No. S _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LORING WINN WILLIAMS,

Plaintiff and Appellant,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT,

Defendant and Respondent.

After A Decision By The California Court of Appeal,
Fourth District, Division Two, No. E055755

San Bernardino Superior Court, No. CIVRS801732
The Honorable Janet M. Frangie

PETITION FOR REVIEW

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ISSUE PRESENTED

Is a prevailing defendant in an FEHA[1] action required to show that a claim was frivolous, unreasonable, or groundless in order to recover ordinary litigation costs?

REASONS FOR GRANTING REVIEW

This case presents an important unsettled legal issue which has broad implications for the rights of litigants in discrimination cases brought under the FEHA. Published appellate authority is deeply split over the proper interpretation of California Government Code section 12965(b), the statute which governs the award of attorney's fees, expert fees and costs in FEHA cases.[2] This split of authority has led to confusion and uncertainty in the courts over whether a prevailing defendant in an FEHA case can be awarded its ordinary litigation costs without a showing that a plaintiff's claim was frivolous, unreasonable, or groundless.

The published opinion in this matter, authored by the Fourth District, Division Two of the Court of Appeal (the "Opinion"), only further deepens the split of authority on this issue.[3] In the Opinion, the Court of Appeal

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[1] California Fair Employment and Housing Act (Cal. Gov. Code § 12900, et seq.).

[2] California Government Code section 12965(b) states: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees."

[3] The Opinion is attached hereto.

held that ordinary litigation costs could be awarded to a prevailing defendant without a showing of frivolousness. This Opinion directly conflicts with *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383. In *Cummings*, the Court of Appeal determined that the standard set forth by the United States Supreme Court in *Christiansburg Garment Co. v. E.E.O.C.* (1978) 434 U.S. 412, 417-421—which requires a showing of frivolousness by a prevailing defendant—was applicable to both a post-judgment claim for "attorney fees and costs" under Government Code section 12965(b). (*Cummings*, *supra*, 11 Cal.App.4th at pp. 1386-1388.) The *Cummings* court, thus, concluded that neither costs nor attorney's fees could be awarded to a prevailing defendant unless a plaintiff's action was found to be frivolous, unreasonable, or groundless. (*Ibid.*)

In *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, the Court of Appeal disagreed with *Cummings* in its interpretation of Government Code section 12965(b). The *Perez* court concluded that ordinary litigation costs could be recovered by a prevailing defendant even if the claim were not deemed frivolous, unreasonable, or groundless. (*Perez*, *supra*, 111 Cal.App.4th at pp. 679-681.)

Here, after surveying these conflicting authorities, the Court of Appeal sided with the line of cases that followed *Perez* and disagreed with *Cummings*. (Opn. 11-12.)

This Opinion not only deepens the split in California appellate authority, but it also splits with federal authority. In *Estate of Martin v. California Dept. of Veterans Affairs* (9th Cir. 2009) 560 F.3d 1042, the Ninth Circuit held that where an antidiscrimination provision makes attorney's fees ***and costs*** parallel (refers to them separately, but giving them equal treatment), the *Christiansburg* standard applies to costs as well as attorney's fees. (*Martin, supra*, 560 F.3d at p. 1052.) Conversely, where the award provision only provides for attorney's fees ***as part of the*** costs, the *Christiansburg* standard applies only to attorney's fees. (*Martin, supra*, 560 F.3d at p. 1052; *compare* 42 U.S.C. § 2000e-5(k) (Title VII[4]) (allowing the court discretion to award "a reasonable attorney's fee ... ***as part of the costs***" (emphasis added)), *and* 29 U.S.C. § 794a(b) (Rehabilitation Act[5]) (permitting the court to award prevailing party "a reasonable attorney's fee ***as part of the costs***" (emphasis added)), *with* 42 U.S.C. § 12205 (ADA[6]) (permitting "a reasonable attorney's fee...***and costs***" (emphasis added)), *and* Cal. Gov. Code § 12965 (b) (FEHA) (providing discretion to award "reasonable attorney's fees ***and costs***" (emphasis added).)

Like 42 U.S.C. § 12205 of the ADA, Government Code section 12965(b) of the FEHA plainly makes an award of "attorney's fees ***and***

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[4] The federal Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.).

[5] The federal Rehabilitation Act of 1973 (29 U.S.C. § 701, et seq.).

[6] The federal Americans with Disabilities Act of 1990 (42 U.S.C. § 12101, et seq.).

costs" parallel. (*emphasis added*). The FEHA does ***not*** merely provide for attorney's fees "***as part of the costs***" as in the dissimilar Title VII (42 U.S.C. § 2000e-5(k)) and Rehabilitation Act (29 U.S.C. § 794a(b)) provisions.

The Opinion fails to take into account this distinction in the statutory language. Consequently, the Opinion is inconsistent with the principle that the *Christiansburg* standard applies to both fees and costs where the two are parallel in the applicable award provisions. (*See Martin, supra*, 560 F.3d at p. 1052.) As a result, the Opinion splits with cases interpreting federal antidiscrimination laws upon which the FEHA was based.

Accordingly, review is needed to resolve this pressing question of statutory interpretation. Without clarity from this Court, the direct conflict among California published authority in addition to the conflict with federal authority will only lead to further confusion concerning the proper interpretation of Government Code section 12965(b). This is a question of far-reaching importance to litigants in FEHA claims and will inevitably recur time and again. Rather than leave courts to wade through the conflicting authority and keep litigants guessing as to which authority a particular trial court will follow, this Court should grant review and settle this important issue of law once and for all. (*See* Cal. Rules of Court, rule 8.500(b)(1).)

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Because this Petition involves a pure question of statutory interpretation, the facts that are relevant to the issue presented are succinct and straightforward.

Plaintiff and Appellant Loring Winn Williams ("Williams") lost an FEHA case in which he sued Defendant and Respondent Chino Valley Independent Fire District ("Chino Fire") for disability discrimination in employment. (Opn. 1.) The trial court awarded Chino Fire costs totaling $5,368.88 after concluding that a prevailing defendant can claim and be awarded ordinary litigation costs even if the case was not frivolous or groundless in nature. (*Id.* at p. 10-11.) Thereafter, Williams appealed. (*Id.* at p. 3.)

