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SUPREME COURT COPY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PORFIRIO SERRANO AND LOURDES SERRANO Plaintiffs - Appellants, STEFAN MERLI PLASTERING COMPANY, INC. DBA INLAND CONCRETE PUMPING Defendant, COAST COURT REPORTERS, Respondent.	)	No. S Court of Appeal No. B215837 Super. Ct. Los Angeles County No. BC324031

SUPREME COURT
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Deputy

APPELLANTS' PETITION FOR REVIEW

Appeal From the Superior Court
State of California, County of Los Angeles
Hon. Aurelio Munoz, Judge

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PORFIRIO SERRANO AND LOURDES SERRANO	)	
Plaintiffs - Appellants,	)	**PETITION FOR REVIEW**
	)	**Ct.App. B215837**
STEFAN MERLI PLASTERING COMPANY, INC. DBA INLAND CONCRETE PUMPING	)	**LASC BC324031**
Defendant,	)	
COAST COURT REPORTERS,	)	
Respondent.	)	

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Plaintiffs-Appellants **PORFIRIO** and **LOURDES SERRANO** respectfully petition for review of the judgment of the Court of Appeal, Second Appellate District, Division Three, No. B215837, filed April 28, 2010,

184 C.A.4th 178 (Exhibit "A" - hereafter ***Serrano#2***[1]). Appellants' Petition for Rehearing, and Request for Judicial Notice on rehearing, were denied on May 24, 2010. (Exhibits "B" and "C" - attached)

ISSUES PRESENTED FOR REVIEW

The Petition is completely about ***In re Joshua S.*** (2008) 42 C.4th 945,[2] this Court's latest pronouncement on the private attorney general doctrine. In this first published case thereafter to authoritatively examine ***Joshua S.***, all issues for review except one involve differing case dispositive interpretations of the following language at p. 949 and its various iterations, which ***Serrano#2*** deemed critical, that ***Code Civ. Proc. §1021.5***[3] does not authorize an award:

> "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"[4]

This language is the issue presented for review, necessary to determine

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[1]***Serrano v. Stefan Merli Plastering et al*** (2008) 162 C.A.4th 1012 is ***Serrano#1***.

[2]Hereafter, ***Joshua S.***

[3]Hereafter, ***§1021.5*** All references are to the ***Code of Civil Procedure*** unless otherwise indicated. **Bolded text** without italics is a signal for "emphasis added."

[4]See also pp. 956, 957, and 958.

important questions of law and to secure uniformity of decision.

1. Did ***Joshua S.*** at 949 rewrite ***§1021.5*** law, as Respondent contended[5] and as the Trial Court (AA T36 1002-1003) and the Court of Appeal agreed, by narrowing ***§1021.5***'s application under a new "private litigation" test to exclude litigation between two private parties over a dispute between them and not against an industry,[6] and which restricted the traditional three elements[7] and "enforcement" element to cases not "private litigation?" Or, did ***Joshua S.*** add only an "enforcement" element, reconfirm the traditional elements, and use "private litigation" as explanation and not ***ratio decedendi*** in a discussion of why enforcement and the three traditional elements must concur to constitute statutory "public interest litigation."[8]

2. Did ***Joshua S.***' "adversely affect the rights of the public or a substantial class of people" "private litigation" language establish a new test

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[5](RT D 3:17-23)

[6] ***Serrano#2*** at 189 noted this "was a private business disagreement between plaintiffs and Coast only--not the entire deposition reporting industry . . ." and that "Coast was not purporting to represent the public," mis-perceiving earlier quoted explanatory language of ***Joshua S.*** at 957 about ***Plaintiffs*** representing the public interest as applicable to those kind of ***Defendants*** subject to a potential award - those which represent the public or an entire industry.

[7] **Joshua S.** at 951-952

[8] ***Joshua S.***' **only** holding required maintenance of proceedings to enforce an important right that the person against whom fees were sought was violating. ***Joshua S.*** at 956, 958.

for *§1021.5*'s "important right affecting the public interest," incorporating a ***de facto*** exception for every non-governmental defendant but big business, by interpreting "affecting the public interest" to mean the **number of people in the litigation directly affected by the individual Defendant's violation of the important right**, rather than **the number of people the important right in its legal context inherently affects statewide**, and importing into the "important right" analysis[9] a requirement that **Defendant's personal adverse practice must cause a substantial effect**, rather than under the substantial public benefit analysis examining if **the results of the individual lawsuit stopping the Defendant's practice caused a substantial benefit statewide by affecting others engaged in similar practices**.

3. Did ***Joshua S.'*** "private litigation" language and general discussion of "public interest litigation" preclude *§1021.5*'s application to any litigation between two non-governmental parties attacking and determining adversely to a business its adoption and use[10] with its customers of lucrative[11] unlawful

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[9] See ***Beasley v. Wells Fargo Bank*** (1991) 235 C.A.3d 1407, 1417-1418, cited with approval (***Joshua S.*** at 955 (fn. 3), overruled on another point ***Olson v. Automobile Club of Southern California*** (2008) 42 C.4th 1142, 1152-1153 on how this "private rights" analysis impermissibly commingles separate elements of important right and public benefit.

[10] Adoption and use of unlawful industry practices is sufficient. ***Joshua S***. at 956-957 only requires that the party "be generally at least partly responsible for the policy or practice that gave rise to the litigation." To require otherwise would require the legal impossibility of suit against an

industry wide standards based on ***Joshua S.'*** "private litigation" language and discussion of "public interest litigation," because it is properly read to require intent or motivation[12] to protect the rights of the public,[13]though the litigation's result[14] is a published decision against the industry standard which protects and confers a substantial benefit on the public, and though the burden of the litigation on the prevailing party is out of proportion to its stake because of the

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entire industry.

[11]The three industry amici and Respondent fought vigorously because, reasonably estimated, the at issue annual improper fees to California's industry are over $1,000,000 and $20,000 to Respondent. (AA T21 617:11-618:16; 626:15-627:14; 628:11-12; 640:26-642:17; 654:4-12; 745:3-4)

[12]But see ***Satrap v. PG&E*** (1996) 42 C.A.4th 72, 77, indicating motive is not determinative. There must be sufficient personal stake or "private interest" to confer standing. ***Press v. Lucky Stores Inc.*** (1983) 34 C.3d 311, 321 (fn. 11). Therefore, initial motivation by economic, business or personal interests (by clear implication "private litigation") is no bar, subject to the rule about the burden being disproportionate to the personal stake in the outcome. ***MBNA America Bank NA v. Gorman*** (2006) 147 C.A. 4th Supp. 1, 10; ***Mejia v. City of Los Angeles*** (2007) 156 C.A.4th 151, 159.

[13]The uncontradicted evidence of Petitioners' motive, apart from the $2,871.57 charge (AA T21 632:5-633:3), was primarily to respond to the Trial Court's request for help, to take case up out of a sense of duty without regard to economics, because the entire situation was a matter of principle and unfair, and to prevent the continuation of the business practice. (AA T21 633:4-634:2) These all qualified as a matter of law even under ***Serrano#2's*** reading that ***Joshua S*** required motive.

[14] ***§1021.5***'s precise language is "result in," not motivated by.

litigation over the industry standard.[15]

4. Did ***Joshua S.*** intend by its "done nothing to adversely affect" language at p. 949[16] to exclude from the violation or compromise of an important right affecting the public interest[17] industry wide conduct which was "unreasonable"[18] as a categorically insufficient level of adversity or wrongdoing, without examining the nature, cause, or statutory violations[19] constituting the "unreasonableness?"

5. In applying alternative standards of deferential abuse of discretion

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[15]This litigation recovered $2,871.57 in improper fees, but cost over $100,000 in attorney time for the appeal involving the Court invited amici alone, which by the time of the fee motion was in excess of $180,000 though only $50,000 was sought, and now is well above $250,000. This was not an exercise to earn fees.

[16] And by its "actions or policies that are deemed harmful to the public interest" language (***Joshua S.*** at 956), quoting ***Connerly v. State Personnel Board***, (2006) 37 C.4th 1169, 1176-1177.

[17]***Joshua S.*** at 956

[18] ***Serrano#1*** read "reasonable" into ***§2025.510(c)***, thus achieving consistency with ***FRCP 30(f)***.

[19] Petitioners attacked the typical circumstances of a lucrative industry wide fee practice charging fictitious fees for no service or cost, for something already paid for by another fee paid by the customer as part of the same transaction, that was up to 100% of that other fee, without any disclosure, that was imposed as a result of a state granted monopoly by a ministerial officer of the court and which was collected using COD withholding. This violated not only ***§2025.510(c)'s*** "reasonable" fee requirement from ***Serrano#1***, but also ***Business and Professions Code, §§17200*** (unfair business practices), ***8025(d)***(court reporter misconduct) and ***Civil Code, §1670.5*** (unconscionability) as a matter of law.

and de novo review to an "important right affecting the public interest," a heretofore unsettled standard,[20] did ***Serrano#2*** incorrectly select a standard and primarily defer to a lower court's decision when that court made no finding on the import of the reviewing court's own ***Serrano#1*** decision, and alternatively, incorrectly apply de novo review, by:

A. misreading and misapplying ***Joshua S.*** as above to the undisputed material facts, and

B. failing to consider the litigation and its stages as a whole,[21] and

C. failing to evaluate the inherently legal issue of "important right" involving a prior opinion of the same division based on the kinds of factors which normally determine the importance of a right, such as its priority within the hierarchy of legal rights, its context, whether the right is a specific context

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[20] ***The People ex rel. Department of Conservation v. El Dorado County*** (2005) 36 C.4th 971, 983 (fn 3) " . . .we requested that the parties also **discuss the standard of review a reviewing court should apply in determining whether an action enforces an important right affecting the public interest so as to justify an award of attorney fees . . .**" (emphasis added) No holding occurred on the point as the case was decided on a different question.

[21] ***Serrano#2*** and the Trial Court incorrectly isolated on the very first thing that happened in the entire case rather than considering the litigation as a whole as it progressed (***Estate of Trynin*** (1989) 49 C.3d 868, 875; ***Punsly v. Ho*** (2003) 105 C.A.4th 102,114). The Trial Court added elements to the case before and resulting in ***Serrano#1***, and the Court of Appeal added further legal elements by inviting industry amici during ***Serrano#1***, all making some award indisputably proper under the rationale of ***Mouger v. Gates*** (1987) 193 C.A.3d 1248, 1258 (n.10).

implementation of greater and more important general rights, the classes of people that the law in context purports to affect, the breadth and numerosity of those classes, the frequency with which it comes into play, the kinds and extent of foreseeable damage, financial consequences, or societal consequences from its violation for portions or all of the contemplated classes, its legal history and the absence thereof, the policies and reasons for its existence and their importance, the importance placed on the right by the legislature, prior appellate actions,[22] court decisions or legal scholars, and the right's relation and importance to the efficacy or implementation of other rights of greater or lesser importance.

REVIEW NOW IS IMPORTANT

Review is important to the vitality and clarity of ***Joshua S.*** Of equal if not greater import, however, is the importance of protecting litigants from the abuse of ministerial court officers, and the consequences failure to act will have on preserving public confidence in the integrity of the judicial system and the fair administration of justice. ***Serrano#2's*** entire tone on the latter score simply sends the wrong message.

