No. S210804

In the Supreme Court of California

Even Zohar Construction & Remodeling, Inc.,

Plaintiff and Appellant,

vs.

Bellaire Townhouses, LLC, et al.,

Defendants and Respondents.

SUPREME COURT
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REPLY BRIEF ON THE MERITS

On Review From A Published Opinion Reversing An Order Vacating Defaults And A Default Judgment
Court of Appeal, Second Appellate District, Division Four, No. B239928

Appeal From An Order Vacating Defaults And A Default Judgment
Los Angeles Superior Court, No. BC458347
The Honorable Ralph Dau

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I.

INTRODUCTION

In the event of a conflict, does Code of Civil Procedure section 473(b)'s specific mandatory relief-from-default requirement prevail over Code of Civil Procedure section 1008(b)'s general prohibition on granting renewed motions unless the moving party offers "new or different facts, circumstances, or law"? That is, must a trial court grant a timely and proper renewed motion for mandatory relief from default when that motion is unaccompanied by new or different facts, circumstances, or law?

In their Opening Brief on the Merits (OBM), defendants Bellaire Townhouses, LLC, et al. showed that, in the event of a conflict, section 473(b) prevails over section 1008(b), thus requiring a court to grant such a motion. Defendants also showed that, although the trial court erred in denying defendants' original motion for such mandatory relief, it properly granted their renewed motion and that the Court of Appeal erred in reversing the order granting that motion.

Against defendants' showing, plaintiff Even Zohar Construction & Remodeling, Inc. (EZ) claims that section 473(b) and section 1008(b) can be "harmonized" but that, if they cannot be, section 1008(b) prevails over section 473(b). EZ also claims that the trial court's order denying defendants' original motion for

mandatory relief is not before this Court and, in any event, was not erroneous.

As will appear, EZ's claims lack merit.

II.

ARGUMENT

A. Contrary To EZ's Claim, In The Event Of A Conflict, Section 473(b) Prevails Over Section 1008(b)

EZ's first claim is that section 473(b) and section 1008(b) can be "harmonized" but that if they cannot be, section 473(b) does not prevail over section 1008(b). Answer Brief on the Merits (ABM) 19-53. EZ is wrong.

1. EZ Is Wrong About Section 473(b)

EZ's claim that section 473(b) and section 1008(b) can be "harmonized" depends in part on its reading of section 473(b). ABM/25-28. EZ's reading is wrong.

Section 473(b) governs motions for mandatory relief from a dismissal, default, or default judgment. The policy underlying the statute is reflected in its three-fold purpose: (1) to "relieve the innocent client of the consequences of the attorney's fault" by requiring the court to grant the client mandatory relief; (2) to "place the burden" on the errant attorney by (a) requiring the court to compel the attorney to pay the opposing party's attorney's fees and (b) authorizing the court to impose up to a $1,000 penalty on the

attorney, direct the attorney to pay up to $1,000 to the State Bar Client Security Fund, and grant any other appropriate relief; and (3) to conserve judicial resources by "discourag[ing] additional litigation in the form of malpractice actions" by the innocent client against the errant attorney. *Solv-All v. Superior Court*, 131 Cal.App.4th 1003, 1009 (2005).

EZ urges this Court to read section 473(b) as though it is not "jurisdictional" and "merely prescribes the conditions on which a motion for [mandatory] relief must be made." ABM/25 (initial capitalization and boldface omitted). Section 473(b), however, cannot be so read.

The six-month "time limit" for granting a section 473(b) motion "is jurisdictional," prohibiting a court from considering such a motion "after that period has elapsed." *Manson, Iver & York v. Black*, 176 Cal.App.4th 36, 42 (2009). And although section 473(b) does prescribe the conditions a party must satisfy to obtain mandatory relief—the party must make the motion within six months, must place the motion in proper form, and must accompany it with an attorney's affidavit of fault—the statute *requires* the court to *grant* the motion "whenever" the party satisfies those conditions. § 473(b).

To salvage its reading of section 473(b), EZ asserts that the scope of the statute is "not unlimited." ABM/27. The question, however, is not what limitations the statute imposes, but whether it

is broad enough to come into conflict with section 1008(b). It is: By requiring a court to grant a renewed motion for mandatory relief when the motion is made within six months, in proper form, and with an attorney's affidavit of fault, section 473(b) will conflict with section 1008(b) when the motion is *not* made upon new or different facts, circumstances, or law.

EZ also asserts that section 473(b) permits a court to deny a motion for mandatory relief that it otherwise would have to grant if it finds that the dismissal, default, or default judgment " 'was *not in fact* caused by the attorney's mistake, inadvertence, surprise, or neglect.' " ABM/27 (ital. orig.). But because the statute's purpose is to relieve an innocent client of the consequences of his or her attorney's fault, the statute is not triggered if the attorney's fault is not a cause. So long as there *is* such a causal connection, the statute operates with full force and requires relief.

In short, this Court cannot read section 473(b) as though it merely prescribes the conditions for making a motion for mandatory relief.

2. EZ Is Wrong About Section 1008(b)

EZ's claim that section 473(b) and section 1008(b) can be "harmonized" also depends on its reading of section 1008(b). ABM/20-25. Like its reading of section 473(b), EZ's reading of section 1008(b) is wrong.

Section 1008 governs both motions for reconsideration and renewed motions. Section 1008(a) prohibits a court from granting a motion for reconsideration unless the motion is made "within 10 days after service ... of written notice of the order," upon "new or different facts, circumstances, or law." Section 1008(b) prohibits a court from granting a renewed motion unless the motion is made upon "new or different facts, circumstances, or law." And section 1008(e) provides that the statute applies to "all" motions for reconsideration and "all" renewed motions. The statute's purpose is to conserve judicial resources by " 'reduc[ing] the number of motions to reconsider and renewals of previous motions heard by judges in this state.' " *Le Francois v. Goel*, 35 Cal.4th 1094, 1098 (2005).