In a published opinion filed July 23, 2013, the Court of Appeal, Fourth District, Division Two, affirmed the trial court's award of costs, agreeing with the trial court that Chino Fire could recover its costs without a showing of frivolousness. (*Id.* at p. 18.) No petition for rehearing was filed.

DISCUSSION

I. This Court Should Grant Review Because There Is a Split of Authority Among the Courts of Appeal Concerning the Appropriate Standard for Awarding Costs to Prevailing Defendants in FEHA Cases

California's Courts of Appeal acknowledge a split of authority regarding the issue at hand: "The Courts of Appeal are split about whether [the *Christiansburg*] standard applies to an award of *ordinary litigation costs* to a prevailing FEHA defendant." (*Baker v. Mulholland Security & Patrol, Inc.* (2012) 204 Cal.App.4th 776, 783, *emphasis in original.*) "[T]here is a split of authority about whether the *Christiansburg* standard applies to 'costs.'" (*Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, 279.)

A. The *Christiansburg* Standard

In *Christiansburg Garment Co. v. E.E.O.C.* (1978) 434 U.S. 412, the United States Supreme Court established the standard which requires prevailing defendants in Title VII discrimination cases to show that a suit was frivolous in order to be awarded its attorney's fees. (*Christiansburg, supra,* 434 U.S. at p. 421.)

In *Christianburg*, the U.S. Supreme Court explained the standard for awarding attorney's fees to a prevailing plaintiff is different than the standard for such an award to a prevailing defendant. (*Id.* at pp. 417-421.)

According to the Court, the reason for these two different standards is to vindicate the important policy goals of Title VII. (*Id.* at pp. 419-420.) Attorney's fee awards to a prevailing plaintiff are permitted to clear the way for meritorious suit to be brought under Title VII. (*Id.* at p. 420.) "[T]he fee provision was included to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'" (*Id.*, quoting Remarks of Senator Humphrey, 110 Cong. Rec. 12724 (1964).) On the other hand, equitable considerations require a court to exercise its discretion using a different standard when determining a fee award to a prevailing defendant: "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." (*Id.* at p. 421.)

B. *Cummings* Establishes that the *Christiansburg* Standard Applies to Both Costs and Attorney's Fees Under FEHA

In *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, the Court of Appeal evaluated the standard of review for an award of attorney's fees and costs under the FEHA. (*Cummings*, *supra*, 11 Cal.App.4th at pp. 1386-1388.) The *Cummings* court recognized that "Government Code section 12965 authorizes an award of attorney fees ***and costs*** to the prevailing party in any action brought under the California Fair Employment and Housing Act (FEHA)." (*Id.* at p. 1386, *emphasis added.*)

The *Cummings* court noted that "[t]he language, purpose and intent of California and federal antidiscrimination acts are virtually identical," and concluded that the FEHA should be interpreted and applied in the same manner as the federal antidiscrimination provisions. (*Ibid.*) This Court has likewise concluded that federal decisions are useful in interpreting the FEHA. (*Reno v. Baird* (1998) 18 Cal.4th 640, 647 ["Because the antidiscrimination objectives and relevant wording...are similar to those of the FEHA, California courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA."].)

Ultimately, the *Cummings* court held that an award of attorney's fees and costs under Government Code section 12965 was subject to an abuse of discretion standard, and that a trial court must use the *Christiansburg* standard "in exercising its discretion in awarding fees and costs to a prevailing defendant." (*Cummings*, *supra*, 11 Cal.App.4th at p. 1387.) Specifically, in the *Cummings* case, the Court of Appeal found that the plaintiff's discrimination claim was "was neither frivolous, unreasonable nor groundless" and therefore concluded "the trial court abused its discretion in awarding costs and fees...and reverse[d] the award." (*Id.* at p. 1386.)

C. The Court of Appeal's Opinion in this Case Splits with *Cummings* and Erroneously Concludes that Costs Can Be Awarded Without a Showing of Frivolousness by a Prevailing FEHA Defendant

The Courts of Appeal agree that Government Code section 12965(b) governs cost awards under the FEHA. (Opn. 8.) However, despite the agreement that this section governs costs, published appellate authority sharply disagrees over the interpretation of that section and whether or not it provides an exception to the general rule of Code of Civil Procedure section 1032(b). (*Ibid.*)

"The right to recover costs exists solely by virtue of statute." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989 *citing Estate of Johnson* (1926) 198 Cal.469, 471; *Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439; *Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 241.)

California's general rule authorizing costs provides: "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Cal. Civ. Proc. Code § 1032(b).) Absent statutory authority, a court has no discretion to deny costs to the prevailing party. (*Vons Companies, Inc. v. Lyle Parks, Jr., Inc.* (2009) 177 Cal.App.4th 823, 832.)

In *Cummings,* the Court of Appeal held that Government Code section 12965(b) provides an exception to the general rule which

automatically awards costs to a prevailing party. It concluded costs are not awarded as a matter of right under section 12965(b), but instead subject to the *Christiansburg* standard where costs are only awarded to a prevailing defendant if the claim was frivolous. (*See Cummings*, *supra*, 11 Cal.App.4th at p. 1387.) The very language of section 12965(b) makes the award of costs discretionary. (Cal. Govt. Code § 12965.)

However, the court in *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671 split with *Cummings* in its interpretation of Government Code section 12965(b). (Opn. 8; *Perez*, *supra*, 111 Cal.App.4th at pp. 679-681.) In *Perez*, the Court of Appeal stated: "We disagree that section 12965(b) states an exception to the general rule of Code of Civil Procedure section 1032(b), as it does not expressly disallow recovery of costs by prevailing defendants." (*Ibid.*) The *Perez* court then went on to conclude, in direct conflict with the holding in *Cummings*, that "ordinary litigation costs are recoverable by a prevailing FEHA defendant even if the lawsuit was not frivolous, groundless or unreasonable." (*Perez*, *supra*, 111 Cal.App.4th at p. 681.)

