No. S209376
(Court of Appeal No. A134337)
(Alameda County Super. Ct. No. HP05237122)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CONSERVATORSHIP OF THE ESTATE OF IDA MCQUEEN:

FESSHA TAYE, AS CONSERVATOR OF THE ESTATE OF IDA MCQUEEN,

Plaintiff and Respondent,

v.

CAROL VERES REED,

Defendant and Appellant.

After a Decision By the Court of Appeal,
First Appellate District, Division Four

BRIEF *AMICUS CURIAE* BY THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PLAINTIFF AND RESPONDENT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or parties to list in this certificate per Rule 8.208(d)(3) of the California Rules of Court.

No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. Other than the Academy and its members, no person contributed money that was intended to fund preparing or submitting this brief.

DATED: December 2, 2013.

STEVEN L. MAYER

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INTRODUCTION

Code of Civil Procedure Section 685.080(a) provides in relevant part that a motion to recover "costs authorized by Section 685.040" must be made "before the judgment is satisfied in full."[1] The "costs authorized by Section 685.040" include "[a]ttorney's fees incurred in enforcing a judgment" if such fees are "otherwise provided by law"—*i.e.*, authorized either by contract or by one of California's many fee-shifting statutes. The issue this case presents is whether attorneys' fees incurred in *defending* a money judgment against the losing party's appeal constitute "fees incurred in *enforcing* a judgment" under Section 685.040 and are therefore subject to the "cut-off-by-satisfaction" rule contained in Section 685.080(a).

Neither the literal words of Section 685.040 nor its legislative history suggests that the Legislature intended in Section 685.080(a) to give an unsuccessful appellant the means to defeat the prevailing party's right to appellate attorneys' fees. Attorneys' fees on appeal are not incurred in *enforcing* the judgment, they are incurred in sustaining the judgment. Accordingly, attorney's fees on appeal are not "incurred in enforcing a judgment" under Section 685.040. They therefore are not subject to the time-bar contained in Section 685.080(a). Instead, as the Rules of Court provide, they are subject to the time limits contained in Rules 3.1702(c) and 8.278(c)(1).

The Court of Appeal's contrary holding creates an absurdity that the Legislature could not have intended. An unsuccessful appellant should not be able to escape liability for the prevailing party's appellate attorneys' fees that otherwise would be owed under one of California's fee-shifting statutes or contractually under Civil Code Section 1717, merely by

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[1] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

paying the underlying judgment plus accrued interest before the remittitur issues. Indeed, the rule created by the Court of Appeal would give solvent losing parties—those best able to pay a judgment—a fool-proof means of escaping liability for appellate fees in *every* fee-shifting case. It would thereby eviscerate the policies that the Legislature sought to further in enacting dozens of fee-shifting statutes, as well as the well-settled rule that prevailing parties in fee-shifting cases are entitled to recover appellate fees as well as trial court fees.

Because the parties' briefs do not focus on this dispositive issue, the California Academy of Appellate Lawyers has requested leave to file this brief to assist the Court in analyzing the central issue this case presents.[2]

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[2] Respondent's Opening Brief on the Merits ("OBM") criticizes the Court of Appeal because it "failed to distinguish between attorney fees for enforcement and appeal." OBM 17. Yet it simultaneously asserts that because fees for enforcing the judgment include fees incurred in defending a judgment, the enforcement of judgments law ("EJL") provides an alternative basis for an award of appellate fees. *See id.* at 21-22 ("The enforcement of judgments law authorizes an award of attorney fees and costs for enforcement, *including defending a judgment on appeal*") (emphasis added); *see generally id.* at 21-24; *see also id.* at 31 (contending that "fees on fees" are also recoverable under the EJL).

Appellant's Answer Brief on the Merits ("AB") understandably, does not deny that the EJL applies to appellate fees. *See* AB 13 ("Respondent also argues that appellate fees fall under the Enforcements of Judgments Law. Appellant concedes that they do").

Respondent's Reply Brief on the Merits ("RBM") asserts that "the time limit" in Section 685.080(a) "applies to enforcement fees and not direct appeals." RBM 16. But it does not define "enforcement fees" or explain why they do not include appellate fees.

ARGUMENT

I.

APPELLATE ATTORNEYS' FEES ARE NOT FEES INCURRED IN ENFORCING A JUDGMENT.

