

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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No. S209376

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Conservatorship of the Estate of IDA McQUEEN:

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

v

CAROL VERES REED, Defendant and Appellant.

SUPREME COURT  
FILED

OCT 3 1:2013

Frank A. McGuire Clerk

Deputy

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



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**REPLY BRIEF ON THE MERITS**

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## INTRODUCTION

This is a case about access to justice. We have all heard the saying “money can buy justice.” But what about a victim of financial elder abuse whose money or property was taken from her? Is she foreclosed from representation, much less justice, in our civil legal system? That would be a double tragedy and poor public policy. Fortunately, that is not the case. The Legislature has enacted attorney fee shifting statutes to protect and ensure justice for a victim of financial elder abuse and others like her who are trying to recover stolen assets or otherwise right a wrong. These statutes encourage an attorney to provide representation to a victim and give them access to justice. If a case is righteous and the attorney succeeds in recovering the victim’s assets or otherwise vindicating her rights, the defendant who brought about the need for litigation will have to pay the bill.

Ida McQueen is a mentally and physically disabled 78-year old, who cannot read or write. Carol Veres Reed (defendant) is an attorney, who essentially knowingly and intentionally defrauded McQueen by assisting in the sale of, and misappropriation of the proceeds from, the home in which McQueen held a life estate, without McQueen’s consent or knowledge. After a jury trial, Fessha Taye, the



conservator for McQueen (collectively plaintiff), prevailed in an action for financial elder abuse against 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 judgment<sup>1</sup>. 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<sup>2</sup>.

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<sup>1</sup> This lawsuit was successful. It only settled when plaintiff transferred all the property back. (Clerk's Transcript 35-38.) Defendant misleadingly notes the settlement included a provision that each side would pay its own fees for that case, but fails to acknowledge she forfeited her argument regarding the provision by not raising it as a ground for objection in the trial court. (Appellant's Answer Brief on the Merits ("AB") 2.)

<sup>2</sup> This Court independently reviews a court of appeal's decision. (*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.)

## LEGAL DISCUSSION

The trial court award of attorney fees should be upheld. Plaintiff argued in its opening brief: (1) the financial elder abuse statute separately and independently mandates an award to plaintiff of attorney fees for the prior appeal and enforcement, (2) the enforcement of judgments law should also entitle plaintiff to an award, and (3) plaintiff should be awarded attorney fees and costs for this fee claim and appeal. Plaintiff explains in this brief why defendant's counter arguments are flawed. Defendant ignores the big picture and cannot overcome the statutory language, legislative intent, public policy and this Court's cases which support an award<sup>3</sup>.

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<sup>3</sup> To bolster her weak arguments and undermine plaintiff's strong ones, defendant claimed in her answering brief that plaintiff made arguments in its opening brief which were not before the court of appeal nor included in the issues in the petition for review. (AB 9.) This claim is a red herring. Plaintiff is augmenting its arguments as allowed by filing a new opening brief on the merits as opposed to re-filing the old court of appeal brief. (Cal. Rules of Court, rule 8.520(a)(1).) Plaintiff is addressing the issues in the petition and those "fairly included in them." (Cal. Rules of Court, rule 8.520(a)(3).) All of plaintiff's arguments go to the issue of whether attorney fees should be awarded in this financial elder abuse case. In any event, this "[C]ourt is empowered to decide issues necessary for the proper resolution of the case before it, whether or not raised in the courts below." (*Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4<sup>th</sup> 1066, 1078 fn. 4.) This Court can resolve any issue which

Because defendant failed to address the third argument, plaintiff does not reiterate it here.

**I THE FINANCIAL ELDER ABUSE STATUTE AND OTHER SUBSTANTIVE FEE SHIFTING STATUTES AUTHORIZE AN AWARD OF ATTORNEY FEES 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 for an appeal or enforcement of a judgment irrespective of the enforcement of judgments law.

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

The financial elder abuse statute requires the court to award reasonable attorney fees for appeal to a prevailing plaintiff:

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

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“is integrally related to the principal issues on review and will provide guidance on remand” irrespective of whether it was raised below. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4<sup>th</sup> 644, 662 [reversing court of appeal judgment on newly raised issue].)

*court shall award to the plaintiff reasonable attorney fees and costs.*

(Welf. & Inst. Code, §15657.5, subd. (a) [italics added].) The plain language of the reasonable attorney fee requirement is mandatory, broad and all-inclusive. It does not limit itself to trial or exclude appeals.