Agreeing with *Perez*, the Opinion here also disagrees with *Cummings*: "We agree with the trial court and the [defendant] that ordinary costs are recoverable as a matter of right under Code of Civil Procedure section 1032....[¶] We also agree with *Perez* that Government Code 12965 does not state an exception to section [sic] Code of Civil Procedure section

1032, subdivision (b) and that ordinary costs are therefore recoverable under that section. [Citation.]" (Opn. 11.) The Opinion also disagreed with *Cummings*, and agreed with *Perez*, that costs can be awarded to a prevailing FEHA defendant even if a claim is not frivolous, unreasonable, or groundless. (*Ibid.*)

1. Government Code § 12965 States an Exception to Code of Civil Procedure §1032

To conclude, as the Opinion does here, that Government Code section 12965(b) does not state an exception to the general rule ignores the plain language of the statute: "In civil actions brought under this section, the court, ***in its discretion, may*** award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees." (Cal. Govt. Code § 12965(b), *emphasis added.*) The statute unequivocally dictates discretion in the application of the cost award. This is a clear departure from the "matter of right" standard set forth in Code of Civil Procedure section 1032(b).

Moreover, by concluding that "Government Code section 12965 does not state a general exception to the general rule of Code of Civil Procedure section 1032," the Opinion and the holding of *Perez* have rendered the portion of Government Code section 12965 providing discretion to award costs meaningless. (*See* Opn. 17.) This violates the well-settled canon of statutory construction which holds that

"interpretations which render any part of a statute superfluous are to be avoided." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207.)

In the case of *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, this Court found that the one-sided attorneys' fees and cost award provisions of the Song-Beverly Consumer Warranty Act, which only applied to buyers, did not state an express exception to the "general rule permitting a seller, as a prevailing party, to recover its costs under section 1032(b)." (*Murillo, supra* 17 Cal.4th 985 at p. 991.) Because the statute at issue, Civil Code section 1794, was silent as to any fee or cost award to a prevailing seller, Code of Civil Procedure section 1032's general provisions applied. Here, if this Court adopts the reasoning of the *Perez* court, it will render section 12965(b)'s specific cost provisions meaningless—as if they were not there at all—just like the provisions at issue in the *Murillo* case.

It is clear based on the plain and commonsense meaning of the statutory language that Government Code section 12965(b) provides a court "discretion" to award "costs," which is an express exception to the general rule of awarding costs "as a matter of right" under Code of Civil Procedure section 1032(b). The contrary conclusion by the Court of Appeal here and in *Perez* conflicts with the holding of *Cummings*, and the statutes. Such a conclusion was error. In order to resolve this important question of law

with finality and ensure uniformity of decision, it is necessary for this Court grant review.

II. This Court Should Also Grant Review Because the Court of Appeal's Decision Conflicts With Cases Interpreting Similarly Worded Federal Antidiscrimination Laws

Cases interpreting the federal antidiscrimination provisions have held that cost awards in ADA claims are subject to the *Christiansburg* standard, while claims brought under Title VII and the Rehabilitations Act are not. (*Martin*, *supra*, 560 F.3d at p. 1052.) The reason costs are treated differently under these various federal costs provisions is explained in *Martin*, where the Ninth Circuit analyzed the significant differences in the relevant text of these statutes. The *Martin* court concluded that the statutory language of each specific provision is meaningfully different and that the specific structure of the text of each provision determines whether the *Christiansburg* standard applies or not. (*Ibid.*)

Citing its earlier decision in *Brown v. Lucky Stores* (9th Cir. 2001) 246 F.3d 1182, 1190, the court in *Martin* held that the *Christiansburg* standard applies to a request for both attorney's fees and costs by a prevailing defendant under the ADA. (*Martin*, *supra*, 560 F.3d at p. 1052.) The court in *Martin* looked at the specific language of the cost provision of the ADA, 42 U.S.C. § 12205, which states: "[T]he court ..., in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, ***and costs***...." (*Emphasis added.*) (*Martin*,

supra, 560 F.3d at p. 1052.) The Ninth Circuit concluded that "the ADA makes fees and costs parallel..., as a result, the *Christiansburg* standard does apply to costs under the ADA." (*Ibid.*)

The Court of Appeal's Opinion discusses both *Brown* and *Martin* and the principle set forth in those cases that courts need to look at the specific text of the applicable cost provision to determine whether the *Christiansburg* standard applies or not. (Opn. 5-7.) Inexplicably, the Court of Appeal skipped this crucial step of actually analyzing the text of Government Code section 12965(b) which makes attorney's fees and cost awards parallel just like the ADA provision. Without performing this essential analysis, the Opinion simply jumps to the erroneous conclusion that Title VII and the Rehabilitation Act provide the relevant precedent and the *Christianburg* standard is, therefore, inapplicable. (Opn. 6-7.)

The text of the FEHA cost provision is strikingly similar to that of the ADA:

Government Code section 12965(b) provides, "[T]he court, in its discretion, may award to the prevailing party, ...reasonable attorney's fees ***and costs***, including expert witness fees." (Emphasis added.)

42 U.S.C. § 12205 provides, "[T]he court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, ***and costs***..." (Emphasis added.)

Just like 42 U.S.C. § 12205 of the ADA, Government Code section 12965(b) makes fees and costs parallel, subjecting them to the same discretionary review as each other.

Conversely, "[t]hat parallel structure in the ADA [and FEHA] between costs and attorney fees is critically absent from the relevant texts of both the Rehabilitation Act and Title VII." (*Martin*, *supra*, 560 F.3d at p. 1052.)

Title VII provides, "[T]he court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) ***as part of the costs***,...." (42 U.S.C. § 2000e-5(k), emphasis added.)

The Rehabilitation Act provides, "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee ***as part of the costs***." (29 U.S.C. § 794a(b), emphasis added.)

In sum, while the ADA and FEHA both provide for attorney's fees "***and costs***," Title VII and the Rehabilitation Act only provide for attorney's fees "***as part of the costs***." (*Martin*, *supra*, 560 F.3d at p. 1052.)

