

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

---

No. S209376

---

Conservatorship of the Estate of IDA McQUEEN:

FESSHA TAYE, as Conservator of the Estate of Ida McQueen,  
Plaintiff and Respondent,

SUPREME COURT  
**FILED**

AUG - 9 2013

v

CAROL VERES REED, Defendant and Appellant.

Frank A. McGuire Clerk

---

Deputy

---

After a Decision by the Court of Appeal,  
First Appellate District, Division Four  
Case No. A134337

---

**OPENING BRIEF ON THE MERITS**

---

DANIEL D. MURPHY (SBN 129100)  
819 Eddy Street  
San Francisco, CA 94109-7701  
T: (415) 771-6174

AUDRA IBARRA (SBN 177464)  
Law Office of Audra Ibarra  
530 Lytton Avenue, 2<sup>nd</sup> Floor  
Palo Alto, CA 94301  
T: (650) 714-2270  
F: (650) 617-3201  
E: ai@aiappeals.com

Counsel for Plaintiff and Respondent

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
ISSUES PRESENTED .....	1
INTRODUCTION .....	1
STATEMENT OF FACTS AND THE CASE.....	3
LEGAL DISCUSSION.....	7
I THE FINANCIAL ELDER ABUSE STATUTE AND OTHER SUBSTANTIVE FEE SHIFTING STATUTES AUTHORIZE AN AWARD OF ATTORNEY FEES AND COSTS FOR AN APPEAL OR ENFORCEMENT IRRESPECTIVE OF THE ENFORCEMENT OF JUDGMENTS LAW .....	8
A THE FINANCIAL ELDER ABUSE STATUTE AND OTHER SUBSTANTIVE FEE SHIFTING STATUTES AUTHORIZE AN AWARD FOR AN APPEAL.....	8
B THE FINANCIAL ELDER ABUSE STATUTE AND OTHER SUBSTANTIVE FEE SHIFTING STATUTES AUTHORIZE AN AWARD FOR ENFORCEMENT ..	14
C PUBLIC POLICY AND LEGISLATIVE INTENT BEHIND THE FINANCIAL ELDER ABUSE STATUTE AND OTHER SUBSTANTIVE FEE SHIFTING STATUTES SUPPORT AN AWARD FOR AN APPEAL AND ENFORCEMENT .....	17
II THE ENFORCEMENT OF JUDGMENTS LAW SHOULD ALSO AUTHORIZE AN AWARD OF ATTORNEY FEES AND COSTS FOR ENFORCEMENT, INCLUDING AN APPEAL, IF A MOTION IS MADE WITHIN A REASONABLE TIME OF SATISFACTION OF THE JUDGMENT .....	21

A	THE ENFORCEMENT OF JUDGMENTS LAW AUTHORIZES AN AWARD FOR ENFORCEMENT, INCLUDING AN APPEAL .....	22
B	STATUTORY INTERPRETATION OF THE ENFORCEMENT OF JUDGMENTS LAW SUPPORTS AN AWARD IF A MOTION IS MADE WITHIN A REASONABLE TIME OF SATISFACTION OF THE JUDGMENT .....	23
C	PUBLIC POLICY AND LEGISLATIVE INTENT BEHIND THE ENFORCEMENT OF JUDGMENTS LAW SUPPORT AN AWARD IF A MOTION IS MADE WITHIN A REASONABLE TIME OF SATISFACTION OF THE JUDGMENT.....	27
III	PLAINTIFF REQUESTS AN AWARD OF ATTORNEY FEES AND COSTS FOR THIS FEE CLAIM AND APPEAL IN AN AMOUNT TO BE DETERMINED BY THE TRIAL COURT.....	28
A	THE FINANCIAL ELDER ABUSE STATUTE MANDATES AN AWARD TO PLAINTIFF .....	29
B	THE ENFORCEMENT OF JUDGMENTS LAW SHOULD ALSO ENTITLE PLAINTIFF TO AN AWARD.....	31
	CONCLUSION.....	32
	CERTIFICATE OF LENGTH.....	33
	CERTIFICATE OF SERVICE.....	34

## TABLE OF AUTHORITIES

### CASES

<i>Arizona Cattle Growers' Ass'n v. Salazar</i> (9th Cir. 2010) 606 F.3d 1160 .....	25
<i>Carnes v. Zamani</i> (9th Cir. 2007) 488 F.3d 1057 .....	26, 27
<i>City of San Jose v. Great Oaks Water Company</i> (1987) 192 Cal.App.3d 1005 .....	15
<i>Conservatorship of McQueen</i> (unpublished Mar. 14, 2011, A126825) .....	5
<i>Conservatorship of McQueen</i> (unpublished Feb. 2, 2013, A34337) .....	6, 10, 13, 16, 26, 30, 31
<i>Davey v. Southern Pac. Co.</i> (1897) 116 Cal. 325 .....	14
<i>Delany v. Baker</i> (1999) 20 Cal.4th 23 .....	18, 19
<i>Downen's, Inc. v. City of Hawaiian Gardens Redevelopment Agency</i> (2001) 86 Cal.App.4th 856 .....	14-17, 25, fn.9
<i>Folsom v. Butte County Assn. of Governments</i> (1982) 32 Cal.3d 668 .....	18
<i>Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.</i> (1998) 71 Cal.App.4th 38 .....	26, 27
<i>In re Atiles</i> (1983) 33 Cal.3d 805 .....	25