Section 1008(b) applies to "all" renewed motions *generally*—indeed, section 1008(e) so states: "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, *and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion*, whether the order deciding the previous matter or motion is interim or final...." (Ital. added.) But the question is whether section 1008(b) applies to renewed motions for mandatory relief from a dismissal, default, or default judgment *specifically*—or more precisely, whether such motions are excepted from section 1008's general applicability to renewed motions.

To support the claim that sections 473(b) and 1008(b) can be "harmonized," EZ notes that section 1008(b) applies to "all" renewed motions. It claims that " 'all' means 'all' " such that section 1008(b) applies to renewed motions under section 473(b). ABM/32 (initial capitalization and boldface omitted). But things are not so simple.

Although the word "all" is unlimited on its face, courts have construed it in as limited in its effect. *See County of Yolo v. Los Rios Community College Dist.*, 5 Cal.App.4th 1242, 1254 (1992) (although Educ. Code § 5420 is "broad enough to encompass *all* of [a] county's so-called administrative costs, including the maintenance of voter files," for a community college district election, it does *not* encompass the cost of maintaining voter files (ital. added)); *Cook v. Superior Court*, 4 Cal.App.3d 822, 828-29 (1970) ("*all* ... device[s] ... intended for the projection or release of tear gas" under former Pen. Code § 12402 nevertheless *exclude* a "tear gas shell, cartridge or bomb" (ital. added)); *see also Younger v. Superior Court*, 21 Cal.3d 102, 113-14 (1978) (reading former Health & Saf. Code § 11361.5's language requiring destruction of *all* marijuana arrest and conviction records as limited in context to require destruction of only *some* records).

Indeed, to construe the word "all" *in section 1008(e) itself* as limited in its effect would not break new ground. *In re Marriage of Hobdy*, 123 Cal.App.4th 360 (2004)—a decision to which we shall return—addressed a conflict between former Family Code section

2030(a) (present Fam. Code § 2030(c) ("section 2030")) and section 1008(a). *Hobdy* held that section 1008(a) does not bar a motion to reconsider an order awarding attorney's fees in a marital dissolution proceeding. *Id.* at 364-73. Although *Hobdy* did not discuss the word "all" in section 1008(e), the Court was indisputably aware of that provision because it quoted the statute. *Id.* at 365. Notwithstanding that awareness, *Hobdy* went on to conclude: "[S]ection 2030 is narrowly tailored to apply only to attorney's fee orders and only to attorney's fee orders in family law matters. These subjects are not expressly addressed in section 1008, which on its face applies to *all* orders.... [S]ection 2030, being more specific, applies to the present situation to the exclusion of section 1008." *Id.* at 369 (ital. added).

No reported decision has criticized *Hobdy*'s holding. More significantly, under *Hobdy*, and because section 2030 does not limit the number of motions a party may make to reconsider an attorney's fees order, it is theoretically possible for a party to so move multiple times, without new or different facts, circumstances, or law. In contrast, in our situation, the ability of a party to make a renewed motion for mandatory relief from default is circumscribed by the six-month jurisdictional period in section 473(b)—thus imposing an outer limit on the number of times a party may move for such relief. Even EZ acknowledges that "the six month period in which a motion for relief from default makes it unlikely that a party could make many renewed motions for relief under Section 473(b)." ABM/52.

There is another significant difference between a motion to reconsider an attorney's fees order under section 2030 and a renewed motion for mandatory relief from default under section 473(b). There is no requirement in section 2030 that the attorney who moves for reconsideration must pay the other side's fees and costs if he or she successfully obtains reconsideration. Under section 473(b), however, the successful moving attorney must pay when his or her client obtains mandatory relief from default. *See* § 473(b), last sent. ("The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties."). Indeed, in granting defendants' motion, the trial court invoked this provision and required defendants' counsel to pay EZ some $34,000. 3AA/555. This fee-shifting provision acts as a significant deterrent to an attorney who seeks to renew a motion for mandatory relief under section 473(b).

To avoid the effect of *Hobdy*, EZ attempts to distinguish it, pointing out that it arose under the Family Code. But if "all" means "all," "all" in section 1008(e) would include "all" motions for reconsideration, no matter what type of proceeding in which the motion was made or what Code on which it was based. *Hobdy* thus is proof that "all" in section 1008(e) does *not* always mean "all."

Also to avoid *Hobdy*'s effect, EZ attempts to distinguish section 473(b). EZ relies on what it calls the "legislative history" of Senate Bill No. 1805 (1991-1992 Reg. Sess.), which amended

section 1008 in 1992 to provide that: (1) a court may *not* grant a motion for reconsideration *unless* the motion is made, within 10 days, upon new or different facts, circumstances, or law (section 1008(a)); (2) a court may *not* grant a renewed motion *unless* the motion is made upon new or different facts, circumstances, or law (section 1008(b)); and (3) "all" motions for reconsideration and "all" renewed motions are subject to these requirements (section 1008(e)). ABM/35-37.

According to EZ, "the Legislature was urged to exempt Section 473 from the requirements of Section 1008, but decided not to do so." ABM/37. Hardly.

In determining whether to enact Senate Bill No. 1805, the Legislature did not consider whether it should apply section 1008 to motions under section 473(b) for mandatory relief. Indeed, the Legislature did not even allude to the issue. That is not surprising. To judge from the reported decisions, the applicability of section 1008 to motions under section 473(b) was a non-issue. Certainly, no reported decision at the time even suggested that section 1008 might apply to such motions.

What the Legislature *did* consider was whether it should apply section 1008 to *interim* orders. It answered that question "yes" and amended section 1008 accordingly. In the findings and declarations accompanying the amendment, the Legislature stated that, "[s]ince the enactment of Section 1008 of the Code of Civil Procedure, some

California courts have found that the section does not apply to *interim* orders"; that, in amending section 1008, "it is the intent of the Legislature to clarify that no motions to reconsider any order made by a judge or a court, whether that order is *interim or final*, may be heard unless the motion is filed within 10 days after service of written notice of entry of the order, and unless based on new or different facts, circumstances, or law"; that, in amending section 1008, "it is the further intent of the Legislature to clarify that no renewal of a previous motion, whether the order deciding the previous motion is *interim or final*, may be heard unless the motion is based on new or different facts, circumstances, or law"; and that "[i]nclusion of *interim* orders within the application of Section 1008 is desirable in order to reduce the number of motions to reconsider and renewals of previous motions heard by judges in this state." Stats. 1992, c. 460, § 1 (ital. added).