The financial elder abuse statute and other substantive fee shifting statutes authorize appellate attorney fees separately and independently from the enforcement of judgments law. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927 [reversing court of appeal's denial of appellate fees under denial of benefits statute: "[S]ettled case law . . . has established the general principal that statutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals."]; *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637 [affirming appellate fee award under private attorney general statute: "[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."].)

This is consistent with the California Rules of Court, under which a party must move for appellate fees and file a memorandum for appellate costs within 40 days of notice of remittitur, irrespective of satisfaction of the judgment. (Compare Cal. Rules of Court, rules 3.1702(c)(1) and 8.278(c)(1)<sup>4</sup> with Code Civ. Proc., §§ 685.070, subd. (b), 685.080, subd. (a)<sup>5</sup>; cf. Code Civ. Proc., § 1034, subd. (b) [“The

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<sup>4</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 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>5</sup> Code of Civil Procedure, section 685.070, subdivision (b) provides:

Judicial Council shall establish by rule allowable costs on appeal and the procedure for claiming those costs.”]).

Nevertheless, defendant mistakenly argues that the enforcement of judgments law cuts off the time to ask for any appellate fees, even

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*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.)

Code of Civil Procedure, section 685.080, subdivision (a) 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.)

those under the financial elder abuse and other substantive fee shifting statutes. (AB 12.) Her argument is without merit or support. She conflates and fails to distinguish between appellate and enforcement fees, and fees sought under a substantive fee shifting statute and those sought under the enforcement of judgments law. She fails to cite any authority on appellate fees in support of her position. She claims there is nothing in the enforcement of judgments law that exempts attorney fee awards under the elder abuse act. (AB 14.) But she ignores the plain language of the enforcement of judgments law that limits its restrictions to only enforcement fees sought under that law.

The enforcement of judgments law and its time limits do not control the availability of appellate fees under the financial elder abuse statute or any other substantive fee shifting statute. The time limits of the enforcement of judgments law apply only to enforcement fees sought under that law (as opposed to any other law or statute). More specifically, the time limits in Code of Civil Procedure sections 685.070 and 685.080 only control “[a]ttorney’s fees, if allowed by section 685.040.” (Code Civ. Proc., § 685.070, subd. (a)(6); see also Code Civ. Proc., § 685.080, subd. (a) [controlling only “costs authorized by Section 685.040”].) Code of Civil Procedure section

685.040 in turn controls only enforcement fees sought under the enforcement of judgments law:

Attorney's fees incurred in enforcing a judgment are not included in *costs collectible under this title* [Title 9. Enforcement of Judgments Law] unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as *costs collectible under this title* [Title 9. Enforcement of Judgments Law] 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].) The appellate attorney fees sought in this case are mandatory, and separately and independently collectible under section 15657.5 of the Welfare and Institutions Code. (Welf. & Inst. Code, § 15657.5, subd. (a).) This statute is not within the Code of Civil Procedure, much less Title 9 the enforcement of judgments law. (Accord *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1286 fn. 2 [awarding appellate attorney fees: Code of Civil Procedure "section 1021.5 represented an independent state rule for awarding attorney fees to a successful litigant under the private attorney general doctrine."].)

Even if the enforcement of judgments law governed the recovery of enforcement fees under substantive fee shifting statutes, it would not limit the recovery of appellate fees. On its face, the



enforcement of judgments law does not limit the time within which to request attorney fees for an appeal. The plain language of the time limit narrowly applies to enforcement fees. (Code of Civ. Proc., §§ 685.040, 685.070 subd. (a) & (b), 685.080, subd. (a).) This is consistent with the fact that attorney fees under substantive statutes may be sought for an appeal after dismissal, irrespective of the enforcement of judgments law.

Defendant also mistakenly claims there is no authority that appellate fees may be sought from a private entity irrespective of the enforcement of judgments law. (AB 14.)

Not true. (*Carter v. Cohen* (2010) 188 Cal.App.4<sup>th</sup> 1038, 1053 [awarding appellate attorney fees under rent stabilization ordinance against landlord]; *Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4<sup>th</sup> 47, 62 [awarding appellate attorney fees under Civil Code of Procedure section 3344 against a celebrity]; *Wilkerson v. Sullivan* (2002) 99 Cal.App.4<sup>th</sup> 443, 448-49 [reversing trial court denial of appellate fees under Anti-SLAPP statute against Planned Parenthood]. *Akins v. Enterprise Rent-A-Car of Co. of San Francisco* (2000) 79 Cal.App.4<sup>th</sup> 1127, 1134 [awarding appellate attorney fees under Fair Debt Collection Practices Act against rental car company].)