Enforcement of a judgment and defense of an appeal both happen after judgment, but they are hardly the same thing. Enforcement is coercive; it means "to compel." *Comite De Padres De Familia v. Honig*, 192 Cal. App. 3d 528, 532 (1987) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (1971)). Indeed, "enforcement" is defined in Black's Law Dictionary as "[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement." BLACK'S LAW DICTIONARY 608 (9th ed. 2009).

This definition accurately describes the remedies provided in the EJL—*e.g.*, liens, execution, garnishment, etc. *See, e.g.*, §§697.010-697.920 (liens), 699.010-701.830 (execution), 706.010-706.154 (garnishment). Each is a means of "compelling compliance" with a judgment—*i.e.*, obtaining payment of a money judgment or acquiescence to a non-money judgment when the party subject to the judgment does not pay or acquiesce voluntarily. They are procedures by which a judgment creditor can "compel the payment of his judgment." *City of Long Beach v. Lisenby*, 180 Cal. 52, 62 (1919).

Notably, the remedies provided in the EJL do *not* include appeal. Nor, for that matter, does the EJL address the judgment creditor's defense of an appeal on the merits taken by the judgment debtor. In fact, the statutes governing appeals are in another title of the Code of Civil Procedure altogether; the EJL is Title 9 of Part 2, while the statutes governing appeals are in Title 13. So while an appeal is certainly a means of resisting a judgment, opposing the appeal is not a means of enforcing it.

Moreover, the Court must "consider portions of a statute in the context of the entire statute and the statutory scheme of

which it is a part." *Sierra Club v. Superior Court*, 57 Cal. 4th 157, 166 (2013) (citation and internal quotation marks omitted). Accordingly, the reference in Section 685.040 to "fees incurred in enforcing a judgment" is most reasonably understood as including only fees incurred in pursuing one of the enforcement remedies provided by the EJL. Since defending an appeal is not one of those remedies, appellate fees are not covered by Sections 685.040 and 685.080(a).

Because appellate fees and enforcement fees are fundamentally different, it is not surprising that California law provides different rules for collecting each. Appellate fees are recoverable in accordance with Rules 3.1702(c) and 8.278(c)(1) of the California Rules of Court—*i.e.*, by motion made within forty days after the remittitur issues. In contrast, a motion for enforcement fees must be made within two years after the fees are incurred and before the judgment is satisfied. §685.080(a).

These differences do not reflect a conflict, as Appellant would have it. Instead, they reflect that the Legislature and the Judicial Council have long understood that appellate fees and enforcement fees are different and, indeed, mutually exclusive. Consequently, the Court of Appeal was mistaken in holding that the EJL provides a statutory exception to Rule 3.1702(a). *See* Slip Op. at 7.[3]

The difference between defending a judgment on appeal and enforcing the underlying judgment has long been recognized. For example, the statutes provide, and have for more than a century, that taking an appeal does *not* stay enforcement of a judgment for damages—the kind involved in this case—unless the appellant also posts an undertaking by

[3] Similarly, contrary to Respondent's suggestion (OBM 25), there is no need to judicially rewrite the EJL to permit an award of appellate fees if claimed "within a reasonable time after satisfaction of the judgment." *Id.*; *see generally id.* at 27-28.

personal sureties or a qualified insurer's bond. *See* §917.1(a)(1).[4] Nor does taking an appeal stay enforcement of many non-money judgments subject to the EJL, such as judgments directing parties to turn over real or personal property, without an undertaking. §§917.2, 917.4. Indeed, where the judgment has been stayed pending appeal, enforcement does not even occur until the appeal is concluded and, if the appeal is unsuccessful, the judgment is affirmed, the remittitur issues and jurisdiction over the case returns to the Superior Court.

In short, the statutes and Court Rules distinguish between the defensive steps needed to sustain a judgment on appeal and the "offensive" steps required to collect a judgment. Consequently, the fees incurred in defending a judgment on appeal are not "fees incurred in enforcing a judgment" governed by Section 685.040 and 685.080(a).[5]

II.

AN UNSUCCESSFUL APPELLANT MAY NOT AVOID THE PUBLIC POLICIES SUPPORTING FEE SHIFTING BY MANIPULATING THE DATE OF SATISFACTION.

Appellant appealed and lost, forcing Respondent to incur fees to defend the appeal. However, those fees were not part of the judgment at the time Appellant decided to satisfy the

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[4] California law has provided that a bond or undertaking is necessary to stay a money judgment pending appeal since at least 1872. *See* former §942, enacted in 1872, amended by Code Am. 1873-74, ch. 383, §124, at 336; Cal. Stat. 1941, ch. 955, §1, at 2551; Cal. Stat. 1967, ch. 17, §14, at 162.

