, 33, 49, 53, 54.)

Although appellants may present their view that Coast's practices were improper (*See* 3AA 599-601), there was never a court finding to that effect. This is mere argument, not a "fact," and ought not be presented as such. The trial court did not expand upon its reason for refunding the full expedite fee charged (2AA 566) and, following argument at an ex parte hearing, signed Coast's notice of ruling over objections by appellants' attorney. (AA 600-601.)

Moreover, initially, appellants even conceded some amount of expedited fee was appropriate for an expedited copy of a deposition transcript, and agreed to pay $37.36, based on rates of government court reporters, instead of the $261.56 billed. (1AA 144.) Again, *Serrano I* specifically ruled some amount of expedite fee is

appropriate. (*Serrano I, supra*, 162 Cal.App.4th at p. 1038.)

Appellants, in argument, attempted to place Coast in one of two boxes: Coast either broke the law by violating a statute, or charged a "fictitious" fee. (AOB 12 fn. 18.) There are, however, other options. The trial court, in its discretion, may have reverted to its original position that the fee was not warranted and chose to disregard the guidance provided in *Serrano I* that a deposition reporter may charge "a reasonable fee for expediting the making, certification, and delivery of a copy." (*Serrano I, supra*, 162 Cal.App.4th at p. 1038.)

In any event, if the trial court thought Coast violated a statute, it would have let its position be known at the ex parte motion concerning the wording of order, which it did not. (3AA 599.) More importantly, the trial court, obviously knowing the background and history of the case, when it had the opportunity to consider whether Coast violated a statute or charged a fictitious fee, did not accept appellants' claims of wrongdoing on Coast's part, as demonstrated by the inclusion of the quote from *Joshua S.* to the effect that Coast "has done nothing to adversely affect the rights of the public or a substantial class of people. . . ." (4AA 1003.) Appellants' repeated mischaracterization of *Serrano I* and the trial court's section 1021.5

ruling demonstrates their overall position is fatally flawed.

C. Appellants Provide Inaccurate Reference to Claimed "Industry Practice."

Appellants repeatedly attack what they call "industry practice adversely affecting the public interest." (*See*: AOB 3, 6 fn. 12, 7, 11, 12, fn. 18, 14, 17, 18, 24, 25, fn. 41,45, 47, 49, 52, 53.) In addition, through the use of unsupported logic that was rejected in S*errano I*, appellants continue to claim in footnote 18 "the industry fee was a wholly fictitious fee for no cost or service." (AOB 12.) And in footnote 24 appellants attempt to attach the concepts of "fraud, dishonesty, wilful (sic) violation of duty or gross negligence" to the conduct of Coast and the court reporting profession. (AOB 15.) These assertions are false and unsupported by the record.

The reason for these claims is obvious: appellants' pervasive attempt to paint the entire court reporting industry as engaging in an "abusive scheme" is designed to manufacture a statewide problem against which their judicial efforts were directed by conferring "significant benefits" on the "'general public or a large class of persons.'" (AOB 5, 13, 14, 17.) However, again, the facts do not support the rhetoric. Holly's declarations never mention "industry

practice" but instead discuss an "industry standard" with respect to Coast's pricing policy and charges, nothing more. (1AA 52, 72, 86.) Appellants apparently shifted gears to argue "industry practice" in an attempt to inflate the importance of this case at hand. That effort is unavailing.

Another attempt by appellants to expand the scope and effect of the underlying action is reflected in the repeated references to comments in *amici* briefs by "trade organizations" (*see*: AOB 13, fn. 20, 18, 19, 25, fn. 37) and extensive quotation from the California Court Reporter's Association website (AOB 25, fn. 37) or "web notes by commentators." (AOB 6, fn. 12.) No trade organization is a party to this action and, more importantly, the motives of such organizations, along with the motives of unnamed "commentators" are a matter of speculation and not worthy of further consideration by this Court.

Appellants attempt to connect comments made by a "national" court reporter organization and apply those comments to practices by California court reporters is illusory and without merit. Appellants cite to the National Court Reporters Association ("NCRA") *amici* brief which discussed a practice that violates statutory rules in

California and present no evidence by way of testimony or expert opinion on the issue. (AOB 17.) In fact, the only credible evidence pertaining to "cost-shifting" concerns the fact that it does *not* occur in California and is found in the declaration of Ms. Holly, where she states: "no sharing of cost" occurs. (1AA 86.) This statement is unchallenged in the record. This Court can be confident that if such evidence existed in a form other than the musings of an attorney's speculation, appellants would have presented such evidence to the trial court. Moreover, *Serrano I* has spoken with respect to "[t]he concerns" of the amici curiae and found them "unfounded." (*Serrano I, supra* 162 Cal.App.4th at p. 1038.)

Appellants stretch the bounds of advocacy in their attempt to condemn the California court reporter industry, and Coast in particular, for violations of California statutory law. No court, in any opinion, ruling, or judgment has made such a finding. Appellants' attempt to expand the scope of *Serrano I,* despite its stated limited application by *Serrano II,* must be rejected.

In a footnote appellants agree that *Serrano I* allows for the expedite fee that started this litigation but attempt to limit that application by stating that the fees apply "in a rare factual

circumstance." (AOB 17, fn. 26.) This blatant misrepresentation of *Serrano I* is intended to exclude the allowance of the expedite fee in this case. No such limitation exists in *Serrano I,* and *Serrano I* is not limited to a specific set of rarely-occurring facts.