Moreover, cases in which appellate attorney fees were awarded against the government under substantive fee shifting statutes prove the point that substantive statutes independently authorize attorney fees, because the enforcement of judgments law does not authorize fees against government entities. (*Morcos*, 51 Cal.3d at 927; *Serrano*, 32 Cal.3d at 637.) Accordingly, irrespective of the enforcement of judgments law, the financial elder abuse statute mandates an award of appellate attorney fees in this case.

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

The financial elder abuse statute requires the court to award attorney fees for enforcement of judgment to a prevailing plaintiff. (Welf. & Inst. Code, §15657.5, subd. (a).) The plain language of the fee requirement is mandatory, broad and all-inclusive. It does not limit itself to the original case or exclude an enforcement action.

The financial elder abuse and other substantive fee shifting statutes authorize attorney fees for enforcement. (*Crespin v. Shewry* (2004) 125 Cal.App.4<sup>th</sup> 259, 262-63, 272 [affirming fees for enforcement under private attorney general statute despite over six

year delay between when fees were initially incurred and the motion was filed]; *Downen's, Inc. v. City of Hawaiian Gardens Redevelopment Agency* (2001) 86 Cal.App.4<sup>th</sup> 856, 862-64 [reversing denial of enforcement fees and explaining that “[b]y construing [a fee shifting statute] to permit plaintiffs to recover their litigation expenses, we implement the Legislature’s purpose”]; *Berti v. Santa Barbara Beach Properties* (2006) 145 Cal.App.4<sup>th</sup> 70, 77 [reversing denial of fees under former (now repealed) Corp. Code, § 15634, subd. (g), of California Revised Limited Partnership Act]; see also *Daniels v. McKinney* (1983) 146 Cal.App.3d 42, 48, 54-55 [reversing denial of fees incurred to enforce prior order and awarding appellate fees under private attorney general statute]; accord *San Francisco N.A.A.C.P. v. San Francisco Unified School District* (2002) 284 F.3d 1163, 1166 [“It is settled law in this circuit that a district court has discretion to award fees to a prevailing party in consent decree litigation for work reasonably spent to monitor and enforce compliance with the decree, even as to matters in which it did not prevail.”)].

Substantive fee shifting statutes generally authorize an award of fees for a separate but related case. (*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]; *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]).

Still, defendant misguidedly argues that the enforcement of judgments law's pre-satisfaction requirement cuts off the time to ask for any enforcement fees, even those under the financial elder abuse statute. (AB 12.) Her argument is again without merit or support. She conflates and fails to distinguish between fees sought under a substantive fee shifting statute and those sought under the enforcement of judgments law. She fails to cite any authority on point. Her reliance on dicta in a footnote in *Ketchum v. Moses* is misplaced. (AB 2; (2001) 24 Cal.4<sup>th</sup> 1122, 1141 fn. 6.) In that note, this Court said a litigant is entitled to attorney fees, under the enforcement of judgments law, for successfully enforcing a judgment if "there is some other legal basis for such an award." (*Ibid.*) This Court did not hold the enforcement of judgments law is the exclusive authority under which fees may be sought.

Substantive fee shifting statutes are not subject to the time limits of the enforcement of judgments law under the plain language of the law. The time limits apply only to enforcement fees sought under the enforcement of judgments law (as opposed to any other law or statute). (Code Civ. Proc., §§ 685.040, 685.070, subd. (a)(6), 685.080, subd. (a); see I, A, above for plain language of enforcement of judgments law.)

Alternatively, even if substantive fee shifting statutes are subject to the time limits of the enforcement of judgments law, its pre-satisfaction requirement would not cut off recovery of fees sought under the financial elder abuse statute. Under the enforcement of judgments law, fees must be sought pre-satisfaction of judgment or they are forfeited. (Code Civ. Proc., §§ 685.070, subd. (b), 685.080, subd. (a).) However, a judgment under the financial elder abuse statute can never be satisfied until all reasonable attorney fees are paid, including enforcement and appellate fees. (Welf. & Inst. Code, § 15657.7, subd. (a).) Notably, defendant concedes plaintiff never filed an acknowledgment of satisfaction of judgment before plaintiff filed its motion for attorney fees. (AB 8.) In short, irrespective of the

enforcement of judgments law, the financial elder abuse statute mandates attorney fees for enforcement in this case.

