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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| TAMARA BASKIN,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>HUGHES REALTY, INC.,<br><br>Defendant and Respondent. | B279645<br><br>(Los Angeles County Super. Ct. No. BC549215) |

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed and remanded with directions.

Metz & Harrison, Jeff A. Harrison and Sara Pezeshkpour for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Gregory F. Hurley and Michael J. Chilleen for Defendant and Respondent.

In the underlying action, appellant Tamara Baskin's original complaint sought injunctive relief under the Disabled Persons Act (DPA) (Civ. Code, §§ 54 - 55.3.), as well as injunctive relief and damages under the Unruh Civil Rights Act (Unruh Act) (Civ. Code, §§ 51, 52), alleging that there was no accessible path for persons with disabilities within the parking lot of a grocery store operated by respondent Hughes Realty, Inc. (Hughes). When Hughes modified the lot to create a path for persons with disabilities, Baskin filed an amended complaint for damages under the DPA and the Unruh Act, alleging that she had been deterred from patronizing the store before the path was established. After Baskin dismissed the Unruh Act claim, the trial court found that the DPA claim failed on its merits, and awarded attorney fees to Hughes under Civil Code section 55, which authorizes a fee award to the prevailing party in a DPA action for injunctive relief. We conclude that the trial court erred in issuing the award, and thus reverse.

## RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This is the second time this case has come before us on appeal. Baskin suffers from osteogenesis imperfecta, a bone disease that renders her unable to walk or stand independently, and requires her to use a wheelchair in order to be mobile. In June 2014, she initiated the underlying action against Hughes, which operates a Ralphs grocery store near

appellant's apartment. Baskin's original complaint asserted a claim under the DPA for injunctive relief to enforce accessibility-related building standards (Health & Saf. Code, § 19955 et seq.), and a claim for injunctive relief and damages under the Unruh Act.[1] The complaint alleged that the store's parking lot lacked a designated and accessible path for persons with disabilities.

In September 2015, upon learning that Hughes had created a path for persons with disabilities in the store's parking lot, Baskin filed her first amended complaint (FAC), asserting claims for damages under the DPA and the Unruh Act. After Baskin dismissed her Unruh Act claim, the trial court bifurcated trial on her remaining DPA claim. Following a bench trial on the issue of liability, the court ruled that the DPA claim, as alleged in the FAC, failed on its merits. In August 2016, the trial court entered a judgment in favor of Hughes and against Baskin, from which Baskin noticed an appeal. In a published decision, we affirmed that judgment. (*Baskin v. Hughes Realty, Inc.* (2018) 25 Cal.App.5th 184 (*Baskin I*).)

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[1] Although Baskin's original complaint did not expressly refer to the DPA, before the trial court and on appeal, the parties have agreed that the first of the two claims described above relied on the DPA.

In October 2016, Hughes requested an award of $28,008.84 in attorney fees under Civil Code section 55.[2] On November 17, 2016, the trial court awarded Hughes $28,008 in fees. This appeal followed.

## DISCUSSION

Baskin challenges the fee award, contending (1) that she -- not Hughes -- was the prevailing party on her DPA claim for injunctive relief, and (2) that Hughes failed to show that the fees it requested were incurred solely in connection with the DPA claim for injunctive relief. As explained below, we agree with both contentions.

### A. *Governing Principles*

We begin by describing the key features of the DPA and Unruh Act, under which Baskin asserted her claims, as well as the relevant rules applicable to a fee award under section 55.

