ASCDC
Association of Southern California Defense Counsel

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September 15, 2017

Associate Justice Brian M. Hoffstadt
Acting Presiding Justice Victoria M. Chavez
Hon. Allan Goodman (Ret.)
California Court of Appeal
Second Appellate District, Division Two
300 S. Spring Street, 2nd Floor, N. Tower
Los Angeles, California 90013

Re: *Haroun v. BMW of North America, LLC*, B272279
Request for Partial Publication

Dear Justices Hoffstadt and Chavez and Judge Goodman:

Pursuant to rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Southern California Defense Counsel (ASCDC) writes to request that the court order partial publication of its opinion in this case with the exception of Section II.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. ASCDC is comprised of over 1,100 attorneys in Central and Southern California. ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and a forum for the exchange of information and ideas. ASCDC appears as amicus curiae in numerous cases before both the California Supreme Court and the Court of Appeal to express the interests and concerns of the civil litigation attorneys who are its members.

Sections I and III of the court's opinion readily satisfy the criteria for publication. In Section III the court rejects plaintiff's argument that, contrary to the plain language of the governing statute, costs can never be awarded to a prevailing defendant in claims brought under the Song-Beverly Act. (Typed opn. 9-10.) No published case has addressed this issue under the Song-Beverly Act, and the court's straightforward analysis would save lower courts and litigants the trouble of relitigating this issue.

The court properly observes that plaintiff's argument is contrary to the general rule that a prevailing party is entitled as a matter of right to the recovery of specified costs under Code of Civil Procedure section 1033.5, and that there should be no implied repeal of the right of the prevailing party to recover costs under the Song-Beverly Act. (Typed opn. 10.) Section III of the court's opinion therefore satisfies the criteria for publication because it "[e]stablishes a new rule of law," and "[a]pplies an existing rule of law to a set of facts significantly different from those stated in a published opinion." (Cal. Rules of Court, rule 8.1105(c)(1)-(2).)

Publication of Section III of the court's opinion would also foster the strong policy in favor of settlement. (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 930 [""[T]he law favors settlements""].) When each side bears risk if a case goes to trial, cases are more likely to settle. In situations where one side has all "upside" and no "down side"—such as when a losing party is immune from an award of costs, as advocated by the plaintiff here—cases are more difficult to settle. Therefore, publication of Section III of the court's opinion will provide further incentive for parties to settle claims brought under the Song-Beverly Act.

Section I of the court's opinion also satisfies the criteria for publication because it addresses two splits of authority regarding recoverable costs. In Section I.A of the opinion, the court addresses the recovery of costs for photocopies of exhibits prepared for trial but not actually introduced into evidence at trial. The court holds that recovery of these costs is permitted under *El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 618 and *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1298. (Typed opn. 5-6.) In doing so, the court rejected the plaintiff's argument that such costs are not recoverable under *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557-1558, where the court stated that costs for exhibits "not used at trial" are not recoverable costs. "[T]o the extent 'not used at trial' [in *Seever*] means they were simply not admitted as evidence, *Seever* is at odds with the case law cited above, and we choose to follow that other case law." (Typed opn. 6.) Publication is warranted because Section I.A of the court's opinion will aid lower courts and litigants in resolving any tension between existing cases on this issue. (See Cal. Rules of Court, rule 8.1105(c)(5).)

For similar reasons, Section I.B of the court's opinion, addressing the recovery of costs for a PowerPoint presentation, also satisfies the criteria for publication. In that section the court holds that costs for projectors and hiring assistants to create and use

PowerPoint presentations during trial are recoverable. (Typed opn. 7-8.) In doing so, the court follows *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 990-991, which permitted the recovery of such costs, and declines to follow *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1104-1105, where the court held that costs for hiring assistants to create and maintain trial exhibits were not recoverable. "We agree with *Bender* that *Science Applications'* refusal to award costs for technical assistance has been eclipsed by the march of technology, and we decline to follow it." (Typed opn. 8.) Accordingly, publication of Section I.B of the court's opinion is warranted because it too addresses and suggests a reasoned resolution of an apparent conflict in the law based on circumstances that have changed since the time of the earlier outdated decision in *Science Applications.* (Cal. Rules of Court, rule 8.1105(c)(5).)