**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**

Defendant concedes that public policy and legislative intent behind the financial elder abuse statute and other substantive fee shifting statutes generally support an award of attorney fees. (AB 15.) The Legislature enacts substantive fee shifting statutes because they are necessary to promote public policy. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933; *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 683.) 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]; see also Welf. & Inst. Code, § 15600, subd. (a)-(h).) Consequently, the Legislature authorized civil actions, including those under the financial elder abuse statute, with mandatory and all-inclusive attorney fee provisions, so elders could

retain counsel to protect themselves. (Welf. & Inst. Code, § 15600, subd. (j).)

Defendant incorrectly argues legislative intent does not support an award in this case, because plaintiff's attorney did not move for attorney fees before defendant satisfied the judgment. (AB 15.) Defendant claims that plaintiff's attorney should be punished for his procedural error, and that denial of fees will not adversely affect Ida McQueen, other victims of elder abuse or civil litigants whose goal is to right a wrong under a statute that authorizes attorney fees. (AB 17) Defendant misses the point. Foremost, there was no procedural error. The motion was timely under the financial elder abuse statute, because it operates separately and independently from the enforcement of judgments law. (See I, A and B, above for independent operation of financial elder abuse statute.)

Moreover, the enforcement of judgments law cannot limit the time within which to request attorney fees for an appeal. The plain language of the time limit and its legislative history prove it narrowly applies to enforcement fees and not direct appeals. (Code of Civ. Proc., §§ 685.040, 685.070 subd. (a) & (b), 685.080, subd. (a); see I, A above for plain language of enforcement of judgments law.) A

review of the legislative history regarding the adoption of the following terms in the enforcement of judgments law reveals the Legislature did not consider, much less intend to limit, fees for direct appeal<sup>6</sup>:

. . . Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. . . .

(Code Civ. Proc., § 685.040, as added by Stats. 1982, c. 1364, Sec. 2, Assem. Bill No. 707 (1981-1982 Reg. Sess.))

(a) . . . cost of enforcing judgment:

. . .

(6) Attorney's fees, if allowed by Section 685.040.

(b) Before the judgment is fully satisfied . . .

(Code Civ. Proc., § 685.070, subd. (a) & (b), as added by Stats. 1982, c. 1364, Sec. 2, Assem. Bill 707 (1981-1982 Reg. Sess.); Code Civ. Proc., § 685.070, subd. (a), para. (6), as added by Stats. 1992, c. 1348, Sec. 4, Assem. Bill 2616 (1991-1992 Reg. Sess.))

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<sup>6</sup> Upon court request, plaintiff can provide the court and defendant a copy of this and other legislative history, discussed in this brief, in which the Legislature's silence is relevant. The relevant history totals approximately 2,353 pages.



. . . before the judgment is satisfied in full . . . .

(Code Civ. Proc., § 685.080, subd. (a), as added by Stats. 1982, c. 1364, Sec. 2, Assem. Bill 707 (1981-1982 Reg. Sess.))

In addition, even if the enforcement of judgments law governs the procedure for recovery of enforcement (as opposed to appellate) fees under the financial elder abuse statute, the pre-satisfaction requirement could not cut off the time to ask for fees. A judgment under the financial abuse statute cannot be fully satisfied unless all reasonable attorney fees are paid, including enforcement and appellate fees. The plain language of the broad reasonable fees mandate and its legislative history prove it does not exclude enforcement or appellate fees. (Welf. & Inst. Code, § 15657.7, subd. (a); see I, B above for fees included in financial elder abuse judgment) A review of the legislative history regarding the terms “the court shall award to the plaintiff reasonable attorney’s fees” in subdivision (a) of section 15657.5 of the Welfare and Institutions Code reveals the Legislature did not consider much less intend to exclude fees for enforcement of judgment. (Welf. & Inst. Code § 15657.5, as added by Stats. 2004, c. 886, Sec. 4, Assem. Bill 2611 (2003-2004 Reg. Sess.), as modeled

upon former subdivision (a) of section 15657, as added by Stats. 1991, c. 774, Sec. 3, Sen. Bill 679 (1991-1992 Reg. Sess.).)

Finally, if plaintiff's attorney and others like him are not fully compensated for completely successful work (especially a long and hard fought victory like this one), they will stop taking contingency cases and Ida McQueen, along with others like her, will be denied access to justice. In short, 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.

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

The enforcement of judgments law authorizes an award of attorney fees for enforcement. The award should be available for a motion that is made within a reasonable time of satisfaction of the judgment.

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

Statutory interpretation of the enforcement of judgments law supports an award of attorney fees if a motion is made within a reasonable amount of time of satisfaction of judgment.