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[22] This includes erroneously declining to take judicial notice of a court's own records. Here, ***Serrano#1*** invited amicus participation by citing the "difficulty" and "novelty" of the "important legal questions" involved. See ***infra*** at 23. ***Serrano#2*** then said it did not create new law, extend existing law, and that the Trial Court's error was "garden variety." ***Serrano#2*** at 190.

A. The Private Litigation Test:

§1021.5's rationale is "that **private litigation** to enforce important public policies should be actively promoted by awarding compensation to the successful plaintiffs' attorneys . . ." ***Estate of Trynin, supra***. ***§1021.5*** embodies the "recognition that **privately initiated lawsuits** are often essential . . . and that without some mechanism authorizing the award of attorneys fees, **private actions to enforce such important public policies will as a practical matter frequently be infeasible**." ***In re Head*** (1986) 42 C.3d 223, 227. ***Serrano#2*** narrowed ***§1021.5*** in favor of wrongdoers without support in statutory language or history and directly contrary to this Court's policy not to frustrate legislative purpose by a restriction of the availability of awards under ***§1021.5*** where "the restriction is **not clearly mandated by the language of the statute**." ***In re Head, supra*** at 233.

Serrano#2's misreading of"private litigation" not only confuses the "important right" and "substantial public benefit" traditional elements as noted and addressed in the first two issues presented for review (***Beasley, supra*** at 1417-1418), but overlooks the obvious - that non-governmental two party disputes require economic or personal interests for there to be litigation or standing to litigate at all (***Press v. Lucky Stores, Inc.*** (1983) 34 C. 3d 311, 321 (fn. 11), a factor accommodated not by a "private litigation" or "motive" test, but by comparing the burden of the litigation to the economic or personal stake

of the litigant - the traditional third element. Thus, ***Serrano#2*** completely rewrote all three elements, engaging in well-intentioned but misguided rule making without need or warrant under the traditional elements. ***Joshua S.*** at 951-952. It did so despite ***Joshua S.***' clear contrary language,[23] despite its approving citations to clear examples of "private litigation,"[24] and despite its affirmation of the principle of fee awards against private parties[25] which would be a meaningless affirmation if "private litigation" did not qualify. All of these, when taken together with the facts of ***Joshua S.*** compared to those of ***Serrano#1*** and ***Serrano#2***, and that ***Joshua S.***' references to "private litigation" were contained principally in discussions establishing ***Joshua S.***' "enforcement" element, clearly indicated that ***Serrano#2's*** broad reading went far beyond this Court's holding. If permitted to stand, ***Serrano#2*** will be validated as a correct interpretation, and throw decades of ***§1021.5*** law into total disarray.

Serrano#2's literal application of ***Joshua S.'*** language without regard

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[23]**Joshua S.** expressly did not bar §1021.5 fees for "**enforcing laws that a . . . private entity was violating** " ***Joshua S*** at 956. Ergo, "private litigation" in the sense in which ***Serrano#2*** used it is not disqualifying.

[24]***Joshua S.*** fn. 3 at p. 955

[25]***Joshua S.*** at 958. See also ***Bartling v. Glendale Adventist Medical Center*** (1986) 184 C.A.3d 97, 101 - "two private civil litigants" - applies "when a private party is a defendant"); ***Franzblau v. Monardo***, (1980) 108 C.A.3d 522, 529-530 (against "private parties")

to the facts[26] means any case between two parties maintained to stop a practice adversely affecting both the plaintiff and the public resulting in a published opinion against the practice will never qualify under ***§1021.5***. The defendant will always claim that the adverse determination of the industry practice was only the equivalent under ***Joshua S.*** at 949 of raising an issue in private litigation resulting in an adverse opinion. If that is what ***Joshua S.*** intended, so be it. If not, embarcation on this voyage must be halted now. Perpetuating these misinterpretations will serve only those whose practices adversely affect the public. Moreover, ***Serrano#2*** unacceptably forecloses for all time public interest litigation attacking lower level improper practices for smaller sums in any business context, where many of the major abuses occur, but where no economic incentive to eliminate them exists, and where no private attorneys will now be incentivized to bring otherwise uneconomical proceedings to correct those practices.

Respectfully, ***Joshua S.***' opinion's structure and word selection is partly responsible for the present misinterpretation. Clarification is necessary, and this Court alone can accomplish that. For example, in several places, and particularly at the end (***Joshua S.*** at 958), the Court implies that "private litigation" might have independent significance apart from the three traditional

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[26]All cases must be read in context with their facts and issues. ***Achen v. Pepsi Cola*** (1951) 105 C.A.2d 113, 125.

elements and enforcement. If there is no clarification, the same misreading may recur later with a different court. Thus, de-publication alone will not suffice.

Joshua S. obviously intended the term "private litigation" as meaning everything other than "public interest litigation," and illustrated "private litigation" with an adoption, not brought to enforce an important right against anyone. While "public interest litigation" may mean different things to different people, in California it is what the Legislature and this Court have always said it is - the presence of the ***§1021.5***'s three traditional elements (***Joshua S*** at 951-952) plus enforcement. ***Joshua S*** did not intend to convey anything else. Its "private litigation"passage at p. 949 was simply describing a circumstance where all three of the traditional elements concurred, but there was no enforcement (and thus "private litigation") because an adoption is a private proceeding not initiated or maintained to enforce a law. ***Joshua S.*** certainly did not intend to create a new and inherently vague test for something not central to its holding, **permitting any court to apply varying notions of what private litigation is to form a basis for decision without even mentioning or analyzing the three traditional elements and enforcement**, as did the Trial Court here.

In adopting its interpretations, ***Serrano#2*** failed to discern ***Joshua S.***' ***ratio decedendi***, and failed to apply it in light of the undisputed facts here.

Ratio decidendi does not extend to an opinion's supplementary or explanatory statements. Only statements necessary to the decision are binding precedent, and a holding is only co-extensive with its facts.[27] This Court is the only one which can state what its holding was.

B. Punishment - the Hidden Concern:

Implicit in the consequence of **Serrano#2's** "private litigation" test, that only big business is subject to ***§1021.5,*** is an unstated notion, heretofore unaddressed by the cases, which needs to be confronted to make ***§1021.5*** most effective. The thought is that adoption by smaller businesses of unlawful but lucrative industry wide practice does not rise to a level of fault necessary to impose an award. As appears ***infra*** at p. 21 (fn. 41, 42), that notion was openly expressed in oral argument, and in Trial Court remarks **even before the fee motion was filed,** though it found Respondent's practice unconscionable and nothing changed on remand.[28] However, under ***§1021.5***, good faith is not a

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[27]**Harris v. Capital Growth Investors XIV** (1991) 52 C.3d 1142, 1157; **People v. Superior Court** (1996) 50 C.A.4th 1202, 1212; **Krupnick v. Hartford Accident & Indemnity Co.** (1994) 28 C.A.4th 185, 199; **Western Landscape Construction v. Bank of America** (1997) 58 C.A.4th 57, 61.

[28] The evidence about adverse practice was the same on remand. Clearly so deciding, the Trial Court said Respondent was rearguing what it lost on ***Serrano#1*** (RTB 1:21-26) and, equating unreasonable with unconscionable, that everything was " back to where we started from when I said I thought it was unreasonable two years ago . . ." (RTB 6:2-5)

defense, a fee award is deemed not punitive, and fault (apart from a violation) is not a requirement.[29] A business which takes advantage of a lucrative but unlawful practice must accept that burden, and cannot retain the revenue in preference to payment from it for the performance of a public service in stopping the practice. Any other result just encourages wrongdoing.

The correct perspective is that one only doing what any industry does may be wrong, but should not bear the entire fee award representing success against the entire industry's standard. The proper approach is equitable discretion under ***Vasquez v. State of California*** (2008) 45 C. 4th 243, 241 which neither bars the door nor imposes disproportionate burden. Petitioners took this approach from the very beginning.[30] This avoids the obvious - emotionally hard cases make bad law. No case will ever present a better opportunity to deal with it than this one, where Respondent justified its actions

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[29] ***Joshua S.*** at 958; ***Plumbers and Steamfitters etc. v. Duncan*** (2007) 157 C.A 4th 1083, 1096; ***Schmid v. Lovette*** (1984) 154 C.A.3d 466, 475

[30]The motion requested $50,000 rather than the $180,000+ time and charges actually incurred because Respondent and the industry each bore responsibility, amici were not subject to fees (***Connerly, supra*** at 1176-1177 (AA T21 628:15-23) and a fair relative allocation between Respondent and the industry was to link and limit Respondent's share to 2.5 times the estimated annual personal revenue from the unlawful fee. (AA T21 625:10-629:17; 640:26-642:11; 648:1-5; 651:13-16; 605:4-13; 621:3-7) Petitioners offered to limit fees to $7,500 in the Court of Appeal if successful, provided Respondent swore it was not being financed by the industry (AOB 3), and make a similar offer for Petitioners' fees here.

by what the industry did and, together with the amici, made this a case about industry standards until Petitioners prevailed. This case then quickly became "private litigation."[31]

Where the amounts in issue are smaller than the attorneys fees incurred, the traditional full fee award[32] would be punitive if it exceeded the revenue gained from the unlawful conduct. Thus, by limiting fee awards to the amount of unlawful benefit over a reasonable period not exceeding the period of Defendant's unlawful practice, only illicit proceeds are devoted to the payment of fees, which removes economic incentive for wrongdoing while providing some incentive to challenge the practice. Smaller incentives may prevent some litigation against smaller violators, but do encourage quick settlements and will not require discovery because quantifying what the Defendant received will be a damage issue before judgment. Defendants are in control because they have the economic data to prove their benefit from the adverse practice should they wish to share it, and Plaintiffs who overestimate Defendant's economic benefit do so at their peril. Lastly, one defendant will not be required to bear

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[31]One cannot claim the benefit of a pervasive statewide practice as justification, but when unsuccessful, shun the burden that its pervasiveness concedes an adverse statewide effect on the public interest which defeat of the industry standard stops - an element of ***§1021.5. Civil Code, §§3521, 1589***.

[32]**Lyons v. Chinese Hospital Association** (2006) 136 C.A.4th 1331, 1344.

the entire expense of the effort necessary to attack an industry wide practice (cf. **Garcia v. Santana** (2009) 174 C.A.4th 464 (ability to bear an award is a factor in reasonableness), but will be required to share some of the responsibility. There are many bases to properly and equitably make allocations which result in less than full fees.[33]

C. Confidence in the Court's Prevention of Abuse by its Ministerial Officers

The Court Reporters Board has no jurisdiction to enforce fee matters (***Hall v. Court Reporters Board*** (2002) 98 C.A. 4th 633, 638; (AA T21 618:18-22; 632:17-633:3), court reporting is a business affected with the public interest,[34] and the courts are thus responsible to ensure such ministerial officers

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[33] ***Saleeby v. State Bar of California***, (1985) 39 Cal. 3d 547, 574 (individual vs. important public right issues); ***Woodland Hills Residents Association, Inc. v. City Council*** (1979) 23 C.3d 917, 942 (and see fn. 13)(relative culpability, lawful vs. unlawful conduct, successful vs. opposing parties, among opposing parties, comparative time spent); ***Mouger v. Gates*** (1987) 193 C.A.3d 1248, 1258 (n.10) (phases of litigation where all elements of ***§1021.5***. concur versus other phases where not all are present); ***Los Angeles Police Protective League v. City of Los Angeles*** (1986) 188 C.A.3d 1, 17 (same); ***Connerly, supra*** at 1176-1177 (effects caused by persons against whom fees cannot be granted in the litigation because not parties, versus effects caused by those who are parties)cf. ***Rivera et al. v. O'Neil*** (2008 1st Cir.) 524 F.3d 331, 337-339 (choice of methods discretionary).

