**ATTORNEY’S FEES RED ALERT: Plaintiff’s Appellate & Enforcement Attorney Fee Awards Are At Risk in a Case Pending Before the California Supreme Court.**

By Carolina C. Rose

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The California Legislature has adopted a number of attorney fee shifting statutes to protect individuals or groups who would not otherwise have access to justice. (E.g. Welf. & Inst. C. §§ 15675 & 15657.5 (elder abuse), CCP §1021.5 (private attorney general doctrine), CCP § 426.16 (anti-SLAPP). Gov. C. § 31536 (denial of county public retirement application), and Civil Code § 2983.4 (Rees Levering automobile retail contracts).)

However now all such plaintiffs’ appellate and enforcement related attorney’s fees are threatened in a case currently before the California Supreme Court. The case could even adversely affect contractually based awards. If the defendant prevails, the Enforcement of Judgments Law will cut off the plaintiff’s ability to move for all reasonable, post-judgment appellate and enforcement attorney’s fees because the defendant rushed to pay the original judgment early, before all such fees could be awarded as mandated under the Financial Elder Abuse law.

The plaintiff’s Supreme Court Brief was filed October 30, 2013. Following is the opening statement from that filing:

This is a case about access to justice for … [plaintiff] … (a mentally and physically disabled 78-year old, who cannot read or write), other victims of elder abuse and civil litigants whose goal is to right a wrong under a statute that authorizes attorney fees. 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 society’s safety net to protect those who need it most.

After a jury trial, … [plaintiff] … prevailed in an action for financial elder abuse … Essentially, defendant, an attorney, intentionally defrauded an old woman with the competency of a child. 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***. [Emphasis added.]

Notably only the *original* judgment was paid. This is relevant because the Enforcement of Judgment statutes relied upon by the defendant require *full satisfaction* of the judgment (CCP Code §§ 658.070 and 685. 080) in order to bar payment of attorney’s fees as specified. Thus, at best, the defendant only made a *partial* payment because the judgment had not yet been amended to incorporate all the mandatory attorney’s fees and costs required under the financial elder abuse statute, Welf. & Inst. C. §15657.5 (a) which states in relevant part:

15657.5. (a) 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***. [Emphasis added.]

After the defendant paid the original judgment, the plaintiff moved for reasonable attorney fees and costs incurred in the appeal and separate lawsuit. The Alameda County Superior Court granted the victim plaintiff’s motion for fees (not costs). But on de novo review, the First District Court of Appeal, 4th Division, reversed in an unpublished opinion (Feb. 2, 2013, Case No. A34337.)

By agreeing with the defendant, the 1st DCA in effect found that the Enforcement of Judgment’s Law barred the elder abuse victim from seeking *all* reasonable post-judgment appellate and enforcement related attorney’s fees and costs under Welf. & Inst. C. § 15657.5, because the frail victim’s abuser had rushed to pay the original trial court judgment before all such fees could even be determined and applied for in a timely manner. According to the 1st DCA, the plaintiff’s motion for such fees was untimely because it followed defendant’s full satisfaction of the original judgment.

The official issue before the California Supreme Court is as follows: “Is a trial court award of statutorily-mandated fees and costs incurred on appeal subject to the Enforcement of Judgments Statutes (Code Civ. Proc., § 685.040 et seq.) if the statutory authority underlying the award is the Elder Abuse Act (Welf. & Inst. Code, § 15600 et seq.)?