The enforcement of judgments law authorizes enforcement costs, as well as attorney fees, in a case involving a substantive statute that 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 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).) 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), 685.080, subd. (a).) 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, fn 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; see also *Downen's, Inc*, 86 Cal.App.4<sup>th</sup> at 860.)

This Court should construe the enforcement of judgments law to allow a motion for attorney fees 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 the purpose of the law, render it reasonable, and avoid the absurd consequence of a successful enforcer being unable to collect full enforcement fees.

*Carnes v. Zamini*, which is relied on by defendant, does not change this analysis. (AB 19; (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*, 488 F.3d at 1061.) However, that case is not controlling here. “[F]ederal 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.) Further, 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.) In this case, plaintiff moved for attorney fees for appeal and enforcement,

within 10 days, a reasonable time, after the judgment was paid but not technically satisfied. (CT 8-47, 105-108.)

Allowing a motion for attorney fees within a reasonable time after the initial judgment is paid is consistent with case law that a trial court's enforcement or appellate fee award is incorporated into the original judgment:

[T]rial court awards of costs and fees incurred on appeal do not constitute separate judgments. Rather, they are incorporated into the original trial court judgment as are all other awards of costs and fees.

(*Lucky United Properties Investments, Inc. v. Lee* (2013) 213 Cal.App.4<sup>th</sup> 635, 657 [affirming appellate fee award under anti-SLAPP statute]; *Lucky United Properties Investments, Inc. v. Lee* (2010) 185 Cal.App.4<sup>th</sup> 125, 145, fn. 12 [reversing trial court denial of enforcement fees].) Because the fees are incorporated into the original judgment, a trial court motion for appellate or enforcement attorney fees is always made before satisfaction of judgment. Thus, the enforcement of judgments law should authorize an attorney fee award in this case.

**B 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 JUDGMENT**

Public policy and legislative intent support an award of attorney fees in a financial elder abuse case or other case with an underlying substantive fee shifting statute. (See I, C, above for policy and intent of financial elder abuse statute.) 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, A, above for purpose of enforcement of judgments law.) To promote this purpose, the enforcement of judgments law should be construed to allow a motion for attorney fees within a reasonable time after satisfaction of the judgment. (See II, A, above for reasonable interpretation of enforcement of judgments law.) To bar a motion immediately upon satisfaction a judgment could deny the most successful of enforcers, like plaintiff, the recovery of fees, and would thereby run counter to public policy and frustrate stated legislative intent. (Cf. *Serrano*, 32 Cal.3d at 634-35 [affirming award for fees incurred defending award on appeal under the private attorney general statute: “In cases where entitlement is vigorously contested, as here, the hours demanded

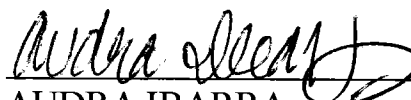
could dwarf those spent to establish the claim on the merits. Citizens of ordinary means are unlikely to file, and competent private practitioners are unlikely to accept, public interest litigation, however meritorious, without some assurance of compensation that fairly covers the legal services required.”]) In short, public policy and legislative intent behind the enforcement of judgments law support an award of attorney fees in this case.



## CONCLUSION

Plaintiff requests 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: October 30, 2013



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Counsel for Plaintiff and Respondent

## CERTIFICATE OF LENGTH

Pursuant to rule 8.520(c) of the California Rules of Court, I, AUDRA IBARRA, counsel for Petitioner-Appellant FESSHA TAYE, certify I prepared the foregoing REPLY BRIEF ON THE MERITS on behalf of my client, and that the word count for this brief is 4,241, excluding cover, tables and certificates. This brief therefore complies with the rule, which limits a computer-generated brief to 8,400 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 30th day of October 2013, in Palo Alto, California.

  
AUDRA IBARRA

## CERTIFICATE OF SERVICE

I declare that I am over the age of 18, not a party to this action, and my business address is Law Office of Audra Ibarra, 530 Lytton Avenue, 2<sup>nd</sup> Floor, Palo Alto, CA 94301. On the date shown below, I served REPLY BRIEF ON THE MERITS on the following parties by placing a true copy, enclosed in a sealed envelope with postage fully prepaid, in the United States mail, in Palo Alto, 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  
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Lafayette, CA

Fessha Taye  
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Berkeley, CA 94705-2702

I declare under penalty of perjury the foregoing is true and correct. Executed this 30th day of October 2013, in Palo Alto, California.



MARSHA LYSEN