[5] Appellant asserts that *Ketchum v. Moses*, 24 Cal. 4th 1122, 1141 n.6 (2001), stands for the proposition that the fees Respondent seeks are governed by the EJL. AB 2. Not so. The cited footnote stands only for the unexceptionable proposition that the recovery of enforcement fees turns on whether a substantive fee-shifting statute applies. Nor does *Carnes v. Zamani*, 488 F.3d 1057 (9th Cir. 2007), also cited by Appellant (AB 19), have anything to do with appellate fees.

judgment. *See Folsom v. Butte Cnty. Ass'n of Gov'ts*, 32 Cal. 3d 668, 678 (1982) (attorneys' fees authorized solely by statute "are not a part of the cause of action. They are incidents to the cause, properly awarded after entry of a stipulated judgment") (footnote omitted). The prevailing party in the trial court has no control over whether the losing party will appeal. And if there is an appeal, under Rule 8.278(c)(1) the prevailing party cannot even claim appellate fees until the appellate decision is final for all purposes and the remittitur issues, returning jurisdiction to the trial court. *See Riley v. Superior Court*, 49 Cal. 2d 305, 310 (1957) ("The [trial] court could not, prior to the determination of the appeal, award fees which had not accrued").[6] Pursuant to Rules 8.264(b)(1) and 8.512(c)(1), that will be at least sixty days after the appellate court files its decision.

Once the remittitur issues, the rules give the prevailing party forty days to file a motion for attorneys' fees on appeal. CAL. R. CT. 3.1702(c)(1), 8.278(c)(1). However, the prevailing party has no control over when the unsuccessful appellant will satisfy the judgment. Here, the Court of Appeal held that by satisfying the judgment on the tenth day after the remittitur issued, Appellant defeated Respondent's incontrovertible right to attorneys' fees on appeal even though Respondent still had another thirty days to file a motion for her appellate fees.

The Court of Appeal's decision therefore allows the losing judgment debtor to force the judgment creditor through an appeal and then—once the judgment is affirmed—snatch away the judgment creditor's right to appellate fees merely by paying the underlying judgment before the time to seek appellate fees has run. If this were the law, a solvent

[6] Indeed, until the appeal is over, the prevailing party will not be in a position to calculate the full amount of its appellate fees.

judgment debtor could always avoid liability for appellate attorneys' fees by posting a bond, waiting to see how the appeal turns out, and then paying the judgment the minute the appellate decision became final for all purposes. Indeed, because there is always some delay between the finality of the appellate process and issuance of the remittitur, the rule sought by Appellant would give solvent judgment debtors a fool-proof means of avoiding liability for fees on appeal *in every case* where the prevailing party would otherwise be entitled to recover them. This result violates both fundamental fairness and the public policies underlying California's many fee-shifting statutes.

This case provides a telling example. The fee-shifting statute at issue in this case was enacted to advance the "important public purpose" of "providing sufficient incentives to encourage private civil actions in cases of abuse or neglect." *Bickel v. Sunrise Assisted Living*, 206 Cal. App. 4th 1, 12-13 (2012). Similar considerations underlie provisions for fee shifting in numerous areas of the law, *e.g.*, email phishing (BUS. & PROF. CODE §22948.3(c)(2)), consumer warranties (CIV. CODE §§1794, 1794.1), unlawful employment practices (GOV'T CODE §12965(b)), non-financial elder abuse if the plaintiff shows by clear and convincing evidence "that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse" (WELF. & INST. CODE §15657(a)), and housing discrimination. GOV'T CODE §12980(h). Moreover, because all these statutes are exceptions to the American Rule, under which the prevailing party in a lawsuit does not recover its attorneys' fees, each of these statutes embodies a legislative recognition that the covered lawsuit is particularly meritorious and that the public interest will be served by preventing the prevailing plaintiff from bearing the cost of successfully initiating and prosecuting

such litigation.[7]

"[S]ettled case law . . . has established the general principle that statutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals." *Morcos v. Bd. of Ret.*, 51 Cal. 3d 924, 927 (1990). A rule that permits judgment debtors to subject judgment creditors to costly appeals yet avoid paying the appellate fees the judgment creditor has been forced to incur would thwart both that public policy and the numerous policies supporting California's many fee-shifting statutes.[8]

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[7] *See* 1 RICHARD M. PEARL, CALIFORNIA ATTORNEY FEE AWARDS §§3.80-3.128 (3d ed. 2013 update) (analyzing fee-shifting statutes other than Section 1021.5).