After the Legislature enacted Senate Bill No. 1805, but before the Governor signed it, the State Bar's Committee on Administration of Justice asked the State Bar's Chief Legislative Counsel to urge the Governor to veto the bill because the bill appeared to unconstitutionally deprive courts of their inherent power to reconsider interim orders. Mot. for Judicial Notice, J. Raymond Decl. 2:147-55; *see id.* at 160-61. The State Bar's Chief Legislative Counsel ended up not complying with the request. *Id.* at 162. Instead, he offered to work with the author of another measure, Assembly Bill No. 2616 (1991-1992 Reg. Sess.), which ran parallel to Senate Bill No. 1805, and draft a bill that would amend section

1008 by adding subdivision (h), which would state that "[t]his section shall not prevent the making or granting of a motion for relief pursuant to Section 473." *Id.* at 164. No such bill was ever introduced, however.

"Unpassed bills, as evidences of legislative intent, have little value." *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1396 (1987). For example, the introduction of a bill exempting a mandatory section 473(b) motion from section 1008's scope might suggest that the author believed the bill was necessary because such a motion does come within section 1008. Alternatively, the failure of such a bill might suggest that legislators believed the bill was unnecessary because such a motion does *not* come within section 1008. The "light shed by such unadopted proposals," however, "is too dim to pierce statutory obscurities." *Grupe Development Co. v. Superior Court*, 4 Cal.4th 911, 923 (1993) (internal quotation marks omitted).

If *unpassed* bills have little value as evidence of legislative intent, bills that were *never introduced* have even less value. *See Grosset v. Wenaas*, 42 Cal.4th 1100, 1117 (2008) ("As a principle of statutory construction, legislative inaction is a 'slim reed upon which to lean.' "). In the ordinary case, the Legislature's silence carries no meaning. *Cf. Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) ("Ordinarily, 'Congress' silence is just that—silence.' "). This is not an extraordinary case, nor does EZ assert that it is. And here we have even less than "silence,"

since the Legislature never had occasion to decide whether it *should* be silent.

3. EZ Is Wrong About The Interplay Of The Two Statutes

EZ's claim that sections 473(b) and 1008(b) can be "harmonized" also depends on its reading of the two statutes' interplay. ABM/28-47. As EZ's reading of each statute is wrong, so too is its reading of their interplay.

EZ claims this Court should read the two statutes to *prohibit* a court from granting a renewed motion for mandatory relief from a dismissal, default, or default judgment, *even if* the motion is made within six months, in proper form, and with an attorney's affidavit of fault, *unless* the motion is made upon new or different facts, circumstances, or law. ABM/28-47. But far from "harmonizing" the two statutes, this simply ignores section 473(b) in favor of section 1008(b)—precisely what the Court of Appeal did and what *Standard Microsystems Corp. v. Winbond Electronics Corp.*, 179 Cal.App.4th 868 (2009) refused to do.

In other words, EZ's reading puts the two statutes into conflict and "resolves" the conflict by concluding that section 1008(b) prevails over section 473(b). This would mean that whenever section 473(b) would *require* a court to grant a motion for mandatory relief, section 1008(b) would *prohibit* it from doing so if the motion was renewed without new or different facts, circumstances, or law.

EZ's reading, moreover, is based on wordplay. Recall that section 473(b)'s mandatory relief provision is triggered "whenever *an* application for relief is made timely and in proper form. § 473(b) (ital. added). EZ asserts that the "an" in section 473(b) restricts a motion for mandatory relief to a *single* original motion, precluding any renewed motion that does not comply with section 1008(b). ABM/39. Not so.

"An" is an indefinite article. *See* Merriam-Webster Online Dictionary, "a," *available at* http://www.merriam-webster.com/-dictionary/a?show=0&t=1393081989 (as of Mar. 5, 2014). As such, "an" is "used before singular nouns when the person or thing is being mentioned for the first time." *Id.* It is *not* used to denote *the one and only* person or thing being mentioned. *See id.* Indeed, as with all provisions of the Code of Civil Procedure, "the singular number includes the plural." Civ. Proc. Code § 17(a).

EZ then asserts that the "whenever" in section 473(b) does *not* mean "whenever." ABM/39-40. According to EZ, "[i]n the context of the surrounding language," "whenever" "merely means that relief is mandatory 'in any case' where the application is timely filed in compliance with the statutory conditions." ABM/39-49. EZ is again wrong.

Generally, "whenever" is a temporal adverb. *See* Merriam-Webster Online Dictionary, "whenever," *available at* http://-merriam-webster.com/dictionary/whenever (as of Feb. 22, 2014).

As such, it means "as often as," "at any time," "at any time when," "at whatever time," "at whatever time it shall happen," and "at what time soever." *Morse v. Custis*, 38 Cal.App.2d 573, 576-77 (1940) (internal quotation marks omitted).

"[W]henever" is also a temporal adverb as used in section 473(b). The Legislature added "whenever" to section 473(b) when it amended the statute in 1991. Stats. 1991, c. 1003, § 1. It did so to convey a temporal sense—to provide that a party may move for mandatory relief *at any time* within the six-month period, whether or not during that period the party acted in a timely fashion or with diligence. *See Douglas v. Willis*, 27 Cal.App.4th 287, 292 (1994) (in amending section 473(b) in 1991, the Legislature "eliminated the timeliness/diligence requirement with reference to an attorney affidavit, and required only that the motion be filed within six months after entry of judgment"). By so providing, the Legislature did *not* provide, as EZ suggests, that a party could make such a motion *only once*.

The Legislature has provided that if a party satisfies the conditions of section 473(b), the party is entitled to relief. That is so even if the party satisfies those conditions in a renewed motion for such relief without offering new or different facts, circumstances, or law.