<i>In re Joyner</i> (1989) 48 Cal.3d 487 .....	25
<i>Lewis C. Nelson &amp; Sons, Inc. v. Lynx Iron Corp.</i> (2009) 174 Cal.App.4th 67 .....	25, 26
<i>Lucky United Properties Inv., Inc. v. Lee</i> (2010) 185 Cal.App.4th 125 .....	24
<i>Morcos v. Board of Retirement</i> (1990) 51 Cal.3d 924 .....	8-10, 18, fn. 5 and 6
<i>People v. Bruner</i> (1995) 9 Cal.4th 1178 .....	25
<i>Russell v. Thermalito Union School Dist.</i> (1981) 115 Cal.App.3d 880 .....	10
<i>Serrano v. Unruh</i> (1982) 32 Cal.3d 621 .....	10, 29, 30
<i>Smiley v. Citibank (South Dakota), N.A.</i> (1995) 11 Cal.4th 138 .....	7
<i>Smiley v. Citibank (South Dakota), N.A.</i> (1996) 517 U.S. 735.....	7
<i>Wallace v. Consumers Cooperative of Berkeley, Inc.</i> (1985) 170 Cal.App.3d 836 .....	14, 15
<i>Woodland Hills Residents Assn., Inc. v. City Council</i> (1979) 23 Cal.3d 917 .....	17, 18

STATUTES

Code of Civil Procedure, sec. 685.040 .....	1, 22, 23, 31
Code Civil Procedure, sec. 685.070 .....	12, 24, fn. 8

Code Civil Procedure, sec. 685.080 .....	12, 24, fn. 8
Code of Civil Procedure, sec. 1033.5 .....	fn. 10
Code of Civil Procedure, sec. 1036 .....	fn. 9
Welfare and Institutions Code, sec. 15600 .....	20
Welfare and Institutions Code, sec. 15657 .....	20
Welfare and Institutions Code, sec. 15657.5 .....	5, 9, 10, 17, 27, 29, 30

COURT RULES

California Rules of Court, rule 3.1700 .....	fn. 7
California Rules of Court, rules 3.1702 .....	11, fn. 7
California Rules of Court, rule 8.278 .....	fn. 7
California Rules of Court, rule 8.520 .....	33

## **ISSUES PRESENTED**

1. Whether the procedures for collection of post-judgment costs under Code of Civil Procedure §§ 685.040, *et seq.* govern the claims of a successful plaintiff for statutorily mandated fees under California's Elder Abuse Act for her efforts at protecting her judgment.

2. Whether satisfaction of the underlying elder financial abuse judgment acts as a bar to a subsequent motion for attorney fees by petitioner.

## **INTRODUCTION**

This is a case about access to justice for Ida McQueen (a mentally and physically disabled 78-year old, who cannot read or write), other victims of elder abuse and other civil litigants whose goal is to right a wrong under a statute that authorizes attorney fees and costs.

Most of us know the basic rules governing attorney fee awards in civil litigation. Under the English Rule, the loser in a civil case pays for the winner's attorney fees. The Rule is followed in England and in most Western countries, other than the United States. The philosophy behind the English Rule is that a party is entitled to legal

representation to prosecute or defend his claim and should not have to incur the cost of his representation if his claim was righteous. Proponents of the English Rule believe that because the Rule encourages righteous claims and discourages frivolous ones, it ultimately reduces litigation.

By contrast, under the American Rule, each party pays for his own attorney fees regardless of the outcome of a case, unless otherwise authorized by statute or contract between the parties. The philosophy behind the American Rule is that a party should be free to prosecute or defend his claim if he perceives it to be righteous and should not be discouraged by fear of potential liability for the opposing party's attorney fees. Proponents of the American Rule believe that parties to a contract should be able to decide whether a fee shifting provision would be beneficial to them and that the legislature can authorize fee shifting where public policy objectives require it.

Public policy requires an attorney fee shifting statute when without one, an individual or group would not have access to justice. In other words, they could not otherwise afford to right a wrong. In



essence, attorney fee shifting statutes are our societal safety net to protect those who need it most.

The court of appeal's ruling in this case unravels that safety net. The ruling effectively denies justice to Ida McQueen, other victims of elder abuse and other civil litigants who want to right a wrong under a statute that authorizes attorney fees and costs.

After a jury trial, Fessha Taye, the conservator for Ida McQueen (collectively plaintiff), prevailed in an action for financial elder abuse against Carol Veres Reed (defendant). Plaintiff also prevailed in defending the judgment on defendant's first appeal, and successfully brought a separate lawsuit against defendant to prevent her from transferring real property to third parties in an attempt to avoid satisfaction of the judgment. As a result, defendant paid the judgment. Plaintiff then moved for attorney fees and costs incurred in the appeal and separate lawsuit. Although the trial court granted the motion for fees, the court of appeal reversed.

### **STATEMENT OF FACTS AND THE CASE**

In 2006, plaintiff sued defendant and several others for financial elder abuse, fraud and concealment, conversion, breach of fiduciary duty and negligence. (*In the Matter of Reed* (Cal. State Bar Hearing

Dept. Dec. 15, 2011), p. 8, ¶ 16 (hereinafter *Reed*).<sup>1</sup>) Plaintiff claimed that they violated the terms of a trust set up for the disabled and elderly Ida McQueen, when they sold the family residence, in which McQueen held a life estate, without her consent or knowledge, and then misappropriated the sales proceeds for their own use. (*Id.*, p. 7, ¶¶ 6-12, n. 3.) Defendant was the family attorney who probated the estate of McQueen's father, created the trust holding McQueen's life estate in the family home, then played an active role in the subsequent sale of the property and distribution of its sales proceeds. (*Ibid.*)

A jury found defendant liable for financial elder abuse, breach of fiduciary duty as an attorney and conversion. (*Reed, supra*, p. 8, ¶ 16.) On September 11, 2009, judgment was entered against defendant and two others for \$99,900 in compensatory damages. (*Id.*, ¶¶ 16-17.) Because defendant was found liable under the financial elder abuse statute, which requires shifting of attorney fees and costs, she was ordered to pay \$320,748.25 in fees and costs to plaintiff. (*Order Granting in Part Attorneys' Fees and Costs Pursuant to Welf. & Inst.*

---

<sup>1</sup> This document was attached as document number 5 to plaintiff's *Motion to Augment the Record* filed in the court of appeal on September 5, 2012. The *Motion to Augment* was granted on September 25, 2012.