[34] ***Business & Professions Code***, §§8015, 8016, 8025; ***In re Martin A. Johnson*** (1977) 554 S.W.2d 775, 784 (court reporting is such a business); cf. ***General Dynamic Corp v. Superior Court***, (1994) 7 C.4th 1164, 1182 (attorneys are such a business).

do not abuse their positions. This Court must demand that prevention of abuse of authority by court officers receives the importance it deserves in protecting the fundamental policies of the due administration of justice and confidence in the courts.

FACTS

In July, 2006, after application to hold a deposition reporter's expedite fee improper, Petitioners were ordered to pay $2,871.57 in fictitious deposition copy "expedite" fees,[35] charged according to an adopted industry-wide practice for services and costs already paid for by the standard copy fee. The Trial Court nonetheless invited Petitioners' appeal because the deposition reporter's practice was unconscionable, the court felt it had no jurisdiction to do anything about it, and that the trial courts needed help on the issues (there being no precedent but the decade old adverse ***Urban Pacific Equities Corp. v. Superior Court***, (1997) 59 C.A.4th 688, 691-692 that a reporter was "free to charge all the market will bear" for copies).[36] Honoring that invitation against

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[35]The order included, and Petitioners paid as well, undisputed standard copy fees.

[36]"I'd love to give you relief. I don't think I can. So take it up," (RT A 1:23-24; Tab 6, AA 83:23-24); "I've given you an offer. The Court up there is going to know that, you know, ***we need help on this***." (RT A 3:28-4:2;Tab 6, AA 85:28-86:2); "As in ***Urban***, this court feels that the practice employed by the Court reporter in this case is unconscionable." (AA T 8 234); "Perhaps an appellate court will have a different view" of the lack of jurisdiction. (AA T8 235) The Trial Court remarked on remand it had

Respondent's and its industry's determined opposition has cost over $250,000 in attorney time to date. However, Petitioners requested but $50,000 after ***Serrano#1*** reversed the order and then, based on its new statutory interpretation, and using the standards, jurisdiction, and remedies it established, won their remand case for every penny of the improper fees. The material facts are essentially undisputed.

The Trial Court denied fees, finding as a matter of law (AA T36 1002-1003) ***Joshua S.***' "private litigation" language controlled, and viewed this as a two party private dispute over ten invoices motivated by personal economic interest of $2,871.57. It neither focused nor ruled on the importance of the rights ***Serrano#1*** established, nor the other traditional ***§1021.5*** elements. It viewed as immaterial the fact that until the fee motion, Respondent cloaked itself with the mantle of the industry standard and practice,[37] and supported by

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wanted "the Court of Appeal to take it over because I didn't think what was going on was right."(RTA 2:20-22)

[37] ***Serrano #1*** at pp. 1021-1022 shows Petitioners objected to Respondent's expedite fee, and initiated court proceedings to determine its reasonableness and validity under ***§2025.510***. Respondent's papers (AA T8 183:6-7, 183:16-17; 193:1-10) and oral argument (AA T8 228:25-229:3) justified the fee based on industry practice. After ***Serrano#1,*** it asserted industry practice as justification here. (AA T24 765) On remand, Respondent swore "all fees charged are reasonable and within industry standards" (AA T5 70:7-8; 72:10-12), that the"method for calculating expedite charges is industry standard" (AA T5 76:21-22; 86:7-8), and that it had "carefully researched the matter, especially with regard to the reasonableness of our pricing in comparison to charges for similar services

its amici,[38] attempted unsuccessfully to justify the reasonableness and validity of the unconscionable fee with it.

Using deferential and alternatively de novo review, a divided Court of Appeal affirmed the "private litigation" decision. ***Serrano#2*** at 188 found:

> "Serrano I is analogous to the prior litigation in *Joshua S.* (citation omitted) and Coast is in the same position as the birth mother in that

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by other court reporters or agencies in our community." (AA T6 83:13-16) Respondent's counsel stated reporters would be looking to this case concerning what an agency could do or not. (RTA 6:21-7:3) The Trial Court recognized this as a "big case" that established "uniformity" among reporters. (RTA 6:21-7:3; RTC 6:8-19)

[38]The trade associations' three amicus briefs and publications to their members show substantial involvement and support. (AA T21 704-706 (National Court Reporters Association ("**NCRA**") website summarizing its brief and issue); 708-709 (California Court Reporter's Association ("**CCRA**") website with all amicus briefs, ***Serrano#1***, letters to this Court, and Petition for Review - "With a **statewide vision, CCRA acts on issues that significantly impact process, procedures, practices and laws**"); 711-716 (Deposition Reporter's Association ("**DRA**") website with ***Serrano#1***, all briefs, amicus letter and Petition for Review, news letter noting **DRA**'s "support" by amicus letter here and "any other available means"); 718-723 (**DRA** "Serrano Compliance Project" noting ***Serrano#1*** is "**new California law,**" "**entirely new legal terrain,**" that "cases interpreting Serrano must be litigated **with their potential impact on the whole profession in mind,**" and ***Serrano#1*** means "**you cannot price in such a way to give the noticing party a break at the expense of the non-noticing party and their copy prices.**"); 840, 844, 845 **DRA** Amicus Letter- ***Serrano#1*** is "**watershed litigation**" resulting in a "**first-ever holding**" that had "**enormous practical consequence for our courts, for thousands of deposition professionals, and for those thousands of attorneys who routinely use and order their services**"); (AA T 34 988-990) (authenticating declaration)

case."

Serrano#2 further supplied a finding not made by the Trial Court, using ***Joshua S.'*** language at 949 while offering a dismissive description of ***Serrano#1***, that an important right affecting the public interest was absent. ***Serrano#2's*** "private litigation" discussion also found absent an implicit motive requirement to represent the public interest, implied that because the fee was "unreasonable" this was a mere commercial dispute not involving an important right, and asserted, despite the total absence of all but negative precedent, that it did not make new law or extend existing law, and that the Trial Court's failure to exercise jurisdiction was "garden-variety" error. ***Serrano#2*** at 189-190.

Justice Croskey,[39] dissenting, analyzed ***Joshua S.***, concluding the majority's broad application of ***Joshua S.*** was unwarranted by its facts and was error as a matter of law on these facts.[40] The dissent asserted that ***Serrano#1*** established and enforced important rights affecting the public interest, and that the Trial Court further erred when it denied relief in part

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[39]Author of the unanimous ***Serrano#1.***

[40]Unlike ***Joshua S.***, Petitioners immediately maintained litigation to stop the Respondent from wrongdoing over the very right at issue. As the dissent noted (***Serrano#2*** at 194), the majority failed to recognize this fundamental factual distinction between the birth mother in ***Joshua S.*** and Respondent here, other than to say "That case is not limited to adoptions." ***Serrano#2*** at 190.

based on a motive test. ***Serrano#2 at 191-195.*** The dissent concluded that reversal and remand was required. ***Serrano#2 at 195.***

Even before the fee motion, the Trial Court[41] and later ***Serrano#2's*** author Justice Aldrich[42] both orally expressed concern that an award would punish Respondent for the industry practice.

Once the attorneys fee motion (AA T 21 604-742) was filed below, the material facts were undisputed because the opposition was a one page declaration attaching two transcripts from prior hearings (including the Trial Court's no fees comment), the order for refund, proof the refund was tendered, a separate legal memorandum, and evidentiary objections never ruled on and thus waived. (AA T31 890-956; T30 873-887; T32 959-971)

Serrano#2 failed to state that the material facts were in fact undisputed, and failed to cite many of the material facts, including the most all of the facts concerning industry focus (fn. 38 at p. 19) and the purported COD and fee waiver (fn. 49 at p. 29), matters brought to the Court's attention in the Petition for Rehearing (Pet. Rhrng. pp. 5, 7, 10-12, 28-29, 32-36, 39) . Given that facts

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[41](RTC 6:8-19)"THE COURT: 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."

[42]During oral argument at 12:33:35 PM on January 12, 2010, Justice Aldrich, ***Serrano#2's*** author, said: "Isn't this a form of punishing Coast Court Reporters for an industry wide practice?"

are liberally annotated throughout, it is unnecessary to repeat those footnoted, other than to note as above.

THE REMAINING POINTS

This Court knows what ***Joshua S.***' holding was, is familiar with what was discussed heretofore, can see how ***Serrano#2*** changed the substance of ***Joshua S.***, and implicitly changed the law on motive. The remaining discussion thus focuses on important right, categorical unreasonableness, and the standard of review.

A. Important Right Affecting the Public Interest:

Serrano#1 conferred a benefit on litigants by a published opinion. (***Serrano#2*** at 184; AA T36 1002-1003) ***Serrano#1's*** rights, from their inherent nature and their legal context, affect all future depositions, all copies, all copy fees, all expedite copy fees, all private deposition reporters, and trial court jurisdiction over them, in a business itself affected with the public interest consisting of ministerial court officers with a statutory monopoly over copies under ***§§2025.510(g)*** (transcript is official record); ***2025.540(b)*** (no use of rough drafts or notations).[43] ***Serrano#1***would not have been published by

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[43]"A monopoly is usually, though not necessarily, harmful or injurious to public interests . . ." ***San Diego Water Co. v. San Diego Flume Co.*** (1895) 108 C. 549, 559; ***Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*** (1979) 24 C.3d 458, 476, 482-483 (history from medieval times of protection of public from monopolies/public service enterprises by requiring **reasonable** rates and no discriminatory service).

a then unanimous court, nor would amicus briefs have been requested, were its subject matter unimportant or of no statewide interest. ***Protect Our Water v. County of Merced***, (2005) 130 C.A. 4th 488, 495 (fn. 8); cf. ***Connerly, supra*** at 1182, 1183 (amici facilitate consideration of information and viewpoints that "***bear on important legal questions***" and advocate what is ". . .***beneficial to the public interest***."); ***United States v. Michigan*** (1991 6th Cir.) 940 F. 2d 143, 164-165 (classical and primary role is in public interest matters); ***Funbus Systems, Inc. v. California Public Utilities Commission*** (1986 9th Cir.) 801 F. 2d 1120, 1125 (same).