Even though the issue is narrowly framed to only address the Elder Abuse Act, if the Supreme Court upholds the 1st DCA’s ruling, it will encourage all defendants such as the elder abuser defendant in the McQueen case whose evasive actions forced the plaintiff victim to undertake appellate and enforcement related actions in order to protect herself. Such defendants would be handed a template for violating the underlying protective statutory schemes with impunity:

* As long as plaintiffs could not be assured of their ability to recover all necessary and reasonable post-judgment appellate and enforcement related attorney’s fees, defendants would have an incentive to take any and all steps to avoid satisfying the original judgment knowing that their victims would never be able to pay the related appellate and enforcement fees out of their own pockets.
* Such defendants would not even have to rush to satisfy the original judgment early to avoid a potential downstream award of post-judgment appellate and enforcement attorney’s fees. As long as such defendants had the *right* to pay the original judgment early and thus avoid responsibility for all post-judgment attorney’s fees, plaintiffs would be strongly discouraged from incurring them in the first place.

The legislative history of the elder abuse attorney fee shifting statute reveals that it was adopted, in major part, to provide an incentive for attorneys to take such cases in order to protect a vulnerable and needy class of persons.

Subdivisions (a), (h) and (j) of Welf. & Inst. Code § 15600 read as follows:

(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***. … (Emphasis added.)

(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***. (Emphasis added.) …

(j) It is further the intent of the Legislature … to enable interested ***persons to engage attorneys*** to take up the cause of abused elderly persons and dependent adults. (Emphasis added.)

The 1991 California Legislature adopted the state’s first mandatory elder abuse attorney’s fees and costs law applicable to physical abuse, neglect and “fiduciary” abuse in Welfare & Institutions Code Section 15657 (a) in Stats. 1991, c. 774 (SB 679), Sec. 3. Thirteen years later in 2004, § 15657 was amended to strike the fiduciary abuse terms in 15657 and a new § 15657.5 was added to require the same “reasonable attorney’s fees and costs” for elder “financial abuse” cases. (Stats. 2004, c. 886 (AB 2611) Sec. 3. Sec. 4.).

The 1991 legislative history reveals that the primary problem addressed by the Legislature in SB 679 was that the award of attorney’s fees and costs in all elder abuse cases was only discretionary, not mandatory. Furthermore, such attorney’s fees could only be awarded out of the victims’ award which was often small to begin with. Also, elder abuse cases were often hard to prove. The 1991 Legislature believed that these problems impeded victims’ ability to sue successfully because there was *insufficient incentive* for plaintiffs’ attorneys to take such cases on contingency. The remedy chosen by the 1991 Legislature to address these problems was to eliminate the malfunctioning discretionary method of awarding attorney’s fees and costs in such cases and to require the abusers to pay them. (E.g., see the Senate Judiciary Committee on SB 679 (Mello), reflecting “author’s amendments to be offered in committee”, published May 8, 1991, Hearing date: April 30, 1991, 1991-92 Regular Session.) (My company, Legislative Research & Intent LLC provided the plaintiff with legislative history research and consulting services.)

This incentive so carefully wrought by the 1991 Legislature to encourage attorneys to take elder abuse cases would at least be partially extinguished if the 1st DCA’s ruling is upheld by the California Supreme Court. Will that Court hand these types of defendants a sword, allowing them to argue that the Enforcement of Judgments Law cuts off their victims’ ability to move for all reasonable, post-judgment appellate or enforcement attorney’s fees whenever a defendant rushes to satisfy the original judgment first, before a court has the opportunity to award such fees? If so, the Legislature would probably be urged to clarify and reaffirm its original intent by repudiating the decision.

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**ABOUT THE AUTHOR.** Carolina Rose (J.D., Stanford, 1976) is owner and President of Legislative Research & Intent LLC (LRI) which has researched the history and intent of more than 10,000 enactments for over 1,500 clients since 1983 (formerly Legislative Research, Inc.). Previously she worked for approximately 7 years in the California Legislature where she was responsible for over 200 bills. Ms. Rose is a recognized expert in the reconstruction of California legislative, regulatory and constitutional history and has written expert witness opinions or provided testimony or consulting in over 100 cases at the administrative, trial and appellate levels. Her website offers complimentary online research and advocacy resources at www.lrihistory.com. She can be reached at 800.530.7613 or carolina.rose@lrihistory.com.