*Code §15657.5*, filed in Alameda County Super. Ct on June 25, 2009, p. 9.<sup>2</sup>)

Defendant and the others appealed, but the court of appeal affirmed the judgment. (*Reed, supra*, p. 8, ¶ 17.) This Court denied review and ordered the opinion depublished. (*Conservatorship of McQueen* (Mar. 14, 2011, A126825) review denied and opn. ordered nonpub. June 8, 2011, S192507.) On June 15, 2011, the remittitur was issued.

In December 2009, plaintiff again sued defendant, as well as her husband and two children. (CT 24-33.<sup>3</sup>) Plaintiff claimed that defendant and her husband had fraudulently transferred three parcels of real property out of defendant's name shortly after the jury verdict in order to avoid satisfaction of the judgment. (*Ibid.*) On June 7, 2010, the fraudulent transfer lawsuit was dismissed in a settlement, in which defendant and her family agreed to transfer the property back into defendant's name so that it was available to satisfy the judgment. (CT 35-38, 41.)

---

<sup>2</sup> This document was attached as document number 4 to plaintiff's *Motion to Augment the Record* filed in the court of appeal on September 5, 2012. The *Motion to Augment* was granted on September 25, 2012.

<sup>3</sup> "CT" refers to Clerk's Transcript on Appeal filed in the court of appeal on February 9, 2012.

Defendant paid the judgment in the underlying case through a series of payments between May 2011 and July 15, 2011. (*Reed, supra*, p. 8, ¶ 19; CT 63, 65, 67, 68.)

On July 25, 2011, within 40 days of the remittitur, plaintiff moved for additional attorney fees and costs for defending the judgment on appeal and bringing the second lawsuit to enforce the judgment. (CT 8-33.) Defendant argued that plaintiff was barred from filing a motion, because the underlying judgment had been paid. (CT 51-61.) The trial court found the motion was timely, granted the motion as to “reasonable attorneys’ fees incurred on appeal and in connection with related collection efforts” and awarded plaintiff \$56,974.50, but denied the motion as to costs. (CT 105-108.)

On February 7, 2013, the court of appeal reversed the trial court order granting additional attorney fees and awarded defendant costs on appeal. (*Conservatorship of McQueen* (unpub. Feb. 2, 2013, A34337) (hereinafter *McQueen II*)).

### **LEGAL DISCUSSION**

On *de novo* review, the court of appeal held that plaintiff’s motion for attorney fees was untimely:

[T]he statutory scheme governing the recovery of postjudgment attorney fees unambiguously required [plaintiff] to request attorney fees before the underlying judgment had been satisfied. Here, [plaintiff] deposited [defendant]’s last payment in full satisfaction of the judgment on or about July 15, 2011, leading [defendant] to believe she had fully satisfied her entire obligation. [Citation omitted.] Ten days later, [plaintiff] filed a “Second Motion for Reasonable Attorney Fees and Costs” requesting additional attorney fees and costs in the amount of \$57,681.90. *Given that [plaintiff]’s July 25, 2011 motion was filed after [defendant] fully satisfied the judgment, [plaintiff] was precluded from recovering more postjudgment costs and attorney fees.*

(*McQueen II, supra*, A34337, p. 5 (italics added).)

This Court independently reviews a court of appeal’s decision and has explained that: “We have no need to defer, because we can ourselves conduct the same analysis. In fact, we have need *not* to defer, in order to be free to further the uniform articulation and application of the law within our jurisdiction.” (*Smiley v. Citibank (South Dakota), N.A.*(1995) 11 Cal.4th 138, 146 *aff’d sub nom. Smiley v. Citibank (South Dakota), N.A.* (1996) 517 U.S. 735.)

In this case, the court of appeal’s decision should be reversed, because: (1) the financial elder abuse statute separately and independently mandates an award to plaintiff of attorney fees for the prior appeal and enforcement, and (2) the enforcement of judgments

law should also entitle plaintiff to an award. Moreover, plaintiff should be awarded attorney fees and costs for this fee claim and appeal.

**I THE FINANCIAL ELDER ABUSE STATUTE AND OTHER SUBSTANTIVE FEE SHIFTING STATUTES AUTHORIZE AN AWARD OF ATTORNEY FEES AND COSTS FOR AN APPEAL OR ENFORCEMENT IRRESPECTIVE OF THE ENFORCEMENT OF JUDGMENTS LAW**

The financial elder abuse statute and other substantive fee shifting statutes authorize an award of attorney fees and costs for an appeal or enforcement of a judgment separately and independently from the enforcement of judgments law.