Serrano#2's majority inexplicably minimized unanimous ***Serrano#1's*** amicus invitations, stating ***Serrano#1*** "did not create new law or extend existing law," did not "pronounce a new principle," and "corrected a garden variety error by a trial court." (***Serrano#2*** at 189-190) That assertion is unsupportable. Justice Aldrich stated during oral argument at 12:33:44 PM on January 12, 2010 in ***Serrano#2***: " . . . so if the Court, I guess, **fueled this fire as to private attorney general rights**, that doesn't, I still don't find Coast at fault for that, and it still seems like its a private fee dispute." It was not merely fueling the fire. On November 6, 2007, Division Three's clerk at its direction and specifying the issues, solicited nominations for amicus briefs for ***Serrano#1***, stating "As you know, the court has **vacated submission of this matter due to the novelty and difficulty of the issues raised**."

(PetRhrngRJN Exh. "1," p. 1 - emphasis added) On December 12, 2007, the Clerk, again listing the issues, described them as "**important legal questions**" upon which the appeal might depend. (PetRhrngRJN Exh. "2," p. 1) Eight court reporter organizations were addressed. Petitioners requested judicial notice of these letters because they directly contradicted the majority's revisionist language about ***Serrano#1***. Notice to show the true facts was improperly denied. ***Serrano#1***. (Exh. "C")

Serrano#1 made new law as confirmed by the industry pronouncements contained in footnote 38, at p. 19 and the absence of prior precedent. It established the only meaningful remedy to ensure timely deposition transcript copy delivery when a reporter withholds a copy by imposing improper conditions. It established statutory jurisdiction over ***private*** deposition reporters as ministerial court officers to administer that remedy. It established a statutory right to limit private reporters' standard copy fees to reasonable fees, not just reasonable expedite fees. It established that a copy fee was not reasonable if any part of it was caused by the noticing party's request for transcription (***Serrano#1*** at 1038). As **DRA's** Serrano Compliance Project said:

> **"the charges relating to copies cannot be based on what you charge the noticing party, so you cannot price in such a way to give the noticing party a break at the expense of the non-**

noticing party . . ."

(AA T21 720) It made ***§2025.510(c)*** consistent with ***FRCP 30(f)***, former ***§2019(f)***, and the 1986 Discovery Act's general intent.[44] ***Serrano#1*** on remand established that in typical circumstances, industry wide percentage based standards for expedite copy fees was a violation of ***Serrano#1***, as there were no additional costs or service not paid for by the standard copy fee. Finally, ***Serrano#1*** overcame the decade old adverse precedent of ***Urban*** at 691-692 that a reporter was "free to charge all the market will bear" for copies, even those fees which ***Urban*** found unconscionable, as the Trial Court found these.

Serrano#1 confirmed the importance of deposition testimony in litigation (***Serrano#1*** at 1036), that the case involved prevention of unfairness and abuse of the authority by officers of the court (***Ibid.***), that to condone transcript withholding for unreasonable fees would undermine rather than promote the administration of justice and could result in a denial of due process (***Ibid.***), and that to hold the court was powerless would undermine its inherent constitutional authority and imperil the due process rights of the non-noticing party. (***Ibid.*** at 1039) Each of the above referenced policies is **either**

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[44] The Act intended to "embody former statutes and case law and, at the same time, make the California rules correspond more closely to the Federal Rules." ***Terry v. Slico***, (2009) 175 C.A.4th 352, 356. ***Serrano#1*** was therefore necessary to implement legislative intention opposed by industry.

of constitutional, statutory or a fundamental nature, and all are implicit in procedural due process of law, which could "very well" be denied were Respondent's arguments accepted. (***Ibid.*** at 1036) Protecting constitutional and statutory rights, fundamental policies underlying constitutional and statutory rights, enforcement of existing rights, and obtaining clarifications, all qualify under ***§1021.5***. ***Press v. Lucky Stores, Inc.*** (1983) 34 C. 3d 311, 318; ***Maria P. v. Riles,*** (1987) 43 C.3d 1281, 1289.

Litigation must ensure neutrality and promote the confidence of the public in a court system and its ministerial officers. Prevention of abuse of authority by those ministerial officers against litigants, whether caused simply by using monopoly power or favoring one's own litigant business customers over non-customer litigants, is clearly an important public policy. (***Serrano#1*** at 1036) Such concerns underlie courts' inherent and statutory powers to control ministerial officers, as confirmed in ***§128(a)(5)'s*** requirement for control "in the furtherance of justice." The administration of justice is a "fundamental public policy." ***Stevenson v. Superior Court*** (1997) 16 C. 4th 880, 922. A CSR-notary public, as a ministerial court officer (***§2093***), cannot, without oversight, serve with equal fairness their steady business providers and the one copy purchaser adverse to their good customer. cf. ***Saunders v. Superior Court***, (1994) 27 C. A.4th 832, 840. Enforcing existing statutes such as found in ***§128(a)(5)***, and ***§2025.510(b)*** and (c) qualifies for fees. ***Riverside***

Sheriff's Assn. v. County of Riverside (2007) 152 C.A.4th 414, 422; ***Otto v. Los Angeles Unified School District*** (2003) 106 C.A.4th 328 , 335.

Moreover, ***Serrano#1*** confirmed courts' inherent powers as embodied in the California Constitution (***Walker v. Superior Court*** (1991) 53 C.3d 257, 266-267) to implement the fundamental statutory guarantee of no right without a remedy, the constitutional right of petition, and the public policy of free access to the Courts.[45] It is "fundamental to our jurisprudence" that for every wrong there is a remedy and one may not profit by its own wrong. ***Crisci v. Security Insurance Company*** (1967) 66 C.2d 425, 433; ***Civil Code, §§3523, 3517***. "[A] right but no expeditious and adequate remedy...**is an unconscionable situation which a court of justice cannot tolerate**." ***People v. Picklesimer*** , (2010) 48 C.4th 330, 339; ***People v. Velez*** (1983) 144 C.A.3d 558, 564 (fn. 5)(statutory right implies a remedy). Only strong necessity or public policy permits a departure from this "fundamental principle." ***Crisci, supra***. The constitutional right of petition (***Jarrow Formulas, Inc. v. Lamarche*** (2003) 31 C. 4th 728, 736 (fn. 5) and the ancillary policy of free access to the Courts (***Grindle v. Lorbeer***, (1987) 196 C.A.3d 1461, 1467) are similarly implicated and important. Fees are appropriate for enforcing "fundamental public policies" ***Woodland Hills, supra*** at 933 and for important

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[45]Under ***Urban*** at 691-692, there was no remedy.

common law rights. ***Friends of the Trails v. Blasius***, (2000) 78 C.A.4th 810, 833.

The above important rights were upheld against a determined individual and industry opposition seeking to condition delivery of transcript copies by unsupervised ministerial court officers on unconscionable monopolistic unregulated rates set with impunity, and to deny an efficacious remedy to prevent redress under ***Urban*** at 691-692. How important is such a public right when one considers the tens of thousands of depositions in this state every year? Respondent's and the industry position was clearly not in the public interest, and would have materially impaired the efficiency of the courts to administer justice under the California Constitution. ***Walker, supra*** at 267.

On remand, Petitioners enforced their ***Serrano#1*** rights by showing the copy expedition fee violated ***§2025.510(c)*** and was injurious to the public interest. How is this different (if not more important) than the cases cited in ***Joshua S. at 955 (n. 3)*** holding consumer protection rights of sufficient importance to warrant fees? (***Beasley***, ***supra*** at 1418 - consumer protection rights important); ***Colgan v. Leatherman Tool Group Inc***. (2006) 135 C.A.4th 663, 682-683 (same) In addition to violations of ***§§2025.510(b)*** and ***(c)***, Petitioners briefed in ***Serrano#1***, on remand, and in ***Serrano#2***, consumer

protection statutes (unfair business practices,[46] unconscionability[47] and violation of the court reporter regulatory statutes[48]) as proven because Respondent imposed by COD,[49] and without COD, charges for something that was already paid for in typical circumstances by the standard copy fee without disclosing that, and which was caused solely by the noticing party's request for expedited transcription of an original and one copy - a violation of ***Serrano#1*** at 1038. (AA T7 112:15-28; 113:10-25; 114:17-25; 116:11-118:21; 120:9-12; AA T 10 481:5-10, 27-28).

While no court ever actually ruled on the violation of these statutes except for unconscionability, the evidence establishes violation as a matter of

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[46]***Business and Professions Code***, §17200

[47]***Civil Code***, §1670.5

[48]***Business and Professions Code*** §8025(d)

[49]***Serrano#2*** at 190 (fn. 3) claims Respondent waived its fee and COD policy. Not so. Respondent's general practice with firms not known to it was to proceed COD. (T8 104:23-25) Thus, most who ordered copies would be on COD. (AA T8 283, T8 230:1-4) Respondent only **temporarily waived** its COD policy as to Petitioners, only after Petitioners sought judicial relief, and only during the pendency of the matter before Judge Munoz. **Nothing in the record supports waiver of the unconscionable portions of the fees as to anyone, or waiver of COD policy as to other copy purchasers**. Respondent moved the Trial Court for a payment order for all monies, including the unconscionable fees, threatened legal process under the order to collect the unconscionable fees, and reinstated Respondent's COD policies in writing. ***Serrano#1*** at 1023-1024, AA T8 290 (Respondent's letter so stating)

law. A fee for services already charged and/or paid for under another invoice specification, without disclosing the fee was for nothing except that already paid for, violates ***Business and Professions Code, §17200***. See ***McKell v. Washington Mutual, Inc.*** (2006) 142 C.A.4th 1457, 1472; ***Schnall v. The Hertz Corporation*** (2000)78 C. A. 4th 1144, 1163-1170; ***People v. Dollar Rent A Car*** (1989) 211 C.A.3d 119, 129-130; cf. ***Buller v. Sutter Health*** (2008) 160 C.A.4th 981, 989-990 (disclosure required where invoice would be materially misleading); cf. ***Princess Cruise Lines, Ltd. v. Superior Court***, (2009) 179 C.A.4th 36, 46 (surcharges would violate UCL if unreasonable and without factual basis)

Deposition reporters cannot commit any act relating to "availability, delivery, execution and certification of transcripts" which amounts to fraud, dishonesty, wilful violation of duty or gross negligence (***Business and Professions Code, §8025(d)***. Proven abuse of the authority by a ministerial court officer by improperly withholding transcripts based on unconscionable or unlawful fees it charges is a ***prima facie*** violation. As noted in ***Saunders, supra*** at 839-841 (AA T10 480-481), violation is also a violation of ***Business and Professions Code, §17200.*** Therefore, what was labeled "unreasonable" under ***§2025.510(c)*** was a violation of other important public rights. Unconscionability in ***Civil Code, §1670.5*** is a similar right.

Serrano#1's important rights were not just substantive, but procedural. The process rights it created or protected are analytically indistinguishable from fair process rights qualifying because they guaranteed the appearance of justice, the potential for more material and measurable benefits to be gleaned from assuring comprehensive and even handed treatment, affected significant numbers of person in the future, and affected processes which themselves involved a significant sum of money. See e.g. ***Saleeby v. State Bar, supra*** at 574; ***Baggett v. Gates*** (1982) 32 C.3d 128, 143 ; ***Otto, supra*** at 333-334; ***Gregory v. State Board of Control*** (1999) 73 C.A.4th 584, 599.