[8] Moreover, the rule sought by Appellant would frustrate numerous other policies in addition to those embodied in the fee-shifting statutes applicable to "public interest" litigation. For example, if a defendant recovered attorneys' fees for bringing a successful anti-SLAPP motion under Section 425.16(c)(1), and was forced to litigate the merits of the motion on appeal, it would lose its appellate attorneys' fees if the plaintiff paid the fees immediately after the appeal was concluded and before the remittitur issued. The same would be true for a party ordered to pay sanctions pursuant to Section 128.7.

Similarly, the Family Code contains several provisions for attorney fee awards based on the moving party's need and the other party's ability to pay, which serve the important public policy of ensuring parity between the parties' ability to obtain effective legal representation. *Droeger v. Friedman, Sloan & Ross*, 54 Cal. 3d 26, 41 n.12 (1991); *see* FAM. CODE §2030 (dissolution of marriage, legal separation or nullity); *id.* §3121 (actions for exclusive custody of children); *id.* §6344(b) (domestic violence); *id.* §§7605, 7640 (action to establish parentage, custody and visitation). Appellant's proposed rule directly contravenes that policy. It would allow the party with greater economic strength who appeals to strip the financially weaker party of the ability to pay for an attorney to defend against the appeal.

III.

LEGISLATIVE HISTORY REFUTES THE COURT OF APPEAL'S INTERPRETATION.

Nothing in the legislative history of Sections 685.040(a) and 685.080 even remotely suggests that the Legislature ever intended the EJL to restrict parties' ability to recover attorneys' fees for defending an appeal. Just the opposite. When a court decision threatened a party's ability to recover appellate fees, the Legislature quickly responded to *ensure* their availability.

A. The EJL's Predecessors Addressed Only Enforcement-Specific Costs.

For at least several decades preceding enactment of the EJL, the sole subject of the relevant statutes was enforcement costs in the most literal sense. The predecessors of Sections 685.040 and 685.070, Sections 1032.6 and 1033.7, were enacted in 1945. Section 1032.6 provided: "In superior courts, municipal courts, and justices' courts, the judgment creditor is entitled to the costs and necessary disbursements of proceedings taken by him *in aid of an execution upon any judgment rendered therein.*" Cal. Stat. 1945, ch. 1149, §2 (emphasis added). Section 1033.7 provided for a cost bill that, in relevant part, could include "the items of [the judgment creditor's] costs and necessary disbursements after judgment." *Id.* §3.

The description of recoverable costs then remained essentially unchanged until enactment of the EJL. *See* Cal. Stat. 1949, ch. 1076, §1 (§1033.7); Cal. Stat. 1951, ch. 1737, §§141, 143 (§§1032.6, 1033.7); Cal. Stat. 1957, ch. 1734, §2 (§1033.7); Cal. Stat. 1970, ch. 602, §2 (§1033.7). Attorneys' fees, whether for defending or prosecuting an appeal, were not part of the enforcement-cost calculus.

Section 1033.7's pre-satisfaction deadline for claiming enforcement costs appeared in 1947. Cal. Stat. 1947, ch. 789,

§1. But until the EJL was enacted in 1982, it applied only to costs, and not to attorneys' fees.

B. Nothing In The EJL Changed The Enforcement-Only Aspects Of Sections 1032.6 And 1033.7.

The EJL, proposed by the Law Revision Commission after years of study, was a complete overhaul of the law governing judgment enforcement. Nothing in the EJL's extensive legislative history indicates that the Legislature intended to import appellate attorneys' fees into its cost-recoupment provisions, thereby raising a potential bar to their recovery. Indeed, the EJL says nothing about costs or attorneys' fees *for an appeal*—the word "appeal" only appears in such contexts as the effect of a stay pending appeal (*e.g.*, §697.040); whether an action is "pending" (*e.g.*, §700.180(d)); and whether an order made under certain provisions of the EJL is appealable. §703.600.

To be sure, the EJL added attorneys' fees to the definition of post-judgment costs in Section 685.040. *See* Cal. Stat. 1982, ch. 1364, §2 ("Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law"). But nothing in the EJL's text or legislative history indicates that the Legislature intended the costs and fees collectible under the EJL to include anything more than what they had always been—*i.e.*, the costs and fees incurred in collecting or otherwise ensuring compliance with a judgment.