Because of these critical differences in the text of the statutes, the ADA provides the federal statute that is analogous to Government Code section 12965(b), not Title VII or the Rehabilitation Act. Therefore, California courts should look to cases interpreting the ADA provisions for

guidance. (*See Reno, supra*, 18 Cal.4th at p. 647; *Guz v. Bechtel* (2000) 24 Cal.4th 317, 378.)

The Court of Appeal here, as well as the court in *Perez*, relied on interpretations of the Title VII cost provision in reaching the conclusion that the *Christiansburg* standard did not apply. (Opn. 14-15; *Perez, supra*, 111 Cal.App.4th at pp. 680-681, fn. omitted.) However, this was error. Courts should only rely on interpretations of Title VII to construe FEHA when the provisions do not have explicit differences. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040.) There are explicit differences between 42 U.S.C. § 2000e-5(k) of Title VII ("attorney's fee...as part of the costs") and Government Code section 12965, subdivision (b) of the FEHA ("attorney's fees and costs"). Therefore, *Perez* and the Court of Appeal here were mistaken in relying on Title VII interpretations to aid in the construction of the FEHA cost provision. (*See State Dept. of Health Services v. Superior Court, supra*, at p. 1040.) This improper reliance has led to an interpretation of Government Code section 12965(b) which, on its face, treats the award of attorneys' fees and costs equally, but in application, results in one standard for attorneys' fees and another for costs—all without any statutory basis.

The Opinion here splits with such cases, including *Martin* and *Brown*, which interpret the similarly worded ADA and hold that the *Christianburg* standard applies where the provision makes costs and fees

parallel. (*Compare* Opn. 17-18, *with Martin*, *supra*, 560 F.3d at p. 1052, *and Brown*, *supra*, 246 F.3d at p. 1190.) This split with federal authority runs contrary to Legislative intent. Awarding costs to a prevailing defendant where they are not allowed under a similarly worded federal statute flies in the face of the legislative mandates that FEHA be construed liberally and that it provide protection equal to or greater than its federal counterparts. (*See* Gov. Code §§ 12926.1(a); 12993.)

Because the published Opinion presents an irreconcilable conflict with both California and federal authority, it is imperative that this Court grant review. Supreme Court review is needed to clarify the proper interpretation of Government Code section 12965(b) as it applies to ordinary litigation costs in the context of a prevailing defendant. This is an issue of paramount importance to FEHA litigants.

III. Additional Statutory Interpretation Issues Demand the Settlement of the Application of this Law

Following the Court of Appeal's opinion in the *Cummings* case in 1992, the California Legislature implicitly endorsed the *Cummings* opinion in its 1999 amendment to Government Code section 12965(b) which directly affected the statutory language at issue in this petition. This Court should defer to the Legislature's intent.

In 1999, the Legislature amended section 12965(b) to insert "including expert witness fees." (Stats. 1999, ch. 591, § 12, p. 3420.)

Thus, the Legislature expanded Government Code section 12965's discretionary award from attorney's fees and costs to fees, costs ***and*** expert witness fees. Notably, this amendment came shortly after this Court's decision in *Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436 which held that Government Code section 12965(b) ***did not*** authorize a court to award expert witness fees to a prevailing defendant.

In determining the legislative purpose in amending a statute, a court "must proceed in light of the decisional background against which the Legislature acted." (*People v. Dixon* (1979) 24 Cal.3d 43, 51.) As a result, it is presumed that the Legislature is fully aware of prior judicial interpretations of the law at the time it amends a statute. (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 562, 572.)

Here, following the *Cummings* court's interpretation of Government Code section 12965(b) and the application of *Christianburg* to both an award of fees and costs, the Legislature amended the very sentence authorizing a discretionary award of attorneys' fees and costs to include expert witness fees. No change to the treatment of costs was made in the amendment. Rather, the Legislature, knowing of *Christianburg's* application to this law, expanded the discretionary treatment to expert witness fees. Accordingly, the Court of Appeal has found "the Legislature implicitly intended the *Christianburg* standard to apply when...expert

witness fees, are awarded under section 12965 to a prevailing defendant." (*Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, 280.)

In *Murillo v. Fleetwood Enterprises, Inc.*, this Court noted "that when the Legislature intends to restrict the recovery of costs to just one side of the lawsuit, it knows how to express such restriction." (*Murillo, supra* 17 Cal.4th 985, 999 *citing* Pub. Contract Code § 10421.) If this is the case, when the Legislature intends to treat attorney's fees, costs, and expert fees the same by specifying they are discretionary, it should be assumed they intended to do so. In short, the *Christianburg* standard should equally apply to all three categories set forth in Government Code § 12965(b).

CONCLUSION

Based on the foregoing, Petitioner Loring Winn Williams respectfully requests that the Supreme Court grant review to resolve the conflict in published authority and settle this important issue of law.

Dated: August 30, 2013

HAMILTON & McINNIS, L.L.P.

By: _____

Ben-Thomas Hamilton, Attorneys for
Plaintiff and Appellant
Loring Winn Williams

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.504(d)(1), and in reliance on the word count feature of the software program used to prepare this document, I certify that this Petition for Review contains 4,236 words, which is less than the total words permitted by the rules of court.

Dated: August 30, 2013

HAMILTON & McINNIS, L.L.P.

By: _____

Ben-Thomas Hamilton, Attorneys for Plaintiff and Appellant Loring Winn Williams

Filed 7/23/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LORING WINN WILLIAMS, Plaintiff and Appellant, v. CHINO VALLEY INDEPENDENT FIRE DISTRICT, Defendant and Respondent.	E055755 (Super.Ct.No. CIVRS801732) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie, Judge. Affirmed.

Loring Winn Williams, in pro. per., for Plaintiff and Appellant.

Liebert Cassidy Whitmore, Peter J. Brown and Judith S. Islas for Defendant and Respondent.