#### 1. *DPA*

The DPA establishes protections for persons with disabilities. (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674 (*Munson*).) The principal substantive protections are set forth in sections 54 and 54.1, which prohibit various

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[2] Further statutory citations are to the Civil Code unless otherwise indicated.

forms of discrimination against persons with disabilities. Those provisions do not, by themselves, require business owners to make structural modifications to their facilities or set forth specific building standards. (*Californians for Disability Rights v. Mervyn's LLC* (2008) 165 Cal.App.4th 571, 587 (*Californians for Disability Rights*); *Marsh v. Edwards Theatre Circuit, Inc.* (1976) 64 Cal.App.3d 881, 886, 891.) The relevant modification requirements and building standards are provided by the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.) and its regulations, and certain state statutes (Gov. Code, § 4450 et seq.; Health & Saf. Code, § 19955 et seq.), which enforce the building standards set forth in Title 24 of the California regulatory code, known as the California Building Standards Code (CBSC). (*Californians for Disability Rights*, *supra,* at p. 585; *Berkeley Center for Independent Living v. Coyle* (1996) 42 Cal.App.4th 874, 876, fn. 2.)

Under the remedial provisions of the DPA, subdivision (a) of section 54.3 permits disabled persons asserting a violation of sections 54 and 54.1 to obtain an award of statutory damages and attorney fees. The fee award provision is unilateral, that is, it authorizes awards only to prevailing plaintiffs. (*Turner v. Association of American Colleges* (2011) 193 Cal.App.4th 1047, 1058-1060 (*Turner*).)

In section 55, the DPA authorizes injunctive relief to correct violations of DPA standards. (*Turner, supra*, 193 Cal.App.4th at p. 1059.) Section 55 states: "Any person who is aggrieved or potentially aggrieved by a violation of

[s]ection 54 or 54.1 . . . may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees." Unlike the fee award provision in section 54.3, the fee award provision in section 55 is bilateral, and thus "either party will be entitled to . . . fees if [it] prevail[s]." (*Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, 792 (*Molski*).)

2. *Unruh Act*

The Unruh Act also bars various forms of discrimination against persons with disabilities. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167.) The key substantive protections against discrimination are set forth in section 51. As with the DPA, those protections encompass violations of building standards established under the ADA and state law, including the CSBC standards. (Ca*lifornians for Disability Rights*, *supra,* 165 Cal.App.4th at p. 587.)

Section 52 provides remedies for violations of section 51, authorizing injunctive relief, statutory damages, and attorney fee awards. (*Turner*, *supra*, 193 Cal.App.4th at p. 1058; *Molski, supra,* 164 Cal.App.4th at p. 786.) Like the fee award provision in section 54.3 -- but unlike the fee award provision in section 55 -- the fee award provision in section 52 is unilateral, that is, "the plaintiff can recover attorney's fees if he or she prevails, but the defendant cannot." (*Molski*, *supra*, at p. 791.)

3. *Fee Awards under Section 55*

As noted above (see pt. A.1., of the Discussion, *ante*), section 55 authorizes a fee award to the prevailing party on a claim for injunctive relief under the DPA. Under the statute, "a trial court's determination of whether a party is entitled to an award of attorney fees, and the calculation of such an award, is reviewed for abuse of discretion." (*Turner*, *supra*, 193 Cal.App.4th at p. 1056.) Baskin's challenges to the fee award implicate specific rules governing those determinations.

a. *Catalyst Theory*

Before the trial court and on appeal, relying on the so-called "catalyst" theory, Baskin has contended that Hughes is not entitled to a fee award because it was not the prevailing party on her DPA claim for injunctive relief. The crux of her contention is that although she did not request a fee award, she was the successful party under the claim because she achieved her goal in asserting it.

The catalyst theory, though originally derived from Code of Civil Procedure section 1021.5, also applies to fee awards under Civil Code section 55. (*Mundy v. Neal* (2010) 186 Cal.App.4th 256, 259 (*Mundy*).)[3] The leading case

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[3] Code of Civil Procedure section 1021.5, known as "the private attorney general statute" (*Mundy*, *supra*, 186 Cal.App.4th at p. 259), provides that "a court may award attorney[] fees to a successful party against one or more

(*Fn. is continued on the next page.*)

regarding the theory is *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553 (*Graham*). There, the plaintiffs asserted a claim for breach of express warranty against a truck manufacturer, alleging that the warranty overstated the truck's towing capacity. (*Id.* at pp. 562-563.) While the action was pending, the manufacturer offered to repurchase or replace all the trucks it had sold to the public. (*Id.* at p. 563.) Although the trial court dismissed the action as moot, it issued an award of attorney fees to the plaintiffs under Code of Civil Procedure section 1021.5, relying on the catalyst theory. (*Graham, supra,* at p. 564.)