C. The 1992 Amendments To Sections 685.040 And 685.070 Were Explicitly Intended To *Preserve* The Right To Recover Appellate Fees.

In 1990, the Court of Appeal decided *Chelios v. Kaye*, 219 Cal. App. 3d 75 (1990), which limited the recovery of contractual attorneys' fees incurred in enforcing a judgment. In that case, the plaintiffs recovered a breach of contract judgment that involved resisting a state-court appeal and pursuing the

defendants through bankruptcy court. *Id.* at 77-78 & n.3. After they recovered on the judgment through the bankruptcy court, they sought contractual attorneys' fees under Civil Code Section 1717. The trial court denied fees, and the Court of Appeal affirmed. The court held that "Civil Code section 1717 has no operation in this case, because the Chelioses' fees were not incurred to enforce the provisions of the contract (as required by Civil Code section 1717), but were instead expended to enforce the *judgment.*" *Id.* at 79 (emphasis in original). As the court explained, "[w]hen, as here, a lawsuit on a contractual claim has been reduced to a final, nonappealable judgment, all of the prior contractual rights are merged into and extinguished by the monetary judgment, and thereafter the prevailing party has *only* those rights as are set forth in the judgment itself." *Id.* at 80 (emphasis in original).

The Legislature responded to *Chelios* by amending Sections 685.040(a) and 685.070 to ensure that attorneys' fees incurred to enforce a contract judgment would be recoverable if the contract contained a fee-shifting clause and Civil Code Section 1717 applied. It amended what is now Section 685.040(a) to add the following language: "Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5." Cal. Stat. 1992, ch. 1348, §3.[9] It also added subdivision (6) to Section 685.070(a), to provide that a judgment creditor may claim "[a]ttorney's fees, if allowed by

[9] The reference is to attorneys' fees recoverable under contract under Section 1033.5, which states: "(a) The following items are allowable as costs under Section 1032: . . . (10) Attorney's fees, when authorized by any of the following: (A) Contract . . . ."

Section 685.040" in a memorandum of costs. Cal. Stat. 1992, ch. 1348, §4.

Multiple documents in the legislative history demonstrate that the purpose of these amendments was to overrule *Chelios* and make clear that attorneys' fees can be awarded post-judgment. For example, an analysis prepared for the Assembly Subcommittee on Administration of Justice states:

> *Chelios* reasoned that the contract merged into the judgment and as such contractual rights are extinguished. Both the State Bar and the [bill's] author believe that *Chelios* is contrary to AB 3331.[10] This bill provides that if attorney's fees were awarded as part of the judgment in enforcing the contract, then they can be awarded post judgment. (Motion for Judicial Notice ("MJN"), Ex. A (ASSEM. SUBCOMM. ON ADMINISTRATION OF JUSTICE, Analysis of Assem. Bill No. 2616 (1991-1992 Reg. Sess.) as proposed to be amended, hearing of May 5, 1992) at 6)[11]

Most pertinent here, the Legislature was also concerned with *Chelios*' threat to the recoverability of appellate attorneys' fees. Although *Chelios* itself did not involve appellate fees (*see* 219 Cal. App. 3d at 78 n.3), the Legislature was nonetheless concerned that it could be interpreted to apply to fees incurred defending a judgment on appeal and sought to forestall any such possibility:

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[10] AB 3331 amended Section 1033.5 to explicitly include contractual attorneys' fees as a recoverable cost. Cal. Stat. 1990, ch. 804, §1.

[11] *See also* MJN, Ex. B (ASSEM. COMM. ON JUDICIARY, 3d reading analysis of Assem. Bill No. 2616 (1991-1992 Reg. Sess.) as amended May 13, 1992) at 2 ("[O]ne provision of the debtor/creditor portion of the bill overturns *Chelios v. Kaye*, 268 Cal. Rptr. 38 (4th Dist. 1990)"); MJN, Ex. C (SEN. COMM. ON JUDICIARY, Analysis of Assem. Bill No. 2616 (1991-1992 Reg. Sess.) as amended Aug. 12, 1992) at 2 ("This bill would overrule *Chelios v. Kaye*. It would allow the creditor to recover his attorney's fees as part of an award of collectible costs whenever the judgment creditor is entitled to an attorney's fee award fees under a written contract or pursuant to statutory authority").