Plaintiff and Appellant Loring Winn Williams lost a FEHA (California Fair Employment and Housing Act, Gov. Code, § 12900 et seq.) case in which he sued defendant and respondent Chino Valley Independent Fire District (the District) for employment discrimination (case No. E052123). The trial court then granted Williams's

motions to tax costs in part and entered an order granting the District costs of $5,368.88. Williams appeals from the order, contending that no costs should have been allowed. The order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(2).

I

ISSUE

The issue presented is whether the District, as the prevailing party, must show that Williams's claim was frivolous, unreasonable, or groundless in order to recover costs in an action for employment discrimination under FEHA.[1]

II

PROCEDURAL HISTORY

On February 25, 2008, Williams filed a complaint for damages and injunctive relief for employment discrimination and for a petition for writ of mandate. His third amended complaint was filed on November 17, 2009.

On October 13, 2010, the court partially granted Williams's motion for summary adjudication and denied the District's motion for summary judgment.

The District then filed a petition for a peremptory writ of mandate in this court. We granted the petition, and Williams's petition for review by our Supreme Court was denied on June 8, 2011.

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[1] Since the issues are issues of statutory interpretation, our review is de novo. (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765; *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1221.)

The trial court followed the writ of mandate by vacating its earlier orders and granting the District's motion for summary judgment. The ensuing judgment awarded the District costs to be determined.

The District then filed its memorandum of costs on appeal, and Williams filed a motion to tax costs. The District also filed a memorandum of costs summary, and Williams filed a second motion to tax costs. Williams argued that no costs should be awarded because his disability discrimination claim was not frivolous, unreasonable, or groundless.

On November 9, 2011, the motions were heard. The first motion was granted in part. The second motion was granted in part and denied in part. After a review of applicable authorities, the trial court rejected Williams's contention that no costs were allowable. Costs totaling $5,368.88 were awarded to the District.

III

WILLIAMS'S ARGUMENT

On appeal, Williams renews his argument that no costs should have been awarded because his discrimination claim was not frivolous, unreasonable, or groundless.

Williams's argument is based on *Christiansburg Garment Co. v. E.E.O.C.* (1978) 434 U.S. 412 (*Christiansburg*), as applied in *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383 (*Cummings*). In *Christiansburg*, our California Supreme Court interpreted section 706(k) of Title VII of the Civil Rights Act of 1964. The section currently provides: "In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the

Commission or the United States, a reasonable attorney's fee [including expert fees] *as part of the costs*, and the Commission and the United States shall be liable for costs the same as a private person." (Italics added.)

Specifically, the Supreme Court focused on the question of when attorney fees should be awarded when the defendant is the prevailing party in a Title VII action. (*Christiansburg*, *supra*, 434 U.S. at p. 414.) The court found that different policy considerations and standards apply when attorney fees are requested by a prevailing plaintiff than when attorney fees are requested by a prevailing defendant. (*Id.* at pp. 417-421.)

The Supreme Court articulated the following standard: "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." (*Christiansburg*, *supra*, 434 U.S. at p. 421.)

In *Cummings*, Division Seven of the Second Appellate District reversed a trial court award of attorney fees and costs to a prevailing defendant in an age discrimination case. (*Cummings*, *supra*, 11 Cal.App.4th 1383.) The court said: "Attorney fees are allowable as costs to a prevailing party when authorized by statute. [Citations.] Government Code section 12965 authorizes an award of attorney fees and costs to the prevailing party in any action brought under [FEHA]. That section provides in pertinent part: [¶] 'In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs except where such action is filed

by a public agency or a public official, acting in an official capacity.'[2] [¶] The language, purpose and intent of California and federal antidiscrimination acts are virtually identical. Thus, in interpreting FEHA, California courts have adopted the methods and principles developed by federal courts in employment discrimination claims arising under title VII of the federal Civil Rights Act, 42 United States Code section 2000e et seq., and under the federal Age Discrimination in Employment Act (ADEA), 29 United States Code section 621 et seq. [Citations.] A trial court's award of attorney fees and costs under this section is subject to an abuse of discretion standard. [Citations.]" (*Cummings*, at pp. 1386-1387.)

Following *Christiansburg*, the court found that the plaintiff's claim was not frivolous, unreasonable, or groundless. It therefore found that the trial court abused its discretion and reversed the award of "costs and fees" to the prevailing defendant. (*Cummings*, *supra*, 11 Cal.App.4th at p. 1388.)

Williams therefore contends that the same standard should apply here, at least in disability discrimination cases. He cites several federal cases in which the courts have applied *Christiansburg* in FEHA and ADA (Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.) cases.

In *Brown v. Lucky Stores* (9th Cir. 2001) 246 F.3d 1182 (*Brown*), the court considered a claim for dismissal for alcoholism under ADA and FEHA. The court found

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2 This portion of Government Code section 12965, subdivision (b) now reads: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees."

no ADA or FEHA violation. (*Brown,* at pp. 1187, fn. 1, 1189.) Regarding costs, the court held that the attorney fee provision of ADA, 42 U.S.C. 12205, is governed by *Christiansburg*. (*Brown*, at p. 1190.) It concluded: "Because [section] 12205 makes fees and costs parallel, we hold that the *Christiansburg* test also applies to an award of costs to a prevailing defendant under the ADA. [Citations.]"[3] (*Brown*, at p. 1190.)

Williams also cites *Estate of Martin v. California Dept. of Veterans Affairs* (9th Cir. 2009) 560 F.3d 1042 (*Martin*). The court cited *Brown* and noted that "the ADA makes fees and costs parallel and [we] held that, as a result, the *Christiansburg* standard does apply to costs under the ADA. [Citation.]" (*Martin*, at p. 1052.) However, because of statutory differences between the cost provisions of ADA and Title VII, the court held that the *Christiansburg* standard does not apply to awards of costs under the Rehabilitation Act. (*Martin*, at p. 1052.)