Our Supreme Court concluded that subject to certain limitations, the catalyst theory is "sound." (*Graham*, *supra*, 34 Cal.4th at p. 571.) Under the theory, plaintiffs may be considered to be the prevailing party when they achieve their litigation objectives, even though they succeed "by means of [the] defendant's 'voluntary' change in response to the litigation," rather than by means of a final judgment. (*Id.* at pp. 571, 572.) As a threshold matter, the theory requires that the plaintiff identify ""the precise factual/legal

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opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecu-niary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

condition that [he or she] sought to change or affect."'" (*Id.* at p. 576.) In order to recover a fee award as the prevailing party, the plaintiff must show (1) that there was a causal connection between the lawsuit and the relief obtained; (2) that the suit had sufficient legal merit, and (3) that the plaintiff made a reasonable attempt to "to settle the matter short of litigation." (*Id.* at p. 577; see *id.* at pp. 571-572, 575-578.) Turning to the case before it, the Supreme Court remanded the matter to the trial court for reconsideration of the fee award, as the elements the court identified included requirements not previously imposed on the catalyst theory. (*Id.* at p. 577.)

b. *Recovery of Fees under Section 55*

Before the trial court and on appeal, relying on *Turner*, *supra*, 193 Cal.App.4th 1047, Baskin has also contended that Hughes failed to show that the fees it requested were incurred solely in connection with her DPA claim for injunctive relief. As explained below, *Turner* held that when a defendant prevails on claims under the DPA and the Unruh Act, including a claim for injunctive relief under section 55, the fee award provision in section 55 permits the defendant to recover only the fees it incurred in the defense of the section 55 claim that are not "inextricably intertwined" with the defense of the other claims. (*Turner*, *supra*, at p. 1073.)

In *Turner*, the plaintiffs sought injunctive relief -- but not damages -- under the DPA and the Unruh Act. (*Turner*,

*supra*, 193 Cal.App.4th at pp. 1054-1056.) After the trial court rejected all the plaintiff's claims, the defendant requested a fee award under section 55 for all legal services rendered to it in the action, without identifying the fees for services specifically dedicated to the section 55 claim for injunctive relief. (*Turner, supra,* at p. 1055.) The trial court denied the fee request in its entirety. (*Id.* at pp. 1054-1055.)

Affirming, the appellate court concluded that the fee award provision in section 55 must be construed to have a narrow scope, in view of special features of the DPA and the Unruh Act. (*Turner, supra*, 193 Cal.App.4th at pp. 1056-1073.) As the court noted, the DPA and the Unruh Act "'have significant areas of overlapping application,'" and -- with the exception of section 55 -- the fee award provisions they contain are unilateral, that is, permit only prevailing plaintiffs to recover fees. (*Turner, supra,* at pp. 1056, 1074 & fn. 8, quoting *Munson, supra,* 46 Cal.4th at p. 675.) The court determined that the Legislature's intent in incorporating unilateral fee provisions in section 52 (which authorizes Unruh Act claims for damages and injunctive relief) and in section 54.3 (which authorizes DPA claims for damages) was "to encourage vigorous enforcement of [those provisions] by removing the potent economic obstacles presented by the cost of obtaining representation and the risk of an adverse fee award." (*Turner, supra,* at p. 1063.) That legislative intent would be frustrated, the court reasoned, if the bilateral fee award provision of section 55 were construed to permit defendants to recover fees for the

defense of claims under sections 52 or 54.3. (*Turner,* at p. 1071.) The court thus held that "where a defendant prevails against a plaintiff who sought relief under section 55 as well as under section 52 and/or section 54.3, the defendant may not obtain an attorney fee award under section 55 for attorney hours inextricably intertwined with hours spent defending claims under section 52 and/or section 54.3." (*Id.* at p. 1073.)