EZ asserts that, even if "whenever" in section 473(b) requires a court to grant mandatory relief "any time" its conditions are

satisfied, section 473(b) incorporates section 1008(b)'s requirement of new or different facts, circumstances, or law. ABM/40.

To support this argument, EZ offers this syllogism: Section 473(b) requires any motion for mandatory relief to be made "in proper form"; section 1008(b) imposes "procedural requirements" for any renewed motion (new or different facts, circumstances, or law); therefore, section 1008(b) imposes those requirements for a renewed motion for mandatory relief. *Id.*

But EZ's minor premise is false: Section 1008(b)'s requirement that a renewed motion must be made upon new or different facts, circumstances, or law is *substantive*, not *procedural*. The "form" of the motion does not matter. That is, section 1008(b) does not require a party to make the motion in some specified mode, manner, or form. *See Darling, Hall & Rae v. Kritt*, 75 Cal.App.4th 1148, 1155 (1999) (section 1008(b) requires a "*showing* of 'new or different facts, circumstances, or law' " for a renewed motion (ital. added), not merely an *allegation* of such facts, circumstances, or law.).

Because EZ's reading of the interplay of sections 473(b) and 1008(b) does not "harmonize" them, this Court cannot avoid deciding whether, in the event of a conflict, section 473(b) prevails over section 1008(b).

4. EZ Is Wrong About How This Court Should Resolve The Conflict Between The Two Statutes

EZ's claim is ultimately that if sections 473(b) and 1008(b) cannot be "harmonized," section 1008(b) prevails over section 473(b) in the event of a conflict. ABM/48-53. To conclude otherwise, EZ says, this Court would need to "rewrite" the two statutes—which is prohibited, since "courts are not free to rewrite statutes to conform to their own views of 'public policy.' " ABM/48. EZ's argument lacks substance.

When, as here, one statute conflicts with another, a court is compelled to determine which prevails over which. *See Center for Public Interest Law v. Fair Political Practices Com.*, 210 Cal.App.3d 1476, 1478-79 (1989) (court was compelled to determine which of two conflicting statutes prevailed over the other). If this were not true, a court could not perform its " 'job,' " which is to " 'decide cases.' " *Allen v. Stoddard*, 212 Cal.App.4th 807, 817 (2013). For unless a court first determines what law (including which of two conflicting statutes) applies, the court cannot decide the case. *See Center for Public Interest Law*, 210 Cal.App.3d at 1478-79 (determining which of two conflicting statutes prevailed so as to decide mandate proceeding).

Obviously, to determine which of two conflicting statutes applies, the court must determine which one prevails over the other. *See Turner v. Association of American Medical Colleges*, 193 Cal.App.4th 1047, 1069 (2011) (one conflicting statute must

prevail over the other to be applicable). To do so, the court must look initially to the rules of statutory construction, *id.* at 1064-71, and ultimately to the "public policy considerations" that motivated the Legislature to enact or amend the statutes in question, *id.* at 1069.

Here, the rules of statutory construction show that in the event of a conflict, section 473(b) prevails over section 1008(b). *See* OBM/37-40.

One such rule is that a remedial statute prevails over one that may result in procedural forfeiture. Section 473(b) is "remedial," *People ex rel. Reisig v. Broderick Boys*, 149 Cal.App.4th 1506, 1517 (2007), intended to enable innocent clients to proceed to "trial and disposition on the merits" by entitling them to relief from a dismissal, default, or default judgment that was caused by their errant attorney, *Elston v. City of Turlock*, 38 Cal.3d 227, 233 (1985). In contrast, section 1008(b) may result in "procedural forfeiture," *California Correctional Peace Officers Assn. v. Virga*, 181 Cal.App.4th 30, 48 (2010) (ital. and internal quotation marks omitted), barring innocent clients from enjoying their day in court, despite the strength of their case, solely because their errant attorney first moved unsuccessfully for mandatory relief without candor or diligence and then renewed the motion without new or different facts, circumstances, or law. It follows that, in the event of a conflict, section 473(b) prevails over section 1008(b).

Another such rule is that, in the event of a conflict, a specific statute prevails over a general one. The Legislature codified this rule in 1872, and it is still valid today. Civ. Proc. Code § 1859 ("[W]hen a general and particular provision are inconsistent, the latter is paramount to the former."). Section 473(b) is more specific than section 1008(b), applying only to motions for mandatory relief from a dismissal, default, or default judgment, while section 1008(b) applies to all renewed motions. Thus, here too, in the event of a conflict, section 473(b) prevails over section 1008(b).

Yet another rule of statutory construction is that a later statute is "not construed as an 'implied repeal' " of an earlier one "unless it is clear" that the Legislature "intended [the later one] to supersede" the earlier one. *California Oak Foundation v. County of Tehama*, 174 Cal.App.4th 1217, 1221 (2009). "All presumptions are against a repeal by implication." *Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 45 Cal.4th 557, 573 (2009) (internal quotation marks omitted). Section 1008(b) is the later statute, with its relevant language added in 1992. Section 473(b) is the earlier statute, with *its* relevant language added in 1988 and 1991. *See* OBM/27-28. In this case, the presumption against implied repeal is *not* rebutted because there is no clear evidence that the Legislature intended section 1008(b) to supersede section 473(b). *See* OBM/45-46.

Hobdy, cited above, is in accord. As noted, that case involved former Family Code section 2030(a), which provided that, in a marital dissolution proceeding, "[f]rom time to time and before

entry of judgment, the court may augment or modify [an] original award for attorney's fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding related thereto ...." Stats. 1993, c. 219, § 106.1. (Present Family Code section 2030(c) incorporates the substance of former section 2030(a).)