Of significance here, the court found that, considering statutory similarities, it was appropriate to use the Title VII precedents to apply to the Rehabilitation Act. (*Martin, supra*, 560 F.3d at p. 1052.) The court stated that the Rehabilitation Act "text makes an attorney fee award discretionary; if given, it may be made a part of the costs. The text does not suggest that '*the* costs' are similarly discretionary, but rather that they are a given, to which fees *may* attach. Accordingly, the wording of the statute supports an

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[3] Section 12205 provides: "In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual."

inference that the general provision in Rule 54(d)(1) of the Federal Rules of Civil Procedure—that costs are allowed in the ordinary course to the prevailing party—applies. Rule 54(d)(1) 'creates a presumption in favor of awarding costs to a prevailing party.' [Citation.]" (*Id.* at p. 1053.) The case is therefore not helpful to Williams's argument.

IV

THE DISTRICT'S ARGUMENT

In response, the District contends that *Christiansburg* is inapplicable and that it is entitled to recover its "ordinary costs" under Code of Civil Procedure section 1032, subdivision (b). That subdivision states: "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding."

The District relies on *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671 (*Perez*); *Knight v. Hayward Unified School District* (2005) 132 Cal.App.4th 121 (*Knight*); and *Baker v. Mulholland Security and Patrol, Inc.* (2012) 204 Cal.App.4th 776 (*Baker*).

In *Perez*, a nurse at a correctional facility sued the County of Santa Clara for racial discrimination and retaliation under FEHA. (*Perez, supra*, 111 Cal.App.4th at p. 673.) After she lost the suit, the county filed a cost bill, which did not include attorney fees. (*Id.* at p. 679.) The trial court applied *Christiansburg* and denied the request.

The Sixth District reversed the trial court and remanded for a cost determination. (*Perez, supra*, 111 Cal.App.4th at p. 673.) In discussing *Cummings*, the court first addressed the statutes and concluded that Government Code section 12965 did not state

an exception to the general rule of Code of Civil Procedure, section 1032, subdivision (b) quoted above. (*Perez*, at p. 679.)

Perez agreed with *Cummings* that Government Code section 12965 is the governing section, but it disagreed with the *Cummings* interpretation of that section.[4] Specifically, it said: "We disagree that [Government Code] section 12965[, subdivision] (b) states an exception to the general rule of Code of Civil Procedure section 1032[, subdivision] (b), as it does not expressly *disallow* recovery of costs by prevailing defendants. [Citation.]" (*Perez*, *supra*, 111 Cal.App.4th at p. 679.)

The *Perez* court did not apply *Christiansburg* because it dealt with an attorney fee award, not costs. It criticized *Cummings* for applying *Christiansburg* to the question of costs: "We find this blending of fees and costs to be unnecessary and inappropriate. Several federal courts themselves have refused to apply the *Christiansburg* test for recovery of defense attorney fees to ordinary litigation expenses. [Citations.]" (*Perez*, *supra*, 111 Cal.App.4th at pp. 680-681, fn. omitted.)

The *Perez* court concluded that "ordinary litigation costs are recoverable by a prevailing FEHA defendant even if the lawsuit was not frivolous, groundless, or unreasonable." (*Perez*, *supra*, 111 Cal.App.4th at p. 681.) Accordingly, it affirmed the trial court's decision and remanded to permit the trial court to exercise its discretion on the county's request for costs. (*Ibid.*)

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[4] See footnote 2, *ante*, page 5.

The second case cited by the District is *Knight*, *supra*, 132 Cal.App.4th 121. In that case, a teacher brought a disability discrimination claim under FEHA against his school district. (*Knight*, at p. 124.) The teacher lost his case, and the school district asked for costs under Government Code section 12965, subdivision (b). (*Knight*, at p. 134.) The trial court awarded costs to the school district. (*Ibid.*)

On appeal, the First Appellate District, Division Two disagreed with *Cummings* and followed *Perez*. (*Knight*, *supra*, 132 Cal.App.4th at p. 135.) It said: "Unlike the court in *Cummings*, which did not focus on costs, and simply assumed they should be treated in the same manner as attorney fees, the *Perez* court explained that the policies justifying the *Christiansburg* standard for awarding attorney fees to a prevailing defendant do not persuasively apply to the award to such a party of costs. For that reason, and because we believe its reasoning persuasive, we agree with *Perez*. It is true that costs may in some FEHA cases be considerable, and that equitable considerations may warrant the denial of a cost award, but *Perez* does not prevent nonprevailing plaintiffs from pleading and demonstrating that such an award would impose undue hardship or otherwise be unjust, and should therefore not be made, and we are unwilling to assume trial judges would turn a deaf ear to such equitable claims." (*Id.* at pp. 135-136.) The court therefore affirmed the trial court's award of costs. (*Id.* at pp. 134, 136.)

The third case relied on by the District is the recent case of *Baker*, *supra*, 204 Cal.App.4th 776. The defendant was the prevailing party and sought expert witness fees as costs under Government Code 13965, subdivision (b) even though the action was not unreasonable, frivolous, or vexatious. The trial court held that expert witness fees may

be awarded to a prevailing FEHA defendant without requiring a showing that the plaintiff's claim was frivolous. (*Baker*, at p. 782.)

The Second Appellate District, Division Eight, reversed the trial court and held that the standard applicable to attorney's fees should apply to expert witness fees claimed as costs. (*Baker*, *supra*, 204 Cal.App.4th at p. 783.) "Expert fees, just like attorney's fees, are not ordinary litigation costs which are routinely shifted under Code of Civil Procedure sections 1032 and 1033.5. Like attorney's fees, expert fees should be treated differently than ordinary litigation costs because they can be expensive and unpredictable, and could chill plaintiffs from bringing meritorious actions." (*Ibid.*) It concluded that expert witness fees, like attorney fees are not recoverable as a matter of right, as are ordinary litigation expenses. (*Id.* at pp. 783-784.) Accordingly, the *Christiansburg* standard is applicable to attorney fees and expert witness fees awarded as costs. (*Baker*, at p. 784.)

V

THE TRIAL COURT'S DECISION

Following a hearing on November 9, 2011, the trial court reviewed the arguments of the parties; quoted extensively from *Cummings*, *Perez*, and *Knight*; and said, "The *Perez* and *Knight* cases are better reasoned. The *Cummings* court did not make a distinction between attorney fees as costs and ordinary costs. Considering that even federal courts have declined to follow *Christiansburg* with respect to ordinary litigation expenses, the court determines that Defendant may claim its ordinary litigation costs [without] a finding that Plaintiff's claim was frivolous or groundless." The reasoning of

the minute order was subsequently incorporated into the final order. Accordingly, the trial court taxed some costs and awarded the District costs of $5,368.88.