**A THE FINANCIAL ELDER ABUSE STATUTE AND OTHER SUBSTANTIVE FEE SHIFTING STATUTES AUTHORIZE AN AWARD FOR AN APPEAL**

In *Morcos v. Board of Retirement*, this Court held that substantive fee shifting statutes authorize attorney fees for an appeal<sup>4</sup>. ((1990) 51 Cal.3d 924, 927 [reversing court of appeal's denial of attorney fees under denial of benefits statute].) *Morcos* is similar to plaintiff's case. Both *Morcos* and plaintiff were the prevailing

---

<sup>4</sup> Costs on appeal were not at issue.

plaintiffs in cases involving statutes that authorized “reasonable attorney’s fees<sup>5</sup>.” (*Id.* at 936-27; CT 105-108.) Both were awarded attorney fees for services in the trial court. (51 Cal.3d at 926; CT 105-

---

<sup>5</sup> Morcos was entitled to fees under the denial of benefits statute, section 31536 of the Government Code, which provided in relevant part:

If a superior court reverses the denial by the board of an application for a retirement allowance, . . . or for a claim based on a claimed pension right or benefit, the superior court in its discretion may award *reasonable attorney’s fees* as costs to the member . . . who successfully appealed [to the superior court] the denial of such application.

(51 Cal.3d at 927, n. 2 (italics added).)

Plaintiff is entitled to fees under the financial elder abuse statute, section 15657.5 of the Welfare and Institutions Code, in which subdivision (a) provides:

Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff *reasonable attorney’s fees* and costs. The term “costs” includes, but is not limited to reasonable fees for the services of a conservator, if any devoted to the litigation of a claim brought under this article.

(Italics added.)

108.) But both were denied fees for appellate services by the court of appeal. (51 Cal.3d at 926; *McQueen II*, *supra*, A34337.)

In *Morcos*, this Court reversed the judgment of the court of appeal and held that an attorney fee statute covers fees at trial and on appeal:

“[I]t is established that fees, if recoverable at all - pursuant either to statute or parties' agreement - are available for services at trial *and on appeal*.” (Italics added.) (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 637 [186 Cal.Rptr. 754, 652 P.2d 985]; accord *Russell v. Thermalito Union School Dist.* (1981) 115 Cal.App.3d 880 [176 Cal.Rptr. 1].) Indeed, appellate courts have consistently permitted a successful party to recover attorney fees incurred on appeal when a statute expressly permits such an award in the trial court or other lower tribunal.

(51 Cal.3d at 927 (italics in original).)

Similarly, this Court should reverse plaintiff's case. Plaintiff has a stronger argument for appellate fees than *Morcos*. *Morcos*'s statute explicitly provided that “the superior court in its discretion may award reasonable attorney's fees,” but the financial elder abuse statute on which plaintiff relies does not limit itself to a specific court and requires an award of attorney fees and costs. (*Morcos*, *supra*, 51 Cal.3d at 927; Welf. & Inst. Code, § 15657.5, subd. (a).)



Notably, in *Marcos*, this Court did not refer to, much less rely on, the enforcement of judgments law to authorize appellate attorney fees, despite the fact that the law had been enacted over seven years before<sup>6</sup>.

That the financial elder abuse statute and other substantive fee shifting statutes authorize attorney fees and costs for an appeal separately and independently from the enforcement of judgments law is consistent with the California Rules of Court. Under the Rules, a party must move for appellate attorney fees and file a memorandum for appellate costs within 40 days of notice of remittitur, irrespective of satisfaction of the judgment. (Cal. Rules of Court, rules 3.1702(c)(1) and 8.891(c)(1)<sup>7</sup>.) However, the enforcement of

---

<sup>6</sup> *Marcos* was decided on November 26, 1990, but the enforcement of judgments law under Code of Civil Procedure section 685.040 was operative as of July 1, 1983.

<sup>7</sup> California Rules of Court, rule 3.1702(c)(1) provides in relevant part:

A notice of motion to claim attorney's fees on appeal – other than the attorney's fees on appeal claimed under (b) – under a statute or contract requiring the court to determine entitlement to the fees, the amount of the fees, or both, must be served and filed *within the time for*

judgments law requires a party to move or file a memorandum for enforcement costs before satisfaction of the judgment. (Code Civ. Proc., §§ 685.070, subd. (b), and 685.080, subd. (a)<sup>8</sup>.)

---

*fn 7 cont'd:*

*serving and filing the memorandum of costs under rule 8.278(c)(1) . . . .*

(Italics added.)

California Rules of Court, rule 8.278(c)(1) provides:

*Within 40 days after the clerk sends notice of issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under rule 3.1700*

(Italics added.)

<sup>8</sup> Subdivision (b) of section 685.070 of the Code of Civil Procedure provides:

*Before the judgment is fully satisfied but not later than two years after the costs have been incurred, the judgment creditor claiming costs under this section shall file a memorandum of costs with the court clerk and serve a copy on the judgment debtor. Service shall be made personally or by mail. The memorandum of costs shall be executed under oath by a person who has knowledge of the facts and shall state that to the person's best knowledge and belief the costs are correct, are reasonable and necessary, and have not been satisfied.*

(Italics added.)

In this case, the court of appeal failed to distinguish between attorney fees for the appeal and those for enforcement. The court also failed to acknowledge that the financial elder abuse statute mandates an award of fees for both irrespective of the enforcement of judgments law. The court of appeal noted that the trial court cited the enforcement of judgments law, and the court of appeal apparently assumed that the fees could only be affirmed under that law. (*McQueen II, supra*, A34337, p. 4.)

---

*fn 8 cont'd:*

Subdivision (a) of section 685.080 of the Code of Civil Procedure provides:

The judgment creditor may claim costs authorized by Section 685.040 by noticed motion. The motion shall be made *before the judgment is satisfied in full*, but not later than two years after the costs have been incurred. The costs claimed under this section may include, but are not limited to, costs that may be claimed under Section 685.070 and costs incurred but not approved by the court or referee in a proceeding under Chapter 6 (commencing with Section 708.010 of Division 2.