In *Hobdy,* after the trial court granted the husband's request to enter the wife's default on the husband's dissolution petition, the wife moved to set aside the default and for sanctions and attorney's fees. The trial court set aside the default but denied sanctions and fees. 123 Cal.App.4th at 362-63. The wife then filed an OSC for various orders, including section 2030(a) attorney's fees. At the OSC hearing, the trial court concluded that the husband would be responsible for the wife's fees and ordered her to submit a declaration for the fees she had incurred in the OSC proceeding. The court apparently rejected the husband's argument that the fee request was an improper section 1008(a) motion to reconsider the original order denying fees. *Id.* at 363-64.

The Court of Appeal upheld the fee order, rejecting the husband's claim that the trial court lacked jurisdiction under section 1008(e) to reconsider its fee order. *Id.* at 364-73. It first disagreed with the wife's claim that the OSC request for attorney's fees was *not* a motion to reconsider. It concluded that, in both the original and OSC "motions," the "wife was requesting attorney's fees

incurred in prosecuting the individual motion as well as future proceedings." *Id.* at 363 n.4.

Hobdy went on to hold that a "section 2030 request for attorney's fees that is filed after an earlier denial of such fees need not comply with section 1008." *Id.* at 365. It concluded that neither statute impliedly repealed the other. It found that both statutes had similar "bloodlines," going back to the Civil Code of 1872, and that both had "coexisted" since then in various forms; it "assume[d]" that the Legislature was "aware of the provisions of [each] statute" when it "amended, repealed or added provisions" to the other; it then concluded that "it is unlikely that the Legislature impliedly repealed any part of either statute." *Id.* at 367-69.

Hobdy concluded that "section 2030 is narrowly tailored to apply only to attorney's fee orders and only to attorney's fee orders in [certain] family law matters. These subjects are not expressly addressed in section 1008, which on its face applies to all orders.... [S]ection 2030, being more specific, applies to the present situation to the exclusion of section 1008." *Id.* at 369.[1]

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1 Although *Hobdy* explained that "statutory construction rules" "compel[led]" its affirmance of the fee order, it added that "courts have been cautious in applying section 1008 outside of civil actions and that not all provisions of the Code of Civil Procedure apply to family law matters." *Id.* at 367. Although this "caution" may not be relevant to whether section 473(b) prevails over section 1008(b), it was neither necessary nor sufficient for *Hobdy*'s conclusion: that

(fn. continued on next page)

Like section 2030(a), section 473(b) has "bloodlines" going back to the Civil Code of 1872, and has "coexisted" with section 1008(b) since then in various forms. The Legislature must have been aware of section 473(b) when it amended section 1008(b) in 1992. Absent contrary evidence, it cannot be concluded that the Legislature impliedly repealed section 473(b). Moreover, just as section 1008(a) applies to all motions for reconsideration yet permits a motion to reconsider a fee order under Family Code section 2030(c), section 1008(b) applies to all renewed motions yet permits a renewed motion for mandatory relief under section 473(b).

Looking ultimately to the public policy considerations that motivated the Legislature to enact and amend section 473(b) and section 1008(b), *see* OBM/40-43, this Court should conclude that, in the event of a conflict, section 473(b) prevails over section 1008(b).

To be sure, the public policy underlying section 1008(b) is weighty. That policy is aimed at conserving judicial resources by reducing the number of renewed motions. But the public policy underlying section 473(b) is also weighty. It is aimed at protecting innocent clients from the consequences they would otherwise suffer at the hands of errant attorneys. At the same time, by placing the burden on errant attorneys rather than innocent clients, section

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(fn. continued from previous page)

"caution" merely "bolstered" its holding, which was "compelled" by statutory construction rules. *Id.*

473(b) also conserves judicial resources. By mandating relief from a dismissal, default, or default judgment for which an attorney was responsible, the statute eliminates the need for the client to burden the court with a legal malpractice action.

The public policy underlying section 473(b) is weightier than the policy underlying section 1008(b). Section 473(b) not only conserves judicial resources but also protects litigants most in need—innocent clients who have suffered a non-merits forfeiture because of their errant attorney.

Here too *Hobdy* is in accord. The Court of Appeal looked to the public policy considerations that motivated the Legislature to enact and amend sections 2030 and 1008(a). 123 Cal.App.4th at 371. It focused on the policies underlying section 2030, which were to further "simple and expedient resolution of attorney's fees issues in a dissolution action" and assure "the parties' access to legal representation": "These policies ... are accomplished by treating section 2030 as an exception to the procedural requirements of section 1008. The vicissitudes of family law proceedings dictate that trial judges must have maximum flexibility in ensuring that each party has the means to pay for counsel. To hold otherwise would frustrate those policies." *Id.*

Section 473(b) is similarly informed. It would be unreasonable to cause section 1008(b)'s policy to frustrate section

473(b)'s policy that protects litigants from forfeitures and conserves judicial resources.

EZ next argues that to conclude that section 473(b) prevails over section 1008(b) in the event of a conflict "would effectively nullify" section 1008(b) "altogether." ABM/49-51. This is hard to fathom, since section 473(b)'s scope is narrow while section 1008(b)'s scope is broad. If section 473(b) does displace section 1008(b), it does so only minimally.

EZ, however, argues that, if section 473(b), a remedial statute, prevails over section 1008(b), which may result in procedural forfeiture, then in the event of a conflict, all of the "numerous remedial statutes in California" would similarly prevail over section 1008(b), effectively nullifying section 1008(b). ABM/49. This argument lacks merit, since only when the two statutes conflict does section 473(b) prevail over section 1008(b).

EZ lists the following as representative of California's "numerous remedial statutes":

- Vehicle Code section 16000 et seq., governing financial responsibility for the owners of motor vehicles;
- Unspecified provisions scattered throughout the Labor Code regulating wages, hours, and working conditions;
- Code of Civil Procedure section 170 et seq., governing the disqualification of judges;

- Health and Safety Code section 1417 et seq., regulating long-term health care facilities;
- Code of Civil Procedure section 526a, governing taxpayer standing;
- Health & Safety Code section 25249.5 et seq., enacted by the electorate at the November 1986 General Election as Proposition 65, governing the discharge of carcinogenic or reproductively toxic chemicals;
- Civil Code section 8000 et seq., regulating mechanic's liens;
- Code of Civil Procedure section 1263.010 et seq., governing eminent domain; and
- Civil Code section 1747 et seq., regulating credit cards and credit card transactions.