Moreover, the importance of ***Serrano#1*** did not depend upon COD leveraging an unlawful fee, as the majority suggests, but as well on the fundamental underlying issue of whether the fee was unlawful or not. ***Serrano#1*** established a statutory right not to pay an unreasonable **standard copy fee**, and what makes it unreasonable.

B. Categorical Exclusion of Unreasonable Conduct from Important Right Affecting the Public Interest:

The fact there cannot be any categorical exemption from important rights for reasonableness issues is not only obvious from what violations unreasonable conduct may entail,[50] but also appears from ***Beasley, supra*** at

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[50]Apart from the underlying statutory violations referenced above, the law recognizes that unreasonable acts may also be intentional. See, eg.

1419. ***§1021.5*** fees were awarded for violation of ***Civil Code, §1671(d)***. The "impracticable or extremely difficult" language of this statute required a determination of whether the "amount stipulated as liquidated damages" in Well's Fargo's agreements was "a reasonable one" and represented "the result of a reasonable endeavor by the parties to estimate such a reasonable compensation for possible damage. (citations)" ***Silva v. Hill***, (1971) 19 C.A.3d 914, 931. Fees were awarded nonetheless on the necessary finding that Wells Fargo's fee was not reasonable compensation.

Categorically exempting unreasonable acts from important rights affecting the public interest without examining their underlying nature would be inconsistent with ***Joshua S.*** that no showing of bad faith under ***§1021.5*** is necessary, nor is good faith but erroneous reliance on law a defense when a statute or right is being violated. ***Joshua S.*** at 955-958; ***Mejia v. City of Los Angeles*** (2007) 156 C.A.4th 151, 161-162.[51]

C. The Correct Standard of Review:

A reviewing court deferring to the ruling of a lower court analyzing the reviewing court's own decision is illogical. In such instances, de novo review

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Ilteo v. Glock (2003 9th Cir.) 349 F.3d 1191, 1290; ***Hellman v. La Cumbre Golf & Country Club*** (1992) 6 C.A.4th 1224, 1230

[51]***Serrano#2*** at 190 (fn. 3) therefore misapplied the law when asserting Respondent's fee was not improper until the Trial Court held it so.

is the appropriate standard. ***Laurel Heights Improvement Assn. v. Regents of UC***, (1988) 47 C. 3d 376, 426-427; ***Protect Our Water, supra*** at 494; ***Mouger, supra*** at 1258-1259 (n. 10). The importance of a public right must inherently be de novo, as courts are requested to exercise judgment in attempting to ascertain the strength or societal importance of the rights involved. ***Woodland Hills***, ***supra*** at 935. The obvious factors are those enumerated in the fifth issue presented for review, at p.6. This court should again grant review on this issue and determine it. ***cf. People v. Department of Conservation, supra***. (hearing granted on proper standard of review but issue not decided)

Serrano#2 purported to apply in part a deferential abuse of discretion standard to the importance of its prior decision. ***Serrano#2 at 188-189***. There is no such thing as deferential review of issues of law, which was the sole basis for the decision in ***Serrano#2***, because there is no element of trial court judgment or discretion to protect, and there is especially no deferential review of a trial court's interpretation of a reviewing court's opinion. ***Serrano#2*** also applied deferential review to what the Trial Court felt ***Joshua S.*** meant. ***Serrano#2*** then and alternatively purported to apply de novo review, but did not appear to examine the factors set forth in Issue No. 5 presented for review, or its own prior records showing the novelty and difficulty of the questions and their legal import, but instead utilized improper factors gleaned from

misinterpreting ***Joshua S.***

Using each standard, the Court was reviewing, and reached nothing other than, whether language in ***Joshua S.*** established the test applicable to this case, and whether the rights established in ***Serrano#1*** and enforced were of sufficient importance - both legal issues. Respectfully, in each application of each standard, the Court clearly erred.

CONCLUSION

Review should be granted for the reasons stated.

Dated: June 2, 2010

Law Offices of David B. Bloom
A Professional Corporation

By _____
STEPHEN MONROE
Attorney for Petitioners/Appellants
Porfirio Serrano and Lourdes Serrano

CERTIFICATE OF WORD COUNT

The undersigned counsel for Petitioners/ Appellants certifies pursuant to California Rules of Court, Rule 8.204(c)(1) that the total word count of this Petition, as counted by the WordPerfect program used to prepare it, is 8374 words, excluding tables, the certificate and such other items as are permitted by Rule 8.204(c)(3).

Dated: June 2, 2010

Stephen Monroe

T:\SerranoPostAppeal#2\SupremeCourtPetHrng\PetHrng#4ALT.wpd

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 3699 Wilshire Boulevard, Tenth Floor, Los Angeles, California 90010.

On June 3 12, 2010 I served the foregoing document described as **APPELLANTS' PETITION FOR REVIEW** on the interested parties to this action by placing **A TRUE COPY** thereof enclosed in a sealed envelope addressed as follows:

See attached Service List

X **BY MAIL** :
I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in the Affidavit.

Executed on June 3, 2010 at Los Angeles, California.

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

KAREN BRUCE

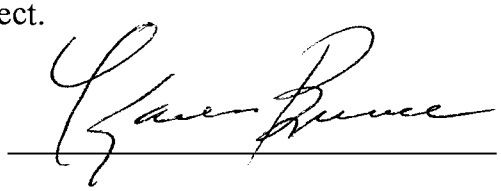

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EXHIBIT "A"

1 of 1 DOCUMENT

PORFIRIO SERRANO et al., Plaintiffs and Appellants, v. STEFAN MERLI PLASTERING COMPANY, INC., Defendant; COAST COURT REPORTERS, INC., Objector and Respondent.

B215837

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

184 Cal. App. 4th 178*; *2010 Cal. App. LEXIS 590

April 28, 2010, Filed

PRIOR HISTORY: [**1]

APPEAL from an order of the Superior Court of Los Angeles County, No. BC324031, Aurelio Munoz, Judge. *Serrano v. Stefan Merli Plastering Co., Inc., 162 Cal. App. 4th 1014, 76 Cal. Rptr. 3d 559, 2008 Cal. App. LEXIS 680 (Cal. App. 2d Dist., 2008)*

DISPOSITION: Affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court, after ruling that a fee charged by a deposition reporter for an expedited copy was unreasonable, denied the purchasers' attorney fee request under *Code Civ. Proc., § 1021.5*. The purchasers applied ex parte to the trial court in the underlying personal injury action for an order requiring the deposition reporter to provide a copy of an expert's deposition transcript without charging the expedition fee. The trial court criticized the deposition reporter's practice of charging the nonnoticing party a substantial expedition fee but denied relief, believing that it had no authority to grant such relief. The purchasers appealed the order. After soliciting briefing from amici curiae, the Court of Appeal concluded that the trial court was empowered to determine the amount of a reasonable fee. On remand, the trial court found that the expedition fee was unreasonable and denied the purchasers' attorney fee request on the basis that the litigation was a private dispute. (Superior Court of Los Angeles County, No. BC324031, Aurelio Munoz, Judge.)

The Court of Appeal affirmed, agreeing with the trial court that the purchasers had failed to demonstrate that their action resulted in the enforcement of an important right affecting the public interest. *Code Civ. Proc., § 1021.5*, is not intended to impose fees on a party to private litigation that has done nothing to adversely affect the public interest other than being on the losing side of a case that has created a precedent. (Opinion by Aldrich, J., with Klein, P. J., concurring. Dissenting opinion by Croskey, J. (see p. 191).) [*179]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Costs § 17--Attorney Fees--Private Attorney General Doctrine--Eligibility.--Codified in *Code Civ. Proc., § 1021.5*, the private attorney general doctrine, under which attorney fees may be awarded to successful litigants, rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. In short, *§ 1021.5* acts as an incentive for the pursuit of public interest-related litigation that might otherwise have been too costly to bring. Eligibility for *§ 1021.5* attorney fees is established when (1) the plaintiffs' action has resulted in the enforcement of an important right affecting the public interest; (2) a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general

public or a large class of persons; and (3) the necessity and financial burden of private enforcement are such as to make the award appropriate. Because *§ 1021.5* states the criteria in the conjunctive, each of the statutory criteria must be met to justify a fee award. The burden is on the claimant in the trial court to establish each prerequisite to an award of attorney fees under *§ 1021.5*.

(2) Costs § 17--Attorney Fees--Private Attorney General Doctrine--Enforcement of Important Right Affecting Public Interest--Private Litigation Establishing Important Precedent.--In virtually every published case in which *Code Civ. Proc., § 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. That is, the public interest litigation obtained a substantial benefit by causing a change in the defendant's behavior, whose actions or failure to act was somehow impairing the statutory or constitutional rights of the public or a significant class of people. The Legislature was focused on public interest litigation in the conventional sense: litigation designed to promote the public interest by enforcing laws that a governmental or private entity was violating, rather than private litigation that happened to establish an important precedent.

(3) Costs § 17--Attorney Fees--Private Attorney General Doctrine--Enforcement of Important Right Affecting Public Interest--Private Litigation Establishing Important Precedent.--The enforcement of an [*180] important right affecting the public interest implies that those on whom attorney fees are imposed have acted, or failed to act, in such a way as to violate or compromise that right, thereby requiring its enforcement through litigation. It does not appear to encompass the award of attorney fees against an individual who has done nothing to curtail a public right other than raise an issue in the context of private litigation that results in important legal precedent. Attorney fees have been awarded to those defending against suits by public entities, or those purporting to represent the public, that seek to expand the government's power to curtail important public rights. In some cases the litigation underlying the *Code Civ. Proc., § 1021.5*, award can involve rights or benefits that are somewhat intangible, such as clarifying important constitutional principles; but even in such cases, the party against whom the fees are awarded is responsible in some way for the violation of those rights and principles.

(4) Costs § 17--Attorney Fees--Private Attorney General Doctrine--Enforcement of Important Right Affecting Public Interest--Private Litigation Establishing Important Precedent.--Courts may consider whether the litigation generated important appellate precedent when determining whether litigation enforced an important right affecting the public interest. But even when an important right has been vindicated and a substantial public benefit conferred, and when a plaintiff's litigation has transcended her or his personal interest, *Code Civ. Proc., § 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.

(5) Costs § 17--Attorney Fees--Private Attorney General Doctrine--Enforcement of Important Right Affecting Public Interest--Private Litigation Establishing Important Precedent.--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, 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 or she has helped to secure.

(6) Costs § 19--Attorney Fees--Private Attorney General Doctrine--Fees Not Allowed--Enforcement of Important Right Affecting Public Interest--Private Litigation Establishing Important Precedent.--Where, at issue was a private business disagreement over the fees a deposition reporter sought to charge for services provided, that private [*181] dispute raised an issue that resulted in a published appellate opinion. However, that dispute did not arise from an attempt to curtail any conduct on the part of the deposition reporter that was infringing a statutory or public right or violating a constitutional principle. The deposition reporter merely raised the argument that it, not the trial court, had the right to regulate the fees it charged. Although the dispute happened to result in legal precedent, and even though the appellate court happened to request amici curiae briefs, that did not transform a private disagreement over an invoice into public interest litigation because the deposition reporter was not purporting to represent the public and its conduct had not been impairing the statutory or constitutional rights of the public or even a large or significant class of people. The proceeding settled only private rights. Accordingly, the trial court acted within the bounds of reason in denying a *Code Civ. Proc., § 1021.5*, attorney fees request.