(Italics added.)

However, an appealed order correct on any theory will generally be affirmed even if the trial court's reasoning may have been erroneous:

No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that *a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason.* If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.

(*Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329 (italics added) [affirming legally correct judgment and order irrespective of trial court's reasoning].)

**B THE FINANCIAL ELDER ABUSE STATUTE AND OTHER SUBSTANTIVE FEE SHIFTING STATUTES AUTHORIZE AN AWARD FOR ENFORCEMENT**

Substantive fee shifting statutes authorize an award of attorney fees and costs for a separate, but related, civil case, irrespective of the enforcement of judgments law. (*Downen's, Inc. v. City of Hawaiian Gardens Redevelopment Agency* (2001) 86 Cal.App.4<sup>th</sup> 856, 862-64 [reversing and remanding where trial court denied award for enforcement action under inverse condemnation statute]; *Wallace v. Consumers Cooperative of Berkeley, Inc.* (1985) 170 Cal.App.3d 836,

846-50 [upholding award for civil penalty action and administrative hearing under private attorney general statute]; see also *City of San Jose v. Great Oaks Water Company* (1987) 192 Cal.App.3d 1005, 1020 [upholding award of attorneys fees for administrative hearing under eminent domain statute].)

In *Downen's, Inc. v. City of Hawaiian Gardens Redevelopment Agency*, the court of appeal held that a substantive fee shifting statute authorizes attorney fees and costs for a separate action to enforce a judgment. (86 Cal.App.4<sup>th</sup> at 862-63.) *Downen's* is similar to plaintiff's case. Both *Downen's, Inc.* and plaintiff were the prevailing plaintiffs in cases involving statutes that mandated reasonable attorney fees and costs<sup>9</sup>. (*Id.*, at 860; CT 105-108.) Both were awarded

---

<sup>9</sup> *Downen's, Inc.* was entitled to fees under the inverse condemnation statute, section 1036 of the Code of Civil Procedure, which provided:

In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of that proceeding, shall determine and award or allow to the plaintiff as part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually

attorney fees and costs for their services in the trial court. (86 Cal.App.4<sup>th</sup> at 859; *Reed, supra*, p. 8, ¶ 16.) But both were denied fees for a separate action to enforce the judgment. (86 Cal.App.4<sup>th</sup> at 859; *McQueen II, supra*, A34337.)

In *Downen's*, the court of appeal reversed, held that a fee shifting statute covers attorney fees and costs for an enforcement action, and explained that “[b]y construing [a fee shifting statute] to permit plaintiffs to recover their litigation expenses, we implement the Legislature’s purpose.” (86 Cal.App.4<sup>th</sup> at 862-64.)

Similarly, this Court should reverse plaintiff’s case. Plaintiff has a stronger argument for enforcement fees and costs than Downen’s, Inc. Downen’s, Inc.’s statute explicitly provided that it authorized fees and costs “actually incurred because of that proceeding in the trial court or any appellate proceeding in which the plaintiff prevails on any issue in that proceeding,” but the financial

---

*fn 9 cont’d:*

incurred *because of that proceeding* in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding.

(86 Cal.App.4<sup>th</sup> at 860 (italics in original).)

elder abuse statute on which plaintiff relies does not limit itself to the underlying proceeding. (86 Cal.App.4<sup>th</sup> at 860; Welf. & Inst. Code, § 15657.5, subd. (a).)

Notably, in *Downen's*, the court of appeal explained that it could not rely on the enforcement of judgments law to authorize fees or costs. (86 Cal.App.4<sup>th</sup> at 863-64.) In that case, the losing party was a city agency, and the enforcement of judgments law only authorizes fees and costs from a private party. (*Ibid.*)

In this case, the court of appeal failed to distinguish between attorney fees for enforcement and appeal, and to acknowledge that the financial elder abuse statute requires an award for both.

**C PUBLIC POLICY AND LEGISLATIVE INTENT  
BEHIND THE FINANCIAL ELDER ABUSE  
STATUTE AND OTHER SUBSTANTIVE FEE  
SHIFTING STATUTES SUPPORT AN AWARD  
FOR AN APPEAL AND ENFORCEMENT**

The legislature enacts substantive fee shifting statutes, because they are necessary to promote public policy:

*The doctrine 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.*

(*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933 (italics added) [referring to the private attorney general statute and reversing the denial of attorney fees]; see also *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 683 [affirming award for attorney fees and costs under private attorney general statute, explaining “[w]hether we focus on enabling suits by those otherwise unable to pursue the litigation, or deterring misconduct, an award to lawyers who have vindicated an important interest achieves the desired result”].)

“This legislative purpose can be achieved only if successful [parties] may recover the attorney fees they incur in the appellate court as well as during the earlier stages of their proceedings in the trial courts.” (*Morcos v. Board of Retirement, supra*, 51 Cal.3d 924, 929.) It follows that legislative intent and public policy can only be promoted if a successful party may recover attorney fees not only for securing a judgment, but for enforcing it as well.

The legislative purpose behind the Elder Abuse Act “is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delany v. Baker* (1999) 20 Cal.4<sup>th</sup> 23, 33 [upholding



attorney fee award under physical elder abuse statute].) The legislature recognizes that elders are at risk of abuse, that the state has a responsibility to protect them, and that too few elder abuse cases are criminally prosecuted or civilly filed:

(a) The Legislature recognizes that *elders and dependent adults may be subjected to abuse, neglect, or abandonment and that this state has a responsibility to protect these persons.*

(b) The Legislature further recognizes that a significant number of these persons are elderly. *The Legislature desires to direct special attention to the needs and problems of elderly persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are more subject to risks of abuse, neglect, and abandonment.*

(c) The Legislature further recognizes that a significant number of these persons have developmental disabilities and that mental and verbal limitations often leave them vulnerable to abuse and incapable of asking for help and protection.