In so concluding, the court did not foreclose section 55 awards to defendants who have prevailed on a section 55 claim and claims under other provisions of the DPA or the Unruh Act. (*Turner*, *supra*, 193 Cal.App.4th at pp. 1072-1073.) The court recognized the propriety of an award when the defendant offers a basis for apportioning fees -- that is, eliminating the fees "'reasonabl[y] and necessarily incurred in defending'" the non-section 55 claims -- even though the work in question "'arguably provided some benefit'" with respect to the section 55 claim. (*Turner, supra,* at p. 1073, quoting *Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 506.)

B. *Underlying Proceedings*

1. *Baskin's Claims*

Baskin's original complaint sought injunctive relief under the DPA, as well as injunctive relief and damages under the Unruh Act, relying on the following factual allegations: "[T]here is no accessible path of travel to the [store] from the public right of way . . . . The lack of a

designated, accessible path of travel to the [store] means that . . . the only way for [Baskin] to get to the [store's] entrance is to wheel herself up the vehicular drive aisle, among moving cars that [were] trying to get into and out of the busy parking lot, and then to wheel herself behind parked cars to the store entrance."

In July 2015, Baskin's counsel visited the store and found that Hughes had established a special path of travel from the street to the store's entrance. Baskin then filed the FAC, which sought only damages under the DPA and the Unruh Act. In addition to reasserting the allegations set forth above, the FAC alleged that on specified occasions between April 2013 and March 2015, the store's lack of an accessible path deterred Baskin from patronizing the store.

In October 2015, Baskin dismissed her claim under the Unruh Act.[4] Prior to trial on the remaining claim under the DPA, Hughes filed a motion in limine to exclude all evidence that it had not provided directional signs identifying the path of travel, contending that the FAC alleged no such claim.

2. *Trial and Judgment*

At Baskin's request, the trial of her DPA claim was bifurcated, and the court ruled that it would resolve the

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[4] We note that the DPA expressly bars a simultaneous recovery of damages under DPA and the Unruh Act. (§ 54.3, subd. (c).)

issue of liability on the basis of trial briefs and closing arguments presented at a hearing. For purposes of the bench trial on liability, the parties stipulated to several facts, including that during the pertinent period -- that is, before Hughes created the existing designated path -- the path of travel Hughes offered to persons with disabilities passed behind parking spaces.

Baskin's trial brief contended that alterations to the store in 2007 required application of the CBSC building standards promulgated in 2001 relating to access for persons with disabilities. Relying on those standards, she argued that a permissible access route could not pass behind parked cars.

Hughes' trial brief contended that Baskin's DPA claim was properly evaluated in light of the CBSC building standards promulgated in 2013. Hughes maintained that those standards permitted accessible paths to include vehicular routes and routes passing behind parked cars; additionally, Hughes argued that the same was true under the corresponding ADA building standards, as well as the 2010 and 2001 CBSC building standards. Hughes also argued that the FAC did not allege that the path of travel Hughes offered -- that is, the path that passed behind parked cars -- must have directional signs.

At the hearing on liability, in response to the trial court's request for clarification of the DPA claim, Baskin's counsel Sara Pezeshkpour stated that the path Hughes had created was precisely the kind of path the FAC alleged was

missing during the relevant period. Pezeshkpour described the path Hughes had created as "one acceptable method of providing access from the public right of way that doesn't endanger people in wheelchairs and complies with the letter and intent of the code."

Following the hearing, the court rejected Baskin's contention that the 2001 CBSC standards applied to her DPA claim. Applying the 2013 CBSC standards, the court determined that Hughes was not required to establish a path of travel from the street to the store that did not pass behind parked cars. The court further determined that the FAC pleaded no claim for inadequate signage. In entering judgment in favor of Hughes and against Baskin, the court found that Hughes was the prevailing party for purposes of costs (Code Civ. Proc., § 1032, subd. (a)), and authorized Hughes to seek a fee award by noticed motion.