VI

DISCUSSION

We agree with the trial court and the District that ordinary costs are recoverable as a matter of right under Code of Civil Procedure section 1032. When attorney fees or expert witness fees are claimed by the prevailing defendant in FEHA litigation, they may be awarded as costs only if the *Christiansburg* standard is met because they can be more expensive and unpredictable than ordinary costs and could discourage plaintiffs from filing meritorious actions. (*Baker*, *supra*, 204 Cal.App.4th at p. 783.) These considerations are not applicable to the other ordinary costs listed in Code of Civil Procedure section 1033.5.

We also agree with *Perez* that Government Code 12965 does not state an exception to section Code of Civil Procedure section 1032, subdivision (b) and that ordinary costs are therefore recoverable under that section. (*Perez*, *supra*, 111 Cal.App.4th at p. 679.) And we agree with the conclusion of *Perez* that "ordinary litigation costs are recoverable by a prevailing FEHA defendant even if the lawsuit was not frivolous, groundless or unreasonable." (*Id.* at p. 681.)

Although attorney fees and expert witness fees are part of a cost award (§ 1033.5), the *Christiansburg* rationale should not be extended to routine costs by indiscriminately lumping attorney fees and routine costs together. We agree with *Perez* and *Knight* that

this was the error of *Cummings*. (*Perez, supra*, 111 Cal.App.4th at pp. 680-681; *Knight, supra*, 132 Cal.App.4th at p. 135.)

Williams asserts three arguments based on federal precedents. First, he argues that California courts are required to follow ADA law and federal precedents. Second, federal courts apply *Christiansburg* to cost claims under both ADA and FEHA. Third, he argues that recent California cases require application of federal precedent in this situation.

The first argument rests on Government Code sections 12993, subdivision (a) and 12926.1, as well as California Code of Regulations, section 7285.1.

Government Code 12993, subdivision (a) states the general principle that the provisions of FEHA must be liberally construed to accomplish its purpose. (See generally *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 233, 243.)

Government Code section 12926.1, subdivision (a) provides: "The law of this state in the area of disabilities provides protections independent from those in the federal [ADA]. Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections."

California Code of Regulations, section 7285.1, subdivision (b) states: "Except as required by the Supremacy Clause of the United States Constitution, federal laws and their interpretations regarding discrimination in employment and housing are not determinative of the construction of these rules and regulations and the California statutes

which they interpret and implement but, in the spirit of comity, shall be considered to the extent practical and appropriate."

These general principles of interpretation of FEHA do not support Williams's argument that California courts are *required* to follow ADA law and federal precedents.

Williams cites the leading case of *Guz v. Bechtel* (2000) 24 Cal.4th 317, but that case does not advance his position. In *Guz*, our Supreme Court said, "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes. [Citation.]"

Similarly, in *Brown, supra*, 246 F.3d 1182, the court said, "California courts use federal court decisions concerning the ADA to interpret analogous provisions of the FEHA. [Citation.]" (*Id.* at p. 1187, fn. 1; see also *Knight, supra*, 132 Cal.App.4th at p. 130.)

However, other than binding United States Supreme Court decisions,[5] there is a significant difference between considering federal law and precedent, which we have done, and being bound by it. "[W]hile federal authority may be regarded as persuasive, California courts are not bound by decisions of federal district courts and courts of appeals. [Citations.]" (*People v. Uribe* (2011) 199 Cal.App.4th 836, 875.) We therefore reject the argument that we are required to follow federal statutes and lower federal court decisions.

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[5] As discussed above, *Christiansburg* is not binding because it deals with attorney fee awards as part of a cost award, but it does not deal with an award of ordinary litigation costs.

Williams's second argument is that federal courts apply *Christiansburg* to cost claims under both ADA and FEHA. Williams relies on the *Brown* and *Martin* cases discussed above, as well as *Dow v. Lowe's Home Improvement, Inc.*, 2007 U.S. Dist. LEXIS 101223 (N.D. Cal. Jan. 23, 2007).

As detailed above, *Brown* and *Martin* did apply the *Christiansburg* test to an award of costs to a prevailing ADA defendant.[6] (*Brown, supra*, 246 F.3d 1182; *Martin, supra*, 560 F.3d 1042.) In *Martin*, however, *Christiansburg* was not applied to a cost award under the Rehabilitation Act. (*Martin*, at p. 1052.)

Dow was an order on a motion for costs in an ADA/FEHA disability action. The district court commented that *Christiansburg* applied to an ADA cost award, and "[t]he same standard governs a prevailing defendant's claim for attorney's fees and costs under FEHA." (*Dow v. Lowe's Home Improvement, Inc., supra*, LEXIS 101223 at p. 2.) It cited *Cummings* to support this assertion but did not discuss either *Perez* or *Knight.*

The District cites several federal cases to demonstrate that there is not a general federal rule that "in all types of discrimination cases, a prevailing defendant is only entitled to costs if the *Christiansburg* standard is met."

For example, in *Byers v. Dallas Morning News, Inc.* (5th Cir. 2000) 209 F.3d 419, the court found that "the standard procedure [in Title VII cases] is to award costs to the prevailing party in Title VII suits. . . . Furthermore, this court has held that the

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[6] *Brown* concerned an attorney fee award and is therefore not persuasive in its application to ordinary costs. (*Brown, supra*, 246 F.3d at p. 1190.)

Christiansburg standard for determining whether a defendant is a prevailing party under Title VII does not apply to an award of costs. [Citation.]" (*Id.* at p. 430.)