In contrast, ASCDC is not requesting publication of Section II of the court's opinion. That section of the court's opinion does not satisfy the criteria for publication because it does not purport to create any new law or address any split of authority. That section in three sentences draws a distinction between "'official superior court reporters'" and "private court reporters hired by a litigant" in addressing whether the limitation on court reporter appearance fees contained in the Government Code applies equally to both. (Typed opn. 9.) The question of statutory limits on court reporter rates is, however, the central issue pending before this court in *Burd v. Barkley Court Reporters, Inc.*, B271694 (*Burd*). That case is fully briefed, including multiple amicus curiae briefs from parties representing differing interests.

In *Haroun,* it is not clear from the opinion that the parties undertook a searching analysis of the governing statutes to aid the court in its interpretation of the laws governing court reporter fees. In particular, this court cites only *Barwis v. Superior Court* (1978) 87 Cal.App.3d 239 (*Barwis*) and *Gamage v. Medical Board* (1998) 60 Cal.App.4th 936 (*Gamage*) for the proposition that the statutory fee schedule in Government Code section 69948 does not apply to private court reporters appointed as official reporters for trial court proceedings (typed opn. 9), but neither case contains a holding to that effect. The 1978 decision in *Barwis* held courts did not have subject matter jurisdiction to order private court reporters to transcribe an administrative proceeding at a fixed price, but the court indicated the rule would be otherwise for reporters appointed to transcribe proceedings related to pending court cases. (*Barwis,* at p. 242, fn. 4 [distinguishing authority regarding private parties such as notaries who are appointed as "official" court officers: "There is an obvious distinction between discovery proceedings in a superior court action and independent administrative

proceedings subject to review in the superior court. The former arises out of and exists because of the superior court action—it is a part thereof. However, administrative proceedings before a different tribunal do not arise out of and are not a part of a superior court action to review the administrative decision"].) The California Supreme Court later confirmed in *Serrano v. Stefan Merli Plastering Co., Inc*. (2011) 52 Cal.4th 1018 (*Serrano II*) that private court reporters reporting proceedings connected with a superior court action are, indeed, officers of the court subject to the court's jurisdiction, notwithstanding briefing in that case arguing that *Barwis* dictated otherwise. (See *id.* at p. 1021 [private deposition reporters are "ministerial officer[s] of the court"]; *id.* at p. 1027 [obligations of private deposition reporters, including what fees they can charge, are "determined by statute"]; see also *Serrano v. Stefan Merli Plastering Co., Inc*. (2008) 162 Cal.App.4th 1014, 1036 (*Serrano I*) [not regulating fees charged by private reporters, who have business incentives to inflate charges or unfairly allocate costs to litigants who are not repeat customers, "could very well result in a denial of due process"]; *Bar Assn. of San Diego v. Superior Ct.* (1923) 64 Cal.App. 590, 593-594 [deposition notary is officer of the court ex officio; "As such officer, he and all proceedings before him are subject to the control of the court"].)

The court in *Gamage,* meanwhile, partially followed *Barwis* with respect to courts' powers over reporters transcribing administrative proceedings, holding an agency must provide a transcript at statutory rates, but could potentially collect higher costs if the agency prevailed in the proceeding. But the court again did not reach the question of statutory construction underlying the question whether private court reporters sworn as the official reporter for specified trial court proceedings are governed by the same fee and transcription standards for court employed reporters. Moreover, the statutory language at issue in *Barwis* and *Gamage* regarding administrative hearing transcript rates was repealed in 2005, so the force of those opinions as to other statutes is in question. Finally, as this court notes (citing *Chaaban v. Wet Seal, Inc*. (2012) 203 Cal.App.4th 49), fees and transcript costs have been treated differently, so the *Barwis* and *Gamage* discussions of transcripts does not translate directly to the question before this court regarding fees. (Typed opn. 8-9.)

Accordingly, the court should avoid the potential confusion that would ensue from publication of Section II of its decision, and await the opportunity presented in *Burd* to address these questions based on full and thorough briefing of the issues.

Accordingly, ASCDC respectfully requests that this court order its opinion published with the exception of Section II.

Respectfully submitted,

HORVITZ & LEVY LLP
LISA PERROCHET
STEVEN S. FLEISCHMAN

By: 
Steven Fleischman

On behalf of **ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL**

cc: See attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

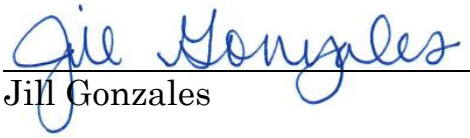
On September 15, 2017, I served true copies of the following document(s) described as **REQUEST FOR PARTIAL PUBLICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 15, 2017, at Burbank, California.



Jill Gonzales

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