None of these statutes, however, even *potentially* conflicts with section 1008(b). That is, none requires a court to grant any renewed motion that section 1008(b) would prohibit the court from granting when the motion is unaccompanied by new or different facts, circumstances, or law. EZ thus fails to show that section 1008(b) would be nullified if section 473(b) prevailed over section 1008(b) in the event of a conflict.

EZ then argues it is unnecessary to conclude that section 473(b) prevails over section 1008(b) in the event of a conflict "because ... it should rarely if ever be necessary for a party to make a renewed motion" for mandatory relief. ABM/51-53. Defendants

agree that it should rarely if ever be necessary for a client to make such a renewed motion—meaning the conflict between the two statutes should rarely if ever arise. But defendants disagree with the conclusion EZ draws from its premise—that it is unnecessary to conclude that section 473(b) prevails over section 1008(b) in the event of a conflict.

Perhaps it is rare that a client's attorney is lacking in candor and diligence in making a motion under section 473(b) for mandatory relief. And perhaps it is rare that a trial court errs in denying such a motion. But that sometimes happens, as this case reveals. *See, post*, at 28-36. And when it does, sections 473(b) and 1008(b) may come into conflict, and the former should govern over the latter, for the reasons stated.

Finally, EZ attacks *Standard Microsystems* and relies on *Gilberd v. AC Transit*, 32 Cal.App.4th 1494 (1995), *Garcia v. Hejmadi*, 58 Cal.App.4th 674 (1997), and *Pazderka v. Caballeros Dimas Alang, Inc.*, 62 Cal.App.4th 658 (1998). ABM/41-47. That attack fails.

First, EZ's reliance on *Gilberd*, *Garcia*, and *Pazderka* is misplaced. None addressed the interplay of sections 473(b) and 1008(b). *Gilberd* and *Garcia* each involved only a motion based, in the alternative, on section 1008(a), seeking reconsideration of one or more orders, and on section 473, seeking *discretionary* relief from the order or orders in question. *Pazderka* involved only a motion

under section 1008(a) to reconsider an attorney's fees order and a separate motion under section 473(b) for *discretionary* relief from a judgment entered pursuant to a settlement under Code of Civil Procedure section 998. None of the three decisions involved reconsideration of an order under section 473(b) for discretionary or mandatory relief, nor did they involve renewal of any previous motion for such relief.

To be sure, in its discussion, *Gilberd* stated: "To hold ... that the general relief mechanism" provided in section 473 could be used to circumvent the jurisdictional requirements for reconsideration" found in section 1008 "would undermine the intent of the Legislature" to prohibit a court from granting a motion for reconsideration unless the motion is made upon new or different facts, circumstances, or law. 32 Cal.App.4th at 1501. *Gilberd* implied that section 473(b) did not prevail over section 1008(a) in the event of a conflict. Whether *Gilberd* was correct insofar as section 473(b) *allows discretionary* relief is of no consequence here, since we are concerned solely with *mandatory* section 473(b) relief.

But *Gilberd* was erroneous insofar as section 473(b) *requires mandatory* relief. For *Gilberd* ignored the Legislature's intent *mandating* relief whenever the motion is made within six months, in proper form, and with an attorney's affidavit of fault. *Gilberd* also ignored the rules of statutory construction that establish that section 473(b) prevails over section 1008(b), at least so far as section 473(b)

requires mandatory relief. And *Gilberd* ignored the public policy considerations that confirm that conclusion.

In addition, EZ's attack on *Standard Microsystems* misses the target. EZ asserts that *Standard Microsystems* "is distinguishable on its facts"; that it "addressed the issue presented here," i.e., whether section 473(b) prevails over section 1008(b) in the event of a conflict, "only in dicta"; and that, "[i]n any event, its reasoning is flawed." ABM/42-43. EZ made much the same assertion in its answer to the petition for review. Answ. Pet. Rev. 16-32. Defendants countered that assertion in their reply. Repl. Answ. Pet. Rev. 2-14.

Be that as it may, that attack proves fruitless. Even if *Standard Microsystems* were "distinguishable on its facts," its analysis remains sound. And even if *Standard Microsystems* had "addressed" whether section 473(b) prevails over section 1008(b) "only in dicta," that dicta is instructive. Lastly, even if *Standard Microsystems*' "reasoning" were "flawed," this Court should nevertheless refine that reasoning and hold that section 473(b) prevails over section 1008(b) in the event of a conflict.

B. Contrary To EZ's Claim, Whether The Trial Court Erred When It Denied Defendants' Original Motion Under Section 473(b) Is Properly Before This Court And This Court Should Hold That The Trial Court Erred

EZ's second claim is that this Court may not consider whether the trial court erred in denying defendants' original motion under section 473(b). It claims that that issue is not properly before the Court but that if the Court decides that issue, it should hold that the trial court did not err. ABM/54-57. This claim also lacks merit.

California Rule of Court 8.516(b)(1) provides that "*any* issues that are raised or fairly included in the petition or answer" are properly before this Court on review. (Ital. added.) In the petition for review, defendants raised the issue of the trial court's error in denying defendant's original section 473(b) motion for mandatory relief. *See* Pet. Rev. 30. EZ responded to the issue. *See* Answ. Pet. Rev. 32-33. EZ's response placed the issue before the Court. *See Goldstein v. Superior Court*, 45 Cal.4th 218, 225 n.4 (2008) (concluding that certain "statutory claims ... are properly before us" because one of the parties "did include his statutory arguments in his answer to the petition for review").

Even if the parties did not squarely raise this issue, they fairly included it in their submissions. Any consideration of whether the trial court erroneously granted defendants' renewed motion for mandatory relief naturally extends to whether it erred in denying their original motion.