The District also points out that the Ninth Circuit has held that *Christiansburg* does not apply to an award of ordinary litigation costs under Title VII. (*National Organization for Women v. Bank of California, Nat. Assn.* (9th Cir. 1982) 680 F.2d 1291.) The Ninth Circuit said: "There is no express statutory provision for applying *Christiansburg* to cost awards, and we see no reason to impose rigid limitations on the district court's discretion." (*Id.* at p. 1294; see also *Delta Airlines, Inc. v. Colbert* (7th Cir. 1982) 692 F.2d 489, 490-491.)

We agree with the District that each case—state or federal—depends upon the statutory authority it cites for the cost award.[7] Since we find no applicable general rule, we reject Williams's second argument that federal courts apply *Christiansburg* to cost claims under both ADA and FEHA.

Williams's third argument is that recent California cases require application of federal precedent in this situation. Under this heading, he cites *Baker*, *supra*, 204 Cal.App.4th 776 and *Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047.

As discussed above, *Baker* applied the *Christiansburg* standard to an award of expert witness fees as costs. It held that for policy reasons such fees should be treated like an attorney fee award, and not like ordinary costs. (*Baker*, *supra*, 204 Cal.App.4th at

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[7] *Christiansburg*, *supra*, 434 U.S. at pages 418 through 422 interpreted section 706(k) of Title VII. (42 U.S.C. § 2000e-5(k).)

pp. 783-784.) Since the case does not apply to an award of ordinary costs and differentiates ordinary costs from attorney fee awards it does not advance Williams's argument.

In *Turner*, the defendant prevailed in an action under Civil Code sections 54 et seq., the Disabled Persons Act; the defendant sought an attorney's fee award. (*Turner v. Association of American Medical Colleges*, *supra*, 193 Cal.App.4th at pp. 1053, 1054.) The court considered a conflict between Civil Code section 55 and Civil Code sections 52 and 54.3, analyzed public policy considerations, and concluded that sections 52 and 54.3 prevail over section 55. (*Turner*, at pp. 1069-1073.) The court cited *Christiansburg* for its settled rule that the case applied to attorney fee awards. (*Turner*, at p. 1069.) But it rejected the defendant's argument that *Christiansburg* applied to section 55 actions. (*Turner*, at pp. 1070-1071.) It noted that a Title VII litigation was different from "access litigation" under Civil Code section 52, 54.3, or 55. The plaintiff could therefore choose a section that exposed himself to the possibility of fee awards (Civ. Code, § 55) or not (Civ. Code, §§ 52 or 54.3). (*Turner*, at pp. 1070-1071.) *Turner* does not strengthen Williams's position because it supports the District's general position that the provisions of the specific statute in issue govern.

The specific cost statutes at issue in this case are Government Code section 12965, subdivision (b)[8] and Code of Civil Procedure section 1032. While Government Code section 12965, subdivision (b) now applies to attorney fee and expert fee awards, it does

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[8] See footnote 2, *ante*, page 5.

not apply to the other costs listed in Code of Civil Procedure section 1033.5. And, as Code of Civil Procedure section 1032 provides, the ordinary costs are obtainable by the prevailing defendant as a matter of right, and they are not subject to *Christiansburg*. (*Perez*, *supra*, 111 Cal.App.4th at pp. 680-681; *Knight*, *supra*, 132 Cal.App.4th at pp. 135-136.)

The District cites *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985. That case arose under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.) The defendants prevailed and were awarded costs and expert witness fees under Code of Civil Procedure sections 998, subdivision (c) and 1032, subdivision (b). (*Murillo*, at p. 988.) The plaintiff argued that the more specific provisions of the Song-Beverly Consumer Warranty Act prevented any such recovery. (*Murillo*, at p. 988.) Our Supreme Court disagreed and held that those sections did not provide a specific exception to Code of Civil Procedure section 1032, subdivision (b).

We agree with defendant here that *Murillo* is analogous to the situation in this case. *Perez* characterized *Murillo* as follows: "mere absence of costs provision for prevailing sellers in Civil Code section 1794, subd. (d) does not constitute exception to Code of Civil Procedure section 1032[, subdivision] (b)." (*Perez*, *supra*, 111 Cal.App.4th at p. 679.)

As discussed above, *Perez* holds that Government Code section 12965 does not state a general exception to the general rule of Code of Civil Procedure section 1032. Accordingly, Code of Civil Procedure section 1032 prevails.

The trial court therefore correctly found that the District should be granted the ordinary costs claimed in its cost memorandum, as modified by the court, without a showing that the action was frivolous, unreasonable, or without foundation.

VII

DISPOSITION

The judgment is affirmed. The District is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION

RICHLI
J.

We concur:

RAMIREZ
P. J.

MILLER
J.

No. S _____

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LORING WINN WILLIAMS,

Plaintiff and Appellant,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT

Defendant and Respondent.

After a Decision By The California Court of Appeal,
Fourth District, Division Two, No. E055755

San Bernardino Superior Court, No. CIVRSS801732
The Honorable Janet M. Frangie

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I, Michelle L. Musgrove, declare under penalty of perjury that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the action; that I am employed or reside in the County of San Diego, State of California, in which county the within-mentioned occurred. My business address is 3110 Camino del Rio S., Ste. 203, San Diego, CA 92108.

I caused the following documents to be personally served:

PETITION FOR REVIEW

____ **(BY PERSONAL SERVICE)** by personal service upon the addressee/agent of the addressee.

XXX **(BY MAIL)** I then sealed each envelope and with postage thereon fully prepaid, deposited each in the United States mail the date mentioned below.

____ **(BY FACSIMILE)** By use of facsimile machine telephone number, I served the document(s) mentioned above. The facsimile machine utilized complies with California Rule of Court 2003(3) and no error was reported by the machine. Pursuant to California Rule of Court 2005(I) I caused the machine to print the transmission record of the transmission.

Clerk of Court (Original + 13 copies)
SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, California 94102-4797

Peter J. Brown
LIEBERT CASSIDY WHITMORE
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The Honorable Janet M. Frangie
c/o Clerk of Court, Dept. R9
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO
8303 N. Haven Avenue
Rancho Cucamonga, California 91730

///

Clerk of Court
COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO
3389 Twelfth Street
Riverside, CA 92501

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 30, 2013.

Michelle L. Musgrove