D. Appellants Improperly Characterize Coast's Litigation Conduct.

Appellants support their claim of $185,000 in attorney time by attacking "Holly's tenacious litigation and tactics." (AOB 20) Appellants claim they were merely responding to the "industry amici," which appellants fail to mention were requested by the Court of Appeal. (AOB 20.) However, again the record does not support the rhetoric. A review of appellants' unsubstantiated claim of the hours billed reveals that $42,000, or almost 140 hours of attorney time, was billed between the publication of the *Serrano I* opinion and the motion for section 1021.5 attorney fees. (3AA 693-703.) This attorney time was self-generated.

As shown below, it was appellants' counsel, not Coast, who continually made a run to the courthouse over every issue in the case resulting in expanding their own hourly workload. Appellants filed an ex parte motion set for July 25, 2006, requesting a stay of the court's

order to pay the court reporter charges (1AA 243- 288); an ex parte motion set for November 7, 2008, to set a status conference regarding the remand hearing (1AA 9-61); and, an ex parte hearing set for January 9, 2009, to determine the proper wording of the trial court's December 4, 2008, order refunding the expedite charge. (3AA 573-598.) This last totally unnecessary ex parte motion was noticed and conducted over two weeks after Coast had already paid the full amount ordered and had filed a notice of compliance with the order of December 4, 2008. (3AA 567-572.) The number and length of these motions belies appellants' claim that Coast expanded the scope of the litigation.

E. Appellants Mischaracterize Their Own Actions.

Appellants summarize the early history of this protracted litigation and paint themselves in a positive light by stating that they "*promptly* paid the standard copy charges and disputed expedite fees . . . . " (AOB 9, *emphasis supplied.*) However, the record reflects, appellants received all 13 expedited deposition transcripts without paying one penny to satisfy any of the court reporter's invoices and subsequently attempted to stay payment pending appellate review despite a court order to the contrary. (1AA 231, 243-288.)

Moreover, appellants received the certified transcript copies on average 2.5 days after the deposition dates, and two transcripts were delivered the next business day after the depositions occurred per appellants' requests. (1AA 84.) Appellants' delay in payment and motion to further delay payment were unwarranted and intended to obstruct the agreement reached before the trial court. Appellants' conduct in providing payment was anything but prompt.

Appellants' underlying premise for their argument to receive private attorney fees is consistently contrary to the record or unsupported by that record, thus leaving their claim fatally flawed.

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CONCLUSION

The trial court and Court of Appeal majority correctly ruled this was a private dispute between private parties, not public interest litigation. The Serranos' claim that they are entitled to private attorney general fees because *Serrano I* was an "important" case, as demonstrated by publication, is without authority and must be rejected.

This began as a private dispute between an attorney and a court reporter over $261.56. The trial court correctly applied *Joshua S.* in holding this matter comes within neither the letter nor the spirit of section 1021.5. The Court of Appeal's ruling affirming the trial court must be affirmed.

Respectfully submitted,

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CHAMBERS, NORONHA & KUBOTA

John L. Dodd, Esq.
JOHN L. DODD & ASSOCIATES

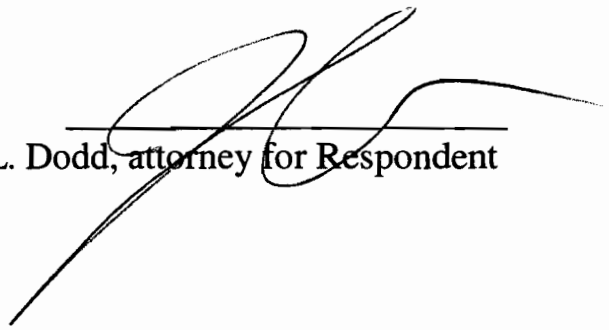
Dated: December 21, 2010

by: _____
John L. Dodd, attorneys for
Coast Court Reporters, Inc.

CERTIFICATION OF LENGTH

I, John L. Dodd, counsel for respondent herein, certify pursuant to the California Rules of Court, that the word count for this document is 15,503 words, excluding tables, this certificate, and any attachment permitted under rule 14(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 21, 2010



John L. Dodd, attorney for Respondent

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 17621 Irvine Blvd., Ste. 200, Tustin, CA 92780.

On December 22, 2010, I served the foregoing document described as **ANSWER BRIEF ON THE MERITS** on the interested parties in this action.

(X) by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

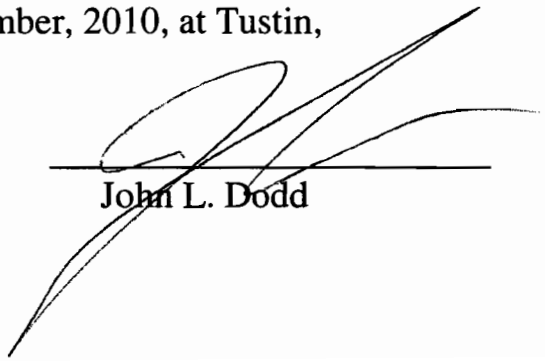
( ) by placing ( ) the original ( ) a true copy thereof enclosed in sealed envelopes addressed as follows:

(X) BY MAIL
(x) I deposited such envelope in the mail at Tustin, California. The envelope was mailed with postage thereon fully prepaid.

( ) BY PERSONAL SERVICE
I delivered such envelope by hand to the offices of the addressee.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 22nd day of December, 2010, at Tustin, California.



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