EZ nevertheless asserts that this Court "granted review to decide" whether, in the event of a conflict, section 473(b) prevails over section 1008(b) or vice versa, and "not the fact-bound question" whether the trial court erred in denying defendants' original motion. ABM/5. But the Court did not specify the section 473(b)-section 1008(b) issue as the sole issue on review—indeed, it did not specify any issue. Moreover, the Court regularly decides "fact-bound questions" on review. *See People v. Wright*, 40 Cal.4th 81, 98-99 & n.10 (2006) (deciding fact-bound issue of prejudice); *Shulman v. Group W Productions, Inc.*, 18 Cal.4th 200, 233 n.13 (1998) (deciding fact-bound issue of whether victims had reasonable expectation of privacy at accident scene).

EZ is also wrong in urging that the trial court properly denied defendants' original motion for mandatory relief. ABM/55-57. That is because defendants satisfied the conditions for such relief.

First, defendants made that motion within six months. *See* 1 Appellant's Appendix (AA) 174-75, 180-88. The six-month period opened with the entry of the default judgment on December 8, 2011. 1AA/174-75. Defendants filed their motion a mere eight days later. 1AA/180-88.

Second, defendants' original motion was in proper form. *See* 1AA/180-88. Although it should have been "accompanied by a copy of the answer" that defendants proposed to file, § 473(b), the motion substantially complied with that requirement by stating that

defendants had "good and meritorious defenses" to the effect that EZ "engaged in fraud, self-dealing, negligent misrepresentation and breach of fiduciary duty," 1AA/184. *See Carmel, Ltd. v. Tavoussi*, 175 Cal.App.4th 393, 402-03 (2009) (defendants "substantially complied" by proffering a proposed answer at the hearing on the motion).

Third, defendants accompanied that motion with an attorney's affidavit of fault. *See* 1AA/186-87. Daniel A. Gibalevich, who was then defendants' sole attorney, declared that "my mistake and excusable neglect resulted in the entry of defaults and default judgements [*sic*] against the Defendants." 1AA/186.

> ... Beginning the end of August and through the first part of November of 2011, I had to spend substantial amounts of time away from the office. I had to attend to certain personal issues that required my undivided attention. I believed that I had sufficient staff to assure competent handling of client files. My associates were instructed to notify me immediately of issues that would require my personal attention. It appears that my staff failed to maintain this file in accordance with this firm's policies and procedures.
>
> ... Due to my frequent absences, I failed to file and serve the responsive pleading. Since the responsive pleading was never filed or served, defaults were taken against the Defendants. Had I filed the responsive pleading on time, prior to defaults being taken, the

> defaults and possible default judgments would have been avoided. It is clear that my mistake and excusable neglect resulted in the entry of defaults and default judgments against the Defendants.

Id.

Under section 473(b), an attorney's affidavit of fault must "attest[ ] to his or her mistake, inadvertence, surprise, or neglect." Gibalevich's declaration did attest expressly to his "mistake" and his "neglect." It is immaterial that it characterized the "neglect" as "excusable" rather than "inexcusable." Section 473(b) "*require*[*s*] the court to grant relief if the attorney admits neglect," whether the attorney characterizes the neglect as excusable or inexcusable. *Metropolitan Service Corp. v. Casa de Palms, Ltd.*, 31 Cal.App.4th 1481, 1487 (1995) (ital. orig.); *see Beeman v. Burling*, 216 Cal.App.3d 1586, 1604 (1990) (whereas previously section 473(b) recognized only excusable neglect," now it "provides relief ... founded on an attorney's neglect, regardless whether it may be characterized as excusable").

Because defendants satisfied the conditions requiring relief from the defaults and default judgment, the trial court *had* to grant the motion "unless" it found they were "not in fact caused by" Gibalevich's mistake and neglect. § 473(b). But the trial court *did not* and *could not* so find. Rather, it stated only that Gibalevich's declaration was "not credible in light of the showing made" by EZ

that EZ directly informed Gibalevich of the events resulting in the entry of the defaults and default judgment, and that any failure by Gibalevich's staff to inform him of those events was inconsequential; that the declaration was "entirely too general"; that the declaration did not "show ... Gibalevich is solely at fault in not filing a timely responsive pleading"; and that Gibalevich "tries to have it both ways: see ... his declaration, which claims he has demonstrated 'excusable neglect.' He has not demonstrated excusable neglect." 2AA/340.

In stating as it did, the trial court implied that Gibalevich could not shift responsibility for the "mistake and neglect" that led to the entry of the defaults and default judgment to his staff, as he had attempted to do in conclusory fashion. The court implied that, instead, Gibalevich alone had to bear the responsibility for his "mistake and neglect," and that his "neglect" had to be characterized as "inexcusable" rather than "excusable."

Although stating that Gibalevich's declaration did not "show ... Gibalevich is *solely* at fault" for the entry of the defaults and default judgment, the trial court could not reasonably have implied that *either* defendant was at fault *in any part*. There were only two defendants: One was a natural person, Dr. Samuel Fersht, who was Gibalevich's stepfather; the other was a legal entity, Bellaire Townhouses, LLC, a limited liability company whose sole and equal members were Dr. Fersht and Israel Even Zohar, EZ's principal. There was *no* evidence, and certainly not the *substantial* evidence

that would have been necessary to support a finding, that Dr. Fersht himself, or Bellaire acting through Dr. Fersht, might somehow have engineered the entry of the defaults and default judgment for some reason. Lacking any such evidence, EZ nevertheless speculated that Dr. Fersht decided to suffer defaults and a default judgment of more than $1.7 million so as to increase EZ's attorney's fees by less than $25,000. 1AA/194, 206. EZ's speculation was irrational. Why would Dr. Fersht subject himself to a substantial judgment that he might not be able to have vacated in order to expose EZ to a relatively small increase in attorney's fees, especially when the price he would have to pay to vacate the judgment would be payment of EZ's attorney's fees? But even if EZ's speculation were not irrational, it would be still be speculation. And "speculation is not evidence, less still substantial evidence." *People v. Waidla*, 22 Cal.4th 690, 735 (2000) (internal quotation marks omitted).