[*Cal. Forms of Pleading and Practice (2010) ch. 174, Costs and Attorney's Fees, § 174.56*; *2 Cathcart et al., Matthew Bender Practice Guide: Cal. Trial and Post-Trial Civil Procedure (2010) § 25A.11.*]

COUNSEL: Law Offices of David B. Bloom, Edward Idell, Stephen Monroe and James Adler for Plaintiffs and Appellants.

John L. Dodd & Associates, John L. Dodd; Chambers, Noronha & Kubota and Peter A. Noronha for Objector and Respondent.

JUDGES: Opinion by Aldrich, J., with Klein, P. J., concurring. Dissenting opinion by Croskey, J.

OPINION BY: Aldrich

OPINION

ALDRICH, J.--

INTRODUCTION

At issue in *Serrano v. Stefan Merli Plastering Co., Inc. (2008) 162 Cal.App.4th 1014 [76 Cal.Rptr.3d 559]* (*Serrano I*) was a dispute about the reasonableness of fees a deposition reporter sought to charge a nonnoticing party for expedited copies. We held in *Serrano I* that the court in a pending action has the authority to (1) require a deposition reporter to provide a copy [*182] of a transcript to a nonnoticing party for a reasonable fee (*id. at p. 1035*), and (2) determine the amount of the reasonable fee in the event of a dispute (*id. at p. 1038*). We remanded the case to the trial court to determine whether the fee charged by the deposition reporter, Coast Court Reporters, Inc. (Coast), to plaintiffs Porfirio and Lourdes Serrano was unreasonable. On remand, the trial court [**2] ruled that the fee was unreasonable.

Thereafter, plaintiffs sought their attorney fees under the private attorney general statute, *Code of Civil Procedure section 1021.5* (*section 1021.5*) from Coast. The trial court denied the fee request relying on the Supreme Court's decision in *Adoption of Joshua S. (2008) 42 Cal.4th 945 [70 Cal.Rptr.3d 372, 174 P.3d 192]* (*Joshua S.*), which prohibits the award of private attorney general fees under *section 1021.5* "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 ... ." (*Joshua S., supra, at p. 949.*) As set forth below, our review is deferential. We affirm the denial of private attorney general fees because the trial court's ruling was within the bounds of reason.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Serrano I*

A detailed recitation of the facts and proceedings leading to the first appeal is set forth in *Serrano I, supra, 162 Cal.App.4th at pages 1021* to 1025. Briefly, plaintiffs brought a personal injury action against a defendant with whom they subsequently settled. While the action [**3] was pending, the defendant took the deposition of one of the plaintiffs' experts and designated Coast as the deposition reporter. Plaintiffs' attorney requested a certified copy. When the defendant requested that the transcript be prepared on an expedited basis, Coast asked plaintiffs' counsel if he too wanted his certified copy to be expedited. Plaintiffs' counsel did. Thereafter, Coast billed plaintiffs' counsel for the transcript and added a fee for expediting the copy. Plaintiffs' counsel protested the expedition fee. Believing this fee to be proper, Coast responded that counsel would not receive the transcript on an expedited basis without payment of the fee. Plaintiffs then applied ex parte to the trial court in the underlying action for an order requiring Coast to provide a copy of the expert's deposition transcript without charging the expedition fee. Other depositions were being taken and so "[plaintiffs] and Coast agreed that the court would determine 'the validity and reasonableness' of the expedited [*183] service fee and that the ruling would govern the fees for all other deposition transcripts in this action. Based on that agreement, Coast waived its COD requirement and delivered [**4] copies of the deposition transcripts to [plaintiffs'] counsel." (*Id. at p. 1021*, fn. omitted.)

The trial court found Coast's practice of charging the nonnoticing party a substantial expedition fee to be "unconscionable" but, pursuant to *Urban Pacific Equities Corp. v. Superior Court (1997) 59 Cal.App.4th 688 [69 Cal.Rptr.2d 635]*, it believed it had no authority to require a deposition reporter to charge other than what the market would allow. (*Serrano I, supra, 162 Cal.App.4th at p. 1024.*) The court ordered plaintiffs to pay the full expedition fee charged for all depositions. (*Ibid.*) Plaintiffs paid the amount and sought review by means of an extraordinary writ. We summarily denied the writ. (*Id. at pp. 1024-1025.*)

In the course of plaintiffs' ensuing appeal, we solicited briefing from amici curiae. Three court reporter associations filed amicus curiae briefs on behalf of Coast. Coast argued, while a trial court may order a deposition reporter to deliver copies of a deposition transcript to a nonnoticing party and the nonnoticing party must pay for it, that the trial court had no authority to " 'regulate the *amount* of the fee." (*Serrano I, supra, 162 Cal.App.4th at p. 1035.*) We disagreed. Based on *Code of Civil Procedure sections 2025.510, subdivision (c)*, [**5] *2025.570, subdivision (a)*, and *128, subdivision (a)(5)*, we held that trial courts have the power to require a deposition reporter to provide a copy of a deposition

transcript to a nonnoticing party for a reasonable fee and that in the event of a dispute, the trial court was empowered to determine the amount of a reasonable fee. (*Serrano I, supra, at pp. 1037-1039.*) We did not hold that expedition fees were per se unreasonable. Rather, we stated: "This does not preclude a deposition reporter from charging a reasonable fee for expediting the making, certification, and delivery of a copy. Although the reporter ordinarily sets the fee in the first instance, the reasonableness of the 'expense' [citation] that a court may require a party to pay to obtain a copy of the transcript in a pending action is a question within the sound discretion of the trial court." (*Id. at p. 1038.*) We remanded the case to the trial court to exercise its discretion to determine whether Coast's fees were reasonable. (*Id. at p. 1040.*)

2. *Remand after* Serrano I

On remand, Coast argued that its expedition fee was reasonable. Plaintiffs countered that the entire fee was unreasonable. The trial court ruled that, "under [**6] the circumstances presented," Coast's entire expedition charge was [*184] unreasonable. The court ordered that amount refunded to plaintiffs. Coast promptly paid that amount plus prejudgment interest. [1]

> 1 We denied Coast's petition for rehearing of *Serrano I* and the Supreme Court denied review and a request for depublication.

3. *The instant motion for attorney fees (§ 1021.5)*

Thereafter, plaintiffs sought their attorney fees from Coast pursuant to *section 1021.5*. Relying on *Joshua S., supra, 42 Cal.4th 945*, the trial court denied the fee motion. It explained: "I'm not here to try to take over an industry. I'm not here to regulate an industry. I'm just concerned with this case and the expedited charges." The court's order states: Plaintiffs were "not trying to vindicate the public's interest. Rather, [they were] trying to protect [their] own interest and in so doing, by virtue of a published opinion, [they] conferred a benefit to litigants." Plaintiffs filed a timely notice of appeal.

CONTENTION

Plaintiffs contend that the trial court erred in denying their *section 1021.5* attorney fee motion.

DISCUSSION

1. *The guiding principles for applications for private attorney fees under section 1021.5*

(1) Codified [**7] in *section 1021.5*, the private attorney general doctrine, under which attorney fees may be awarded to successful litigants, "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. [Citations.]" (*Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal.3d 917, 933 [154 Cal.Rptr. 503, 593 P.2d 200]* (*Woodland Hills*).) " 'In short, *section 1021.5* acts as an incentive for the pursuit of *public interest-related litigation* that might otherwise have been too costly to bring. [Citations.]' " (*Punsly v. Ho (2003) 105 Cal.App.4th 102, 109 [129 Cal.Rptr.2d 89]*, italics added.)

"Eligibility for *section 1021.5* attorney fees is established when '(1) plaintiffs' action "has resulted in the enforcement of an important right affecting the [*185] public interest," (2) "a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons" and (3) "the necessity and financial burden of private [**8] enforcement are such as to make the award appropriate." ' " (*Joshua S., supra, 42 Cal.4th at pp. 951-952*, fn. omitted, quoting *Woodland Hills, supra, 23 Cal.3d at p. 935.*) [2] Because *section 1021.5* "states the criteria in the conjunctive, each of the statutory criteria must be met to justify a fee award. [Citations.]" (*County of Colusa v. California Wildlife Conservation Bd. (2006) 145 Cal.App.4th 637, 648 [52 Cal.Rptr.3d 1]*.) The burden is on the claimant in the trial court to establish each prerequisite to an award of attorney fees under *section 1021.5*. (*Ryan v. California Interscholastic Federation (2001) 94 Cal.App.4th 1033, 1044 [114 Cal.Rptr.2d 787]*; *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal.App.4th 387, 401 [25 Cal.Rptr.3d 514]*.)

> 2 *Section 1021.5* reads in relevant part: "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 [**9] 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."

Generally, "[d]ecisions awarding or denying attorneys' fees are reviewed under an abuse of discretion standard." (*City of Santa Monica v. Stewart (2005) 126 Cal.App.4th 43, 82 [24 Cal.Rptr.3d 72]*.) "Whether the

moving party has proved each of these prerequisites for an award of attorney fees pursuant to *section 1021.5* is best decided by the trial court, and the trial court's judgment on this issue must not be disturbed on appeal 'unless the appellate court is convinced that it is clearly wrong and constitutes an abuse of discretion.' [Citations.]" (*Family Planning Specialists Medical Group, Inc. v. Powers (1995) 39 Cal.App.4th 1561, 1567 [46 Cal.Rptr.2d 667]*.) This standard is deferential. Thereunder, " ' "[t]o be entitled to relief on appeal ... it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice. ..." ' [Citation.] ... '... [R]eversal is appropriate "where no reasonable basis for the action is shown." [Citation.]' [Citations.]" (*Baggett v. Gates (1982) 32 Cal.3d 128, 143 [185 Cal.Rptr. 232, 649 P.2d 874]*.)

Some courts [**10] have applied a de novo standard of review when the appellate court publishes an opinion in the case. (Cf. *Los Angeles Police Protective League v. City of Los Angeles (1986) 188 Cal.App.3d 1, 7-8 [232 Cal.Rptr. 697]*.) When an appellate court issues an opinion, it is arguably in as good a position as the trial court to determine whether the legal right enforced [*186] through its opinion meets any of the three criteria of *section 1021.5*. (See *Los Angeles Police Protective League v. City of Los Angeles, supra, at p. 8*.) And, a " 'de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.' " (*Connerly v. State Personnel Bd. (2006) 37 Cal.4th 1169, 1175 [39 Cal.Rptr.3d 788, 129 P.3d 1]*.) As explained below, under either standard--abuse of discretion or de novo--the trial court's ruling must be affirmed.