(d) The Legislature recognizes that most elders and dependent adults who are at the greatest risk of abuse, neglect, or abandonment by their families or caretakers suffer physical impairments and other poor health that place them in a dependent and vulnerable position.

...

(h) The Legislature further finds and declares that infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and *few civil cases are brought in connection with this abuse due to problems of*

*proof, court delays, and the lack of incentives to prosecute these suits.*

(Welf. & Inst. Code, § 15600 (italics added).)

Consequently, the legislature authorized civil actions, including the financial elder abuse statute, with a mandatory attorney fee provisions, so that elders could retain counsel to help them protect themselves. (Welf. & Inst. Code, § 15600, subd. (j).) Specifically, with respect to financial elder abuse cases, the legislature intended that statutory attorney fees and costs would help elders get their homes and other assets back:

Welfare and Institutions Code Section 15657 was created to provide enhanced remedies to ensure adequate representation of elders in cases of elder abuse. *A particular problem arises with elder financial abuse cases.* Even where the perpetrators of elder financial abuse are criminally prosecuted, oftentimes, they no longer have control over their assets. The assets have been consumed, or they have been retained by or passed on to third parties, who then profit from the abuse. . . .

*Elder financial abuse cases already tend to be drawn out and complicated. Protracted disputes with third parties can entirely deplete an elder's remaining or disputed assets, or may discourage such cases from ever being prosecuted.*

Changing the burden of proof from clear and convincing to a preponderance of evidence[ ] in financial abuse cases *for the enhanced remedy of fees and costs would help elders get their homes and other assets back.*

(California Bill Analysis, A.B. 2611 Sen., 6/22/2004, California Bill Analysis, A.B. 2611 Sen., 6/22/2004 (italics added).)

Notably, that is almost exactly what happened in this case: defendant sold Ida McQueen's home without consent; plaintiff retained counsel for protection; and counsel obtained a civil judgment for plaintiff in the trial court, defended the judgment on appeal and successfully brought a second civil lawsuit to enforce the judgment. (*Reed, supra*, pp. 7-8, ¶¶ 6-19; CT 24-38.)

Thus, public policy and legislative intent behind the financial elder abuse statute support an award of attorney fees to plaintiff for the appeal and enforcement of the judgment. This is especially true since the mandatory fee shifting language of the statute is wide open. In other words, it does not limit itself to a specific court or proceeding.

## **II THE ENFORCEMENT OF JUDGMENTS LAW SHOULD ALSO AUTHORIZE AN AWARD OF ATTORNEY FEES AND COSTS FOR ENFORCEMENT, INCLUDING AN APPEAL, IF A MOTION IS MADE WITHIN A REASONABLE TIME OF SATISFACTION OF THE JUDGMENT**

The enforcement of judgments law authorizes an award of attorney fees and costs for enforcement, including defending a

judgment on appeal. The award should be available for a motion which is made within a reasonable time of satisfaction of the judgment.

**A THE ENFORCEMENT OF JUDGMENTS LAW AUTHORIZES AN AWARD FOR ENFORCEMENT, INCLUDING AN APPEAL**

The enforcement of judgments law authorizes enforcement costs, as well as “[a]ttorney’s fees incurred in enforcing a judgment” if “otherwise provided by law.” (Code Civ. Proc., § 685.040<sup>10</sup>.) In other words, if there is an underlying substantive statute, which authorizes attorney fees for a prevailing party, then the enforcement of judgments law will also authorize attorney fees for enforcement of the judgment, including enforcing or defending it on appeal.

---

<sup>10</sup> Section 685.040 of the Code of Civil Procedure provides:

The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. *Attorney’s fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law.* Attorney’s fees included in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney’s fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5.

(Italics added.)

In this case, plaintiff should be entitled to attorney fees for enforcement of the judgment, including successfully defending it on appeal, under both the enforcement of judgments law and the financial elder abuse statute. (See I above for entitlement under the financial elder abuse statute, and II, B and C below for entitlement under the enforcement of judgments law.)

**B STATUTORY INTERPRETATION OF THE ENFORCEMENT OF JUDGMENTS LAW SUPPORTS AN AWARD IF A MOTION IS MADE WITHIN A REASONABLE TIME OF SATISFACTION OF THE JUDGMENT**

The enforcement of judgments law authorizes enforcement costs, as well as attorney fees in a case involving a substantive statute which authorizes attorney fees in the underlying litigation. (Code Civ. Proc., § 685.040.) One apparent purpose of the enforcement of judgments law is to further the public policy and legislative intent of the underlying substantive fee shifting statute. If a prevailing party is entitled to attorney fees for litigating the underlying action, it follows that the party should be entitled to all fees necessary to vindicate that party's position, including fees incurred to enforce the judgment.

However, a motion for attorney fees and costs under the enforcement of judgments law must "be made before the judgment is

satisfied in full.” (Code Civ. Proc., § 685.080, subd. (a); see also Code Civ. Proc., § 685.070, subd. (b).) “[T]he statutory purpose of requiring that the motion for enforcement costs be brought [before the judgment] is to avoid a situation where a judgment debtor has paid off the entirety of what he believes to be his obligation in the entire case, only to be confronted later with a motion for yet more fees.” (*Lucky United Properties Inv., Inc. v. Lee* (2010) 185 Cal.App.4th 125, 144 [reversing denial of attorney fees for enforcement].)