> The *Chelios* decision conflicts with existing law permitting the recovery of post-judgment attorney's fees incurred in enforcing a judgment on appeal. Courts both in California and throughout the nation have well established that attorney's fees incurred on appeal are recoverable under the terms of the contract. This bill would assure that contract provisions which provide for attorneys' fee [sic] are enforceable *regardless of whether they are incurred in enforcing the judgment or in an appeal of the judgment.* (MJN, Ex. C at 5 (emphasis added))[12]

In short, on the one occasion when a judicial decision threatened a litigant's ability to recover appellate fees, the Legislature acted swiftly to preserve them. Against this backdrop, it is improbable that the Legislature intended Sections 685.040(a) and 685.080 to eliminate a litigant's right to recover appellate fees by satisfaction of the underlying judgment. And it is even more inconceivable that the Legislature would have accomplished this goal *sub silentio*, without any legislator, legislative committee or member of the public noticing such a drastic restriction of the right to recover such fees.

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[12] Although the first sentence of the quoted paragraph refers to "enforcing a judgment on appeal," the last sentence expressly distinguishes between fees incurred "enforcing the judgment" and fees incurred "in an appeal of the judgment." Consequently, the first sentence cannot be interpreted to support the claim that appellate fees are the same as enforcement fees. In all events, the relevant inquiry is what the second sentence of Section 685.040(a) means in its statutory context, not what a legislative committee report meant in discussing the bill that added the third sentence of the same statute years later. For the reasons stated in Part I, the phrase "fees incurred in enforcing a judgment" found in the second sentence of Section 685.040(a) has a precise meaning—*i.e.*, fees incurred in utilizing one of the enforcement remedies contained in the EJL.

D. There Is No Evidence That The Legislature Intended To Disturb The Prior Law Ensuring The Recoverability Of Appellate Fees.

It has long been the law that courts "generally presume the Legislature is aware of appellate court decisions and do not presume that the Legislature, in the enactment of statutes, intends to overthrow long-established principles of law unless such an intention is made clear by declaration or necessary implication." *Gaetani v. Goss-Golden W. Sheet Metal Profit Sharing Plan*, 84 Cal. App. 4th 1118, 1127 (2000) (citation omitted). That principle applies here. The 1992 amendments to Sections 685.040(a) and 685.070 were enacted against a backdrop of the settled rule "that fees, if recoverable at all—pursuant either to statute or parties' agreement—are available for services at trial and on appeal." *Serrano v. Unruh*, 32 Cal. 3d 621, 637 (1982). Indeed, even before the EJL was adopted it had been the rule that a "contract for a reasonable attorney's fee in enforcing its provisions embraces an allowance for legal services rendered upon appeal as well as during the trial." *Cirimele v. Shinazy*, 134 Cal. App. 2d 50, 52 (1955); *accord*, *Wilson v. Wilson*, 54 Cal. 2d 264, 272 (1960).

As indicated above, there is no evidence anywhere in the legislative history of the EJL or any statutory amendments thereto that the Legislature intended to provide judgment debtors with a sure-fire means of defeating the judgment creditor's hitherto unquestioned right to recover appellate fees. The legislative silence speaks volumes.

CONCLUSION

"This case is simple" (AB 23), but not in the way Appellant suggests. Because appellate fees are not "fees incurred in enforcing a judgment," the judgment of the Court of Appeal

should be reversed, at least insofar as it denies Plaintiff and Respondent her appellate attorneys' fees.[13]

DATED: December 2, 2013.

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[13] Respondent also seeks fees incurred in filing a separate action to prevent the defendant from transferring property to third parties. *See* OBM 3, 5-6. *Amicus* takes no position on whether those fees are subject to the time bar in Section 685.080(a).

CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 504(d)(1)

Pursuant to California Rule of Court 504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached **Brief *Amicus Curiae* By The California Academy Of Appellate Lawyers In Support Of Plaintiff And Respondent** contains 4,295 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: December 2, 2013.

STEVEN L. MAYER

PROOF OF SERVICE

I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, 10th Floor, San Francisco, CA 94111-4024.

On December 2, 2013, I served the following document(s):

BRIEF *AMICUS CURIAE* BY THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PLAINTIFF AND RESPONDENT;

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* BY THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PLAINTIFF AND RESPONDENT

I served the document(s) on the following person(s):

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The document(s) was served by the following means:

By U.S. mail. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above.

I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Dated: December 2, 2013.

John C. Carrillo

John C. Carrillo