2. *The Supreme Court in* Joshua S. *established the applicable criteria here for determining under section 1021.5 whether the litigation "has resulted in the enforcement of an important right affecting the public interest."*

As noted, if any of the *section 1021.5* elements is [**11] not met, then the fee award is not justified. (*County of Colusa v. California Wildlife Conservation Bd., supra, 145 Cal.App.4th at p. 648*.) We agree with the trial court that plaintiffs here failed to meet the first element. That is, plaintiffs did not demonstrate that their action resulted in the enforcement of an important right affecting the public interest. (*Joshua S., supra, 42 Cal.4th at pp. 951-952*.) Stated otherwise, the Supreme Court's explication in *Joshua S.* indicates that the dispute here over expedition fees did not amount to public interest litigation. Where the trial court's ruling denying the attorney fee request was entirely consistent with *Joshua S.*, it was not an abuse of discretion.

Joshua S. involved a dispute between a same-sex couple that had engaged in a practice known as "second parent" adoption, in which the same-sex partner of a birth mother adopted the child, while the birth mother retained her parental rights. After the couple's relationship ended, the birth mother challenged her former partner's adoption of the second child, Joshua, by arguing, inter alia, that the form of adoption had no legal basis. (*Joshua S., supra, 42 Cal.4th at p. 950*.) The prior [**12] case concluded in a Supreme Court opinion that upheld second parent adoptions. (*Ibid.*) Thereafter, the prevailing adoptive mother moved for *section 1021.5* attorney fees on the basis that she had prevailed in the Supreme Court on "an issue of benefit to a large class of persons." (*42 Cal.4th at p. 950*.)

(2) The Supreme Court concluded that attorney fees under *section 1021.5* were not appropriately awarded because the losing party birth mother was "not the type of party on whom private attorney general fees were intended to [*187] be imposed." (*Joshua S., supra, 42 Cal.4th at p. 953*.) With respect to the behavior of the party charged with paying attorney fees, according to the Supreme Court's review of the case law, "in 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.*" (*Joshua S., supra, at p. 954*, italics added; see *id. at p. 955*, fn. 3 [citing cases].) That is, the "public interest litigation obtained a substantial benefit by causing a change in the defendant's behavior, [**13] whose actions or failure to act was *somehow impairing the statutory or constitutional rights of the public or a significant class of people.*" (*Id. at pp. 954-955*, italics added.)

(3) The court also found support for its interpretation of public interest litigation such as would justify *section 1021.5* attorney fees in the statute's legislative history. "[T]he Legislature was focused on public interest litigation in the conventional sense: litigation designed to promote the public interest by enforcing laws that a governmental or private entity was violating, rather than *private litigation that happened to establish an important precedent.*" (*Joshua S., supra, 42 Cal.4th at p. 956*, italics added, citing Sen. Com. on Judiciary, Rep. on Assem. Bill No. 1310 (1977-1978 Reg. Sess.) as amended May 18, 1977, p. 1 and Sen. Com. on Judiciary, Hearing on Assem. Bill No. 1310 (1977-1978 Reg. Sess.) Aug. 14, 1977, testimony of John R. Phillips, p. 15.) The court explained, "[t]he enforcement of an important right affecting the public interest implies that those on whom

attorney fees are imposed have acted, or failed to act, in such a way as to violate or compromise that right, thereby requiring its enforcement [**14] through litigation. It does not appear to encompass the award of attorney fees against an individual who has done nothing to curtail a public right other than raise an issue in the context of private litigation that results in important legal precedent." (*Joshua S., supra, at p. 956.*) The court noted that "attorney fees have been awarded to those defending against suits by public entities, or those *purporting to represent the public, that seek to expand the government's power to curtail important public rights.* [Citation.]" (*Id. at p. 957*, italics added.) Recognizing "in some cases the litigation underlying the *section 1021.5* award can involve rights or benefits that are somewhat intangible, such as clarifying important constitutional principles," the Supreme Court explained that, "even in such cases, the party against whom the fees are awarded is *responsible in some way for the violation of those rights and principles.* [Citation.]" (*Joshua S., supra, at p. 958*, italics added.)

(4) The *Joshua S.* court viewed the birth mother, the person from whom the prevailing party sought to recover fees, as "a private litigant with no [*188] institutional interest in the litigation, and the judgment she sought [**15] in the present case would have settled only her private rights and those of her children and [the prevailing party adoptive mother]. She simply raised an issue in the course of that litigation that gave rise to important appellate precedent decided adversely to her." (*Joshua S., supra, 42 Cal.4th at p. 957*, fn. omitted.) Courts may consider whether the litigation generated important appellate precedent when determining whether the litigation enforced an important right affecting the public interest. (*Id. at p. 958.*) "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.*" (*Joshua S., supra, at p. 958*, italics added.)

3. Joshua S. *is on point and is controlling Supreme Court precedent.*

Serrano I is analogous to the prior litigation in *Joshua S.* (*Sharon S. v. Superior Court (2003) 31 Cal.4th 417 [2 Cal.Rptr.3d 699, 73 P.3d 554]*) [**16] and Coast is in the same position as the birth mother in that case. The trial court here denied plaintiffs' motion for private attorney general fees under *section 1021.5* on remand, finding that in seeking an order for Coast to provide a copy of the deposition transcript without charging the expedited-service fee, plaintiffs were trying to protect their own private interest and not seeking to vindicate an important right affecting the public interest. As explained, our review is deferential. We affirm the denial of attorney fees because the trial court's ruling was clearly correct and well within the bounds of its discretion.

(5) The trial court here did not abuse its discretion in concluding that *Serrano I* was a private dispute, not public interest litigation, notwithstanding our decision to publish *Serrano I* did have, as plaintiffs characterize it: a "public effect." "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" ' (Dawson, [*Lawyers and Involuntary Clients in*] *Public Interest Litigation* [(1975)] 88 Harv.L.Rev. 848, 918 ...), [**17] 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. [Citations.]" (*Woodland Hills, supra, 23 Cal.3d at p. 946.*) [*189]

(6) At issue in *Serrano I* 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. (*Joshua S., supra, 42 Cal.4th at p. 953.*) That private dispute raised an issue that resulted in a published appellate opinion. But, that dispute did not arise from an attempt to curtail any conduct on the part of Coast that was infringing a statutory or public right or violating a constitutional principle. Indeed, as we noted *twice* in *Serrano I*, Coast waived its fees and delivered all of the deposition transcripts to plaintiffs pending the trial court's determination of the reasonableness of the expedited-service fee. (*Serrano I, supra, 162 Cal.App.4th at pp. 1020, 1021.*) Coast merely raised the argument that it, not the trial court, [**18] had the right to regulate the fees it charged. Although the dispute in *Serrano I* happened to result in legal precedent, and even though we happened to request amici curiae briefs, *Serrano I* did not transform this private disagreement over an invoice into public interest litigation because Coast was not purporting to represent the public and its conduct addressed in our opinion had not been impairing the statutory or constitutional rights of the public or even a large or significant class of people. (*Joshua S., supra, at pp. 954-955*; *Woodland Hills, supra, 23 Cal.3d at p. 946.*) Indeed, our opinion in *Serrano I* did not pronounce a rule that all expedition fees are unreasonable; we merely clarified that the trial court had the power and discretion to

determine the reasonableness of the particular fee that Coast was charging plaintiffs in this specific case. (*Serrano I, supra, at p. 1038.*) The proceeding in *Serrano I* settled only plaintiffs' and Coast's private rights. Accordingly, the trial court acted within the bounds of reason in denying plaintiffs' attorney fees request. The trial court's determination that *Serrano I* did not result in enforcement of an important public right is entitled [**19] to deference and is easily upheld.

4. *Under our independent analysis,* Serrano I *was not public interest litigation for purposes of section 1021.5 as explicated by* Joshua S.

We may determine de novo whether our own opinion enforced a legal right that meets the criteria of *section 1021.5. Serrano I* did not result in the clarification or enforcement of an important public right or a constitutional principle as described by *Joshua S.* This court's earlier decision in *Serrano I* did not create new law or extend existing law. Our opinion merely reiterated the state of statutory authority (*Code Civ. Proc., §§ 2025.510, subd. (c), 2025.570, subd. (a), 128*), which empowers trial courts to regulate deposition fees. Nor did our opinion pronounce a new principle. Trial courts have long had the inherent power generally to control the conduct of ministerial officers [*190] and others connected with judicial proceedings. (*Code Civ. Proc., § 128.*) The trial court in *Serrano I* misunderstood its power and believed itself constrained by *Urban Pacific Equities Corp. v. Superior Court, supra, 59 Cal.App.4th 688. Serrano I* gave guidance by disagreeing with *Urban* and explicating the court's power. Therefore, we merely [**20] corrected a garden-variety error by a trial court that had mistakenly believed it lacked the authority to limit court reporter fees, with the result that *Serrano I* did not enforce a fundamental public right or constitutional principle that was being infringed by Coast. [3]

> 3 The dissent makes much of our observation in *Serrano* I that deposition reporters are ministerial officers of the court to argue that Coast's conduct in "holding a necessary transcript hostage while demanding an unreasonable fee" transforms this dispute into public interest litigation. (See dis. opn., *post*, at pp. 192, 194.) Yet, as noted, the fee Coast charged was not unreasonable until the trial court ruled it so, and once the dispute arose between Coast and plaintiffs, Coast waived its fee and provided the deposition transcripts pending resolution of the disagreement by the trial court. Therefore, the fact that deposition reporters are ministerial officers of the court does not transform this disagreement into public interest litigation.

For these reasons, we reject plaintiffs' contention that, unlike *Joshua S.*, this case "implicate[s] ongoing adverse impact to the public." Although vague, it appears that plaintiffs also [**21] argue that the trial court misread *Joshua S.* and ignored plaintiffs' mixed motives both to protect their own rights and to vindicate a public right. However, a similar argument, namely, that the attorney was motivated to defend a public right, was not successful in *Joshua S.* (*42 Cal.4th at p. 951.*) Moreover, we review a trial court's "actual ruling, not its reasons" (*Punsly v. Ho, supra, 105 Cal.App. at p. 113*), and plaintiffs have not persuaded us that the trial court was clearly wrong. *Joshua S.* is on point as it discusses what sort of action gives rise to "public interest litigation" such as would justify the imposition of fees against the losing party. That case is not limited to adoptions.

To summarize, the trial court's determination that *Serrano I* was private litigation and did not result in the enforcement of an important public right is entitled to deference and is handily affirmed. Our independent review of our own opinion confirms the trial court's conclusion that *Serrano I* was not public interest litigation. As we conclude that the trial court did not abuse its discretion in denying plaintiffs private attorney general fees because plaintiffs had failed to show the first [**22] element of the *section 1021.5* test (*County of Colusa v. California Wildlife Conservation Bd., supra, 145 Cal.App.4th at p. 648*), we need not address plaintiffs' contentions touching on the remaining elements of the test. [*191]

DISPOSITION

The order is affirmed. Respondent to recover costs of appeal.

Klein, P. J., concurred.

DISSENT BY: Croskey

DISSENT

CROSKEY, J., Dissenting.--I respectfully dissent.