EZ asserts that the denial was subject to review for substantial evidence and that the denial survived such review. ABM/55-57. EZ acknowledges that, although an order like the trial court's denial of defendants' original motion is subject to " 'substantial evidence' " review " '[w]here the facts are in dispute,' " it is " subject to de novo review' " where it " 'does not turn on disputed facts.' " ABM/56 n.27 (quoting *Carmel*, 175 Cal.App.4th at 399).

Because defendants satisfied the conditions for mandatory relief, there was only one fact material to deciding the motion—whether the entry of the defaults and default judgment was "in fact

caused by" something other than Gibalevich's mistake and neglect. Although there was evidence, in the form of Gibalevich's express admission in his declaration, that his mistake and neglect caused the defaults and default judgment, there was *no* evidence that anything else contributed.

As shown, the trial court impliedly found that Gibalevich's mistake and neglect were his alone and that his neglect was inexcusable. Defendants have not challenged those findings. Why would they? The findings support defendants' showing that Gibalevich's mistake and neglect did cause the defaults and default judgment. And the findings complement defendants' showing that nothing else contributed.

EZ asserts that this Court should sustain the denial of defendants' original motion based on the trial court's finding that Gibalevich's declaration was "not credible." ABM/56. According to EZ, the court made an "adverse credibility finding" against Gibalevich, and the court's "adverse credibility finding is 'conclusive on appeal.' " *Id.*

Yes ... but there is a but: The bite of the trial court's finding favors defendants, not EZ. The court did not believe Gibalevich as he attempted to shift responsibility for his admitted "mistake and neglect" which led to the entry of the defaults and default judgment from himself to his staff. Nor did the court believe Gibalevich as he attempted to characterize his "neglect" as "excusable" rather than

"inexcusable." Accordingly, the court found that Gibalevich was chargeable with "mistake" and "inexcusable neglect." In the absence of any evidence that anything else contributed to the defaults and default judgment, the court's finding should have resulted in granting defendants' original motion, not denying it.

EZ also asserts that this Court should sustain the trial court's denial of defendants' original motion based on the trial court's finding that Gibalevich's declaration was "entirely too general." ABM/56. According to EZ, the court found the declaration "too conclusory" to require the granting of the motion. ABM/57. But section 473(b) "*require[s]* the court to grant relief if the attorney admits neglect," whether the attorney characterizes the neglect as excusable or inexcusable. *Metropolitan Service*, 31 Cal.App.4th at 1487 (ital. orig.). Gibalevich admitted "neglect" as well as "mistake," and admitted both expressly. 1AA/186.

EZ relies on *Cowan v. Krayzman*, 196 Cal.App.4th 907 (2011), and *State Farm Fire & Casualty Co. v. Pietak*, 90 Cal.App.4th 600 (2001), but in vain. In *Cowan*, an attorney executed a declaration that "did not unequivocally admit error"; indeed, the declaration effectively denied any "error," stating only that the attorney " 'reasonably believed' his client's representations, which he had no reason to 'question or challenge.' " 196 Cal.App.4th at 916. Similarly, in *Pietak*, an attorney executed two declarations, neither of which contained any "admission of fault"; in fact, the attorney submitted a legal memorandum expressly

denying any "neglect on his part." 90 Cal.App.4th at 609. Here, as noted, Gibalevich expressly admitted his "neglect" as well as his "mistake."

Although the trial court erred when it denied defendants' original motion, its error is understandable. Not without reason, the court found Gibalevich to be lacking in candor and diligence. But such a finding should have caused to court to grant the motion, not deny it. Although Gibalevich may have been lacking in candor and diligence, defendants were not. Although the attorney may have been errant, the clients were innocent. Where, as here, the attorney may have been greatly at fault, the clients were deserving of relief.

III.
CONCLUSION

The trial court correctly applied *Standard Microsystems* and granted defendants' renewed section 473(b) motion for mandatory relief, properly vacating the defaults and the default judgment. The Court of Appeal's reversal is based on a misreading of section 473(b)'s plain language and its underlying policy—language and a policy that, in this limited circumstance, prevail over section 1008(b). EZ's attempt to salvage the Court of Appeal's misreading

of section 473(b) comes up short. Accordingly, this Court should reverse the judgment of the Court of Appeal.

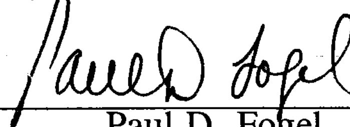
DATED: March 5, 2014.

Respectfully Submitted,

GIBALEVICH AND ASSOCIATES

JAMES S. LINK

REED SMITH LLP

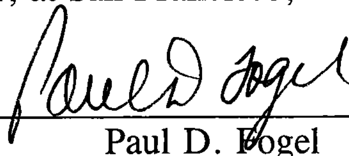
By: 
Paul D. Fogel

Attorneys for Defendants and Respondents Bellaire Townhouses, LLC, and Samuel Fersht, Individually and as Trustee of the Fersht Family Living Trust

WORD COUNT CERTIFICATE

This Reply Brief on the Merits contains 8,260 words (including footnotes, but excluding cover, tables, the signature block, and this certificate). In so stating, I have relied on the word count of Microsoft Office Word 2010, the computer program used to prepare the petition.

Executed on March 5, 2014, at San Francisco, California.


Paul D. Fogel

PROOF OF SERVICE

Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC, et al.
California Supreme Court No. S210804;
Second District, Div. Four, No. B239928; Los Angeles Super. Ct. No. BC458347

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On March 5, 2014, I served the following document(s) by the method indicated below:

REPLY BRIEF ON THE MERITS

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of 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 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 this Declaration.

Daniel B. Harris, Esq. 3450 Sacramento Street, Suite 108 San Francisco, CA 94118	Attorneys for Plaintiff and Appellant Even Zohar Construction & Remodeling, Inc. Tel: 415.994.1727 Fax: 415.723.7411 dbh2007@sbcglobal.net
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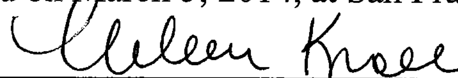
Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012-3014	

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 5, 2014, at San Francisco, California.



Eileen Kroll