There is a tension between the competing purposes of the enforcement of judgments law. Successful enforcement of a judgment is by definition complete payment or satisfaction. Thus total enforcement costs cannot be known until the judgment is satisfied. For the sake of efficiency and judicial economy, a prevailing party would ideally wait until the judgment is satisfied to make one motion which requests all enforcement costs. But satisfaction ultimately bars a successful enforcer’s right to file a motion for attorney fees. Consequently, under the plain language of the relevant statutes, a prevailing party might never be made whole. (Code Civ. Proc., §§ 685.070, subd. (b), and 685.080, subd. (a).) This is especially true where the losing party does everything she can to avoid paying the

judgment, then only after the prevailing party fights to enforce the judgment and the losing party realizes she cannot avoid it, she rushes to pay it before the prevailing party can move for attorney fees for enforcement. That would be an absurd result.

“Rules of statutory construction require courts to construe a statute to promote its purpose[s], render it reasonable, and avoid absurd consequences.” (*In re Atilas* (1983) 33 Cal.3d 805, 810, n. 4, *disapproved on other grounds by In re Joyner* (1989) 48 Cal.3d 487 and *overruled on other grounds by People v. Bruner* (1995) 9 Cal.4th 1178.) Appellate courts “apply rules of statutory construction where . . . a literal interpretation would lead to absurd consequences.” (*Downen’s, Inc. v. City of Hawaiian Gardens Redevelopment Agency, supra*, 86 Cal.App.4<sup>th</sup> 856, 860.)

This Court should construe the enforcement of judgments law to allow a motion for attorney fees and costs within a reasonable time after satisfaction of the judgment. (Cf. *Arizona Cattle Growers’ Ass’n v. Salazar* (9th Cir. 2010) 606 F.3d 1160, 1165 [construing “occupied” under the Endangered Species Act to mean “likely to be present during any reasonable span of time”]; *Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp.* (2009) 174 Cal.App.4th 67, 78 [“The

question of whether a plaintiff's voluntarily [sic] dismissal is timely under section 581 depends upon—and must remain tethered to—a reasonable construction and application of the statutory term “commencement of trial.”] That would promote both purposes of the law, render it reasonable and avoid the absurd consequence of a successful enforcer being unable to collect full enforcement fees.

In this case, plaintiff moved for attorney fees and costs for appeal and enforcement, within 10 days, a reasonable time, after the judgment was satisfied. (CT 8-47, 105-108.)

In its opinion, the court of appeal mistakenly relied on *Carnes v. Zamani*. (*McQueen II, supra*, A34337, p. 5; (2007) 488 F.3d 1057.) In that case, the Ninth Circuit affirmed the denial of attorney fees under the enforcement of judgments law, because the motion for fees was filed after the underlying judgment was satisfied. (*Carnes, supra*, 488 F.3d at 1061.) However, that case is not controlling here. Foremost, “federal decisional authority is neither binding nor controlling in matters involving state law.” (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.* (1998) 71 Cal.App.4th 38, 52.) Moreover, *Carnes* only concerned enforcement fees, but this case concerns enforcement fees, as well as appellate fees. (488 F.2d



at 1059.) Further, the financial elder abuse statute requires an award of both enforcement and appellate fees, separately and independently from the enforcement of judgments law. (Welf. & Inst. Code, § 15657.5, subd. (a).) Finally, in *Carnes*, the motion for fees was brought over two months after the judgment was satisfied, arguably an unreasonable period of time under the enforcement of judgments law. (488 F.3d at 1059.)

**C PUBLIC POLICY AND LEGISLATIVE INTENT  
BEHIND THE ENFORCEMENT OF JUDGMENTS  
LAW SUPPORT AN AWARD IF A MOTION IS  
MADE WITHIN A REASONABLE TIME OF  
SATISFACTION OF THE JUDGMENT**

Public policy and legislative intent support an award of attorney fees and costs in a financial elder abuse case or other case with an underlying substantive fee shifting statute. (See I, C, above for policy and intent on substantive fee shifting statutes.) One of the purposes of the enforcement of judgments law is to further the policy and intent of the substantive statute underlying the judgment. (See II, B, above for purpose of the enforcement of judgments law.) To promote this purpose, the enforcement of judgments law should be construed to allow a motion for attorney fees and costs within a reasonable time

after satisfaction of the judgment. (See II, B, above for promotion of purpose of the enforcement of judgments law.)

Thus, public policy and legislative intent support an award of attorney fees and costs for enforcement of a judgment in a financial elder abuse case or other case with an underlying substantive fee shifting statute, if a motion is made within a reasonable time of satisfaction of the judgment. To bar a motion immediately upon satisfaction a judgment could deny the most successful of enforcers, like plaintiff, the recovery of fees and costs, and would thereby run counter to public policy and frustrate stated legislative intent.

### **III PLAINTIFF REQUESTS AN AWARD OF ATTORNEY FEES AND COSTS FOR THIS FEE CLAIM AND APPEAL IN AN AMOUNT TO BE DETERMINED BY THE TRIAL COURT**

The financial elder abuse statute separately and independently requires an award to plaintiff of attorney fees and costs for this fee claim and appeal. The enforcement of judgments law should also entitle plaintiff to an award. The amount of the award can be determined by this Court or the trial court.

## **A THE FINANCIAL ELDER ABUSE STATUTE MANDATES AN AWARD TO PLAINTIFF**

The financial elder abuse statute requires an award of attorney fees and costs to a prevailing plaintiff. (Welf. & Inst. Code, § 15657.5, subd. (a).) That statute and other fee shifting statutes “ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim.” (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639 [affirming attorney fees for defense of fee claim on appeal, and remanding for reconsideration of denial of attorney fees for fee motions, under private attorney general statute].) This includes compensation for an appeal where “the sole issue on appeal has been fee entitlement.” (*Id.* at 637.)