I believe the trial court read the Supreme Court's opinion in *Adoption of Joshua S. (2008) 42 Cal.4th 945 [70 Cal.Rptr.3d 372, 174 P.3d 192]* (*Joshua S.*) too broadly, and our prior opinion in *Serrano v. Stefan Merli Plastering Co., Inc. (2008) 162 Cal.App.4th 1014 [76 Cal.Rptr.3d 559]* (*Serrano I*) too narrowly. An award of attorney fees under *Code of Civil Procedure section 1021.5* (*section 1021.5*) is not inappropriate in this case. Therefore, I would reverse.

1. *Serrano I*

We held in *Serrano I* that the court in a pending action has the authority to require a deposition reporter to provide a copy of a transcript to a nonnoticing party for a reasonable fee. This is so because a deposition reporter acting, as Coast Court Reporters, Inc. (Coast), did, as a deposition officer, is a ministerial *officer of the court.* (*Serrano I, supra, 162 Cal.App.4th at p. 1035.*)

A deposition must be conducted under the supervision of a deposition [**23] officer who is authorized to administer an oath. (*Code Civ. Proc., § 2025.320.*) The deposition testimony must be recorded stenographically, unless the parties agree or the court orders otherwise. (*Code Civ. Proc., § 2025.320.*) In this case, Coast followed the common practice of acting as both deposition officer and certified shorthand reporter. (*Serrano I, supra, 162 Cal.App.4th at p. 1033.*) The Code of Civil Procedure imposes certain obligations of nonbias and objectivity on deposition officers. (*Code Civ. Proc., § 2025.320.*) In addition, *Code of Civil Procedure section 2025.570, subdivision (a)* provides, in pertinent part, "unless the court issues an order to the contrary, a copy of the transcript of the deposition testimony made by, or at the direction of, any party, ... if still in the possession of the deposition officer, shall be made available by the deposition officer to any person requesting a copy, on payment of a reasonable charge set by the deposition officer." [*192]

In this case, Coast *violated its statutory duty as a deposition officer* by refusing to deliver copies of its transcripts without payment of an unreasonable fee. [1] Thus, *Serrano I* did not resolve a mere dispute [**24] between private parties regarding the reasonableness of a fee, but a dispute between a *party to a litigation* in the California courts and the *deposition officer* who was undermining that party's ability to prepare for trial by *violating its own statutory duties.*

> 1 The majority makes much of the fact that Coast "waived its fees and delivered all of the deposition transcripts to plaintiffs pending the trial court's determination of the reasonableness of the expedited-service fee." (Maj. opn., *ante*, at p. 189.) Yet Coast initially charged the unreasonable fee, then, when plaintiffs protested, Coast stated that "counsel would receive a certified copy of the transcript on an expedited basis only upon payment of the additional fee." (*Serrano I, supra, 162 Cal.App.4th at p. 1021.*) Coast did not agree to deliver the transcripts without payment of the fee until after plaintiffs had sought ex parte relief, and the court had set the matter for a further hearing on the validity and reasonableness of the fee. (*Ibid.*) Agreeing to provide the transcripts without payment of the fee pending trial court resolution of the issue does not erase the fact that Coast violated its statutory duty by initially refusing [**25] to provide the transcripts until it was paid its unconscionable fee.

2. *Joshua S.*

In *Joshua S.*, the Supreme Court concluded that *section 1021.5* fees are not appropriately awarded against a party who "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.*) The court reasoned that the unspoken justification for *section 1021.5* fees "is that it is equitable to impose public interest attorney fees on parties that have done something to adversely affect the public interest," and that this requires something more than merely prosecuting or defending a lawsuit. (*42 Cal.4th at p. 954.*)

The court also recognized that, as a general rule, in cases where *section 1021.5* fees have been awarded, the litigation "obtained a substantial benefit by causing a change in the defendant's behavior, whose actions or failure to act was somehow impairing the statutory or constitutional rights of the public or a significant class of people." (*Joshua S., supra, 42 Cal.4th at pp. 954-955.*) The court then identified many of these prior cases in a lengthy [**26] footnote. (*Id. at p. 955, fn. 3.*) These cases included litigation against private defendants, where the only wrongdoing by the defendants was against their own customers (e.g., *Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 682-693 [38 Cal.Rptr.3d 36]* [corporation labelled its products in violation of the false advertising law]; *Beasley v. Wells Fargo Bank (1991) 235 Cal.App.3d 1407, 1412 [1 Cal.Rptr.2d 459]*, disapproved on other grounds in *Olson v. Automobile Club of Southern California (2008) 42 Cal.4th* [*193] *1142 [74 Cal.Rptr.3d 81, 179 P.3d 882]* [bank improperly assessed fees against its credit card customers who failed to make timely payments or exceeded their credit limits]). Thus, it is clear that when the court spoke of defendants "whose actions or failure to act was somehow impairing the statutory or constitutional rights of the public or a significant class of people," the court was not restricting the application of *section 1021.5* to public entities or those who violate the rights of the general public. Indeed, the Supreme Court was not restricting the application of *section 1021.5*, as it had been applied by the courts, at all; it was simply *recognizing* that all previous parties charged with fees under *section 1021.5* had been parties [**27] who had engaged in some actual wrongdoing, and had not simply raised an issue in litigation which resulted in important appellate precedent.

Finally, the court pointed to the language of *section 1021.5* which creates the first element of the test for attorney fees: that the action "has resulted in the enforcement of an important right affecting the public interest." The court focused on the word "enforcement," and concluded that "[t]he enforcement of an important right affecting the public interest implies that those on whom attorney fees are imposed have acted, or failed to act, in such a way as to violate or compromise that right, thereby requiring its enforcement through litigation. It does not appear to encompass the award of attorney fees against an individual who has done nothing to curtail a public right other than raise an issue in the context of private litigation that results in important legal precedent." (*Joshua S., supra, 42 Cal.4th at p. 956.*) In short, the court was persuaded that "the parties against whom attorney fees should be assessed should be those responsible for the policy or practice adjudged to be harmful to the public interest." (*Id. at p. 957.*)

In sum, the court [**28] held that "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, ... *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." (*Joshua S., supra, 42 Cal.4th at p. 958.*)

3. Joshua S. *Does Not Bar an Award of Attorney Fees in This Case*

In the instant case, Coast argues that it is in the same position as the birth mother in *Joshua S.*, as it did nothing to adversely affect the public interest, or a significant class of people, other than attempt to defend its expedition fees and ultimately be on the losing side of *Serrano I.* We disagree. Coast overlooks that it refused to deliver copies of its transcripts without payment of an unreasonable fee. As we stated in *Serrano I*, "For a deposition reporter [*194] to refuse to provide a copy of a transcript to a nonnoticing party in a pending action unless the party agrees to pay an unreasonable fee would be grossly unfair. Moreover, for a deposition reporter, as [**29] an officer of the court, to engage in such conduct would be an abuse of the reporter's authority." (*Serrano I, 162 Cal.App.4th at p. 1036.*) Coast did exactly that. [2] A deposition reporter which abuses its authority by withholding copies of its transcripts unless an unreasonable fee is paid has done an act which adversely affects the public interest. [3]

2 We held in *Serrano I* that withholding a transcript unless a party agreed to pay an unreasonable fee would be "an abuse of the reporter's authority," and a violation of statutory requirements which, when read together, require that copies be provided for a reasonable fee (*Code Civ. Proc., §§ 2025.510, subd. (c), 2025.570, subd. (a)*). What had not been established was whether Coast's fee had, in fact, been unreasonable. Once the trial court concluded that Coast's fee was unreasonable in its entirety, it was necessarily established that Coast had abused its authority and violated the statutory requirements.

3 As Coast represented that the fee it charged plaintiffs was its standard fee for an expedited transcript copy, the conclusion that Coast's conduct adversely affected all nonparties who sought expedited transcript copies from Coast, and [**30] not merely the plaintiffs in this action, is inescapable.

To be sure, *Serrano I* involved more than whether a deposition reporter could withhold a transcript copy unless paid an unreasonable fee; the opinion also established a trial court's jurisdiction and authority to determine the reasonableness of the fee in the pending proceeding (even though the deposition reporter, while an officer of the court, was not a party to the action). Had this latter issue been the *sole* issue before us in *Serrano I*, and Coast had *not* charged an unreasonable fee or had *not* withheld the transcript, Coast would have a potentially viable argument that it falls within the scope of the rule of *Joshua S.* But this is not a case in which Coast simply litigated a private issue and ended up on the losing side of an opinion establishing trial court jurisdiction over deposition reporters' fees; Coast instead abused its authority as an officer of the court by holding a necessary transcript hostage while demanding an unreasonable fee. It is therefore not entitled to the benefit of the *Joshua S.* opinion. To the extent the trial court concluded otherwise, I believe it erred as a matter of law. [4]

4 I believe the trial court [**31] further erred in its apparent reliance on the plaintiffs' initial motives. That is, the court stated, "Moving party was not trying to vindicate the public's interest. Rather [they were] trying to protect [their] own interest and in so doing, by virtue of a published opinion, [they] conferred a benefit to litigants." But whether a plaintiff pursued an action with the *subjective motivation* of benefitting himself or the public is not a controlling factor in determining whether the plaintiff is entitled to fees under *section 1021.5.* (*Satrap v. Pacific Gas & Electric Co. (1996) 42 Cal.App.4th 72, 77 [49 Cal.Rptr.2d 348].*) *Joshua S.* did not consider, or change, controlling law regarding the inapplicability of evidence of motive, rather, it rejected the attorney

fee claim despite a substantial widespread public benefit because the party against whom fees were sought had done nothing wrong. In any event, even if plaintiffs' motivation in initially challenging the fees was purely selfish, there can be no doubt that their motivation in pursuing the issue on appeal was not. No party would spend over $ 100,000 to litigate $ 2,872 in deposition fees if motivated purely by its own financial interest.

[*195]

I would therefore [**32] reverse and remand for a determination of whether plaintiffs are entitled to attorney fees under each of the elements which must be established for an award of fees pursuant to *section 1021.5*. (See *Joshua S., supra, 42 Cal.4th at pp. 951-952*; *Los Angeles Police Protective League v. City of Los Angeles (1986) 188 Cal.App.3d 1, 6 [232 Cal.Rptr. 697]*.)

EXHIBIT "B"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 3

May 24, 2010

Stephen S. Monroe
Law Offices Of David B. Bloom
3699 Wilshire Boulevard
10th Floor
Los Angeles, CA 90010

PORFIRIO SERRANO et al.,
Plaintiffs and Appellants,
v.
COAST COURT REPORTERS,
Defendant and Respondent.

B215837
Los Angeles County No. BC324031

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

EXHIBIT "C"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 3

DATE: May 24, 2010

Stephen S. Monroe
Law Offices Of David B. Bloom
3699 Wilshire Boulevard
10th Floor
Los Angeles, CA 90010

PORFIRIO SERRANO et al.,
Plaintiffs and Appellants,
v.
COAST COURT REPORTERS,
Defendant and Respondent.

B215837
Los Angeles County No. BC324031

THE COURT:

Appellants' request for judicial notice filed with permission of the court on May 24, 2010, in the above entitled matter is denied.

cc: File