The inclusion of fee claims and appeals in awards made under fee shifting statutes promotes important public policy objectives:

“[I]f an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney’s effective rate for all the hours expended on the case will correspondingly decreased. Recognizing this fact, attorneys may become wary about taking . . . civil right cases, or other cases for which attorneys’ fees are statutorily authorized. Such a result would not comport with the purpose behind most statutory fee authorizations, viz., the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating [legislative] policies.” [Citation omitted.] The contrary rule . . .

“would permit a deep pocket losing party to dissipate the incentive provided by an award through recalcitrance and automatic appeals.” [Citations omitted.] It could permit fees to be determined by the litigiousness of losing parties.

In cases where entitlement is vigorously contested as here, the hours demanded could dwarf those spent to establish the claim on the merits. *Citizens of ordinary means are unlikely to file, and competent private practitioners are unlikely to accept, public interest litigation, however meritorious, without some assurance of compensation that fairly covers the legal services required.*

(*Serrano v. Unruh, supra*, at 634-35. (italics added).)

In this case, a jury found defendant liable to plaintiff under the financial elder abuse fee shifting statute. (*Reed, supra*, p. 8, ¶ 16; Welf. & Inst. Code, § 15657.5, subd. (a).) Plaintiff successfully defended the judgment against defendant on appeal and enforced the judgment in a second lawsuit. (*Reed, supra*, p. 8, ¶¶ 16-18; CT 24-38.) Plaintiff then brought a fee claim for the appeal and enforcement, which was granted by the trial court. (CT 105-108.) Defendant appealed the fee order. (*McQueen II, supra*, A34337.) Consequently, the financial elder abuse statute and public policy behind it require that plaintiff be awarded attorney fees and costs for the fee claim and this appeal.

**B THE ENFORCEMENT OF JUDGMENTS LAW SHOULD ALSO ENTITLE PLAINTIFF TO AN AWARD**

The enforcement of judgments law requires an award to a prevailing party of enforcement costs, as well as “[a]ttorney’s fees incurred in enforcing a judgment” if “otherwise provided by law.” (Code Civ. Proc., § 685.040.) That statute, like other fee shifting statutes, includes compensation for fee claims and appeals. (See III, A, above for compensation included in fee shifting statutes).


In this case, plaintiff prevailed over defendant in a financial elder abuse case, successfully enforced the judgment on appeal and in a second lawsuit, and then brought a fee claim, which was granted by the trial court. (*Reed, supra*, pp. 7-8, ¶¶ 16-18; CT 24-38, 105-108.) Defendant appealed the fee order. (*McQueen II, supra*, A34337.) As a result, the enforcement of judgments law and public policy behind it require that plaintiff be awarded attorney fees and costs for the fee claim and this appeal. (See II, C, above for public policy behind enforcement of judgments law, and III, A, for public policy behind fee shifting statutes generally.)

## CONCLUSION

Ida McQueen (a mentally and physically disabled 78-year old, who cannot read or write), other victims of elder abuse and other civil litigants who seek to right a wrong under a statute that authorizes attorney fees and costs, have a right to justice. The availability of an award of fees and costs for success in trial, appeal, and enforcement of a judgment, gives them access to justice by helping them retain counsel to protect themselves and pursue valid claims.

Plaintiff requests that this Court reverse the judgment of the court of appeal, affirm the trial court order granting attorney fees, plus interest, and award plaintiff additional attorney fees and costs for this fee claim and appeal in an amount to be determined by the trial court.

Dated: August 8, 2013

  
\_\_\_\_\_  
DANIEL D. MURPHY  
AUDRA IBARRA  
Counsel for Plaintiff and Respondent

### **CERTIFICATE OF LENGTH**

Pursuant to rule 8.520(b)(1) of the California Rules of Court, I, DANIEL D. MURPHY, counsel for Petitioner-Appellant TESSHA FAYE, hereby certify that I prepared the foregoing OPENING BRIEF ON THE MERITS on behalf of my client, and that the word count for this brief is 5,517 excluding cover, tables and certificates. This brief therefore complies with the rule, which limits a computer-generated brief to 14,000 words. I certify that I prepared this document in Microsoft Word, and that this is the word count generated by the program for this document.

I declare under penalty of perjury the foregoing is true and correct. Executed this 8<sup>th</sup> day of August 2013, in San Francisco, California.



---

DANIEL D. MURPHY

**CERTIFICATE OF SERVICE**

I declare that I am over the age of 18, not a party to this action, and my business address is 819 Eddy Street San Francisco, CA 94109. On the date shown below, I served OPENING BRIEF ON THE MERITS on the following parties by:

X Placing a true copy, enclosed in a sealed envelope with postage fully prepaid, in the United States mail, in San Francisco, California, addressed to:

First District Court of Appeal  
350 McAllister Street  
San Francisco, CA 94102

The Honorable Judge Jo-Lynne Q. Lee  
Alameda County Superior Court  
U.S. Post Office Building  
201 13th Street  
Oakland, CA 94612

Brooke Veres Reed  
Nichols, Catterton, Downing & Reed  
3433 Golden Gate Way, Suite C  
Lafayette, CA

Fessha Taye  
2625 Alcatraz Ave  
Berkeley, CA 94705-2702

I declare under penalty of perjury the foregoing is true and correct. Executed this 9<sup>th</sup> day of August 2013, in San Francisco, California.

  
\_\_\_\_\_  
DANIEL D. MURPHY