3. *Fee Motion and Ruling*

Hughes's fee motion sought the fees it incurred for "the period of time whe[n Baskin] sought injunctive relief under [section] 55," which it characterized as running from the date of Baskin's first pre-litigation demand letter (April 17, 2014) to the date of the filing of the FAC (September 18, 2015.) Hughes argued that it was the prevailing party under section 55 because judgment had been entered in its favor and against Baskin on all her claims. Accompanying Hughes's motion were declarations from its counsel, who

stated that during the period in question, they provided legal services reasonably valued at $28,008.84.

Relying on the catalyst theory, Baskin's opposition contended she was the prevailing party under section 55, arguing that before the FAC was filed, Hughes established the path she sought to achieve through injunctive relief. In support of her contention, Baskin submitted a declaration from attorney Pezeshkpour and other evidence.

Additionally, Baskin contended that under *Turner*, Hughes failed to show that the fees it requested pursuant to section 55 were not inextricably intertwined with the defense of her other claims. She argued that her claims for injunctive relief and damages arose out of the same set of facts, and that Hughes did not demonstrate that it incurred "'even one extra hour of attorney fees'" exclusively devoted to defending the section 55 claim for injunctive relief.

Hughes's reply to the opposition offered no evidence challenging Baskin's showing. Hughes maintained that it was the prevailing party under section 55, arguing that because the trial court ultimately entered a judgment in Hughes's favor on the issue of liability, the court necessarily found that Baskin was not entitled to the injunctive relief she requested. Hughes further contended that it distinguished the fees it sought regarding Baskin's section 55 claim for injunctive relief from the fees relating to her other claims, arguing that it requested only the fees it incurred before Baskin filed the FAC.

In awarding Hughes $28,008 in attorney fees, the trial court stated that it had found Hughes to be the prevailing party when it entered judgment. The court further concluded that under *Turner*, the fees requested under section 55 were not inextricably intertwined with the defense of Baskin's other claims, stating that "until the filing of the FAC, the parties' focus was primarily . . . on [her] demand for injunctive relief."[5]

C. *Prevailing Party*

We conclude that the trial court erred in identifying Hughes as the prevailing party under section 55. As explained below, the record establishes that under the catalyst theory, Baskin was the prevailing party.

In *Tipton-Whittington v. City of Los Angeles* (2004) 34 Cal.4th 604, 608 (*Tipton-Whittington*), a companion case to *Graham*, the Supreme Court summarized the elements of the catalyst theory as follows: "In order to obtain attorney fees without . . . a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat

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[5] As an alternative basis for the award, the court stated that even if some fees requested were incurred in connection with Baskin's other claims, all the fees were properly awarded under *Molski*, *supra*, 164 Cal.App.4th 786.

of victory, not by dint of nuisance and threat of expense, as explained in *Graham*; and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit."

Before the trial court, Baskin submitted uncontested evidence regarding the events relevant to the catalyst theory. According to her showing, prior to filing the original complaint, attorney Pezeshkpour twice wrote to Hughes, seeking to resolve Baskin's issues without litigation. When Hughes did not respond, Baskin commenced her action. In May 2015, Pezeshkpour told Hughes that Baskin's settlement demand was for a designated wheelchair-accessible route across the parking lot that did not pass behind parked cars. In July 2015, Pezeshkpour discovered that Hughes had created such a route, and that "all other items for which [Baskin] sought injunctive relief at the [store] had been remediated." Baskin then filed the FAC, which eliminated her claims for injunctive relief because they were moot. Prior to trial, the parties asserted cross-motions for summary judgment, which were denied. Later, Barton Kirkland, Hughes's Director of Retail Maintenance, testified in his deposition that Baskin's action was Hughes's sole reason for creating the path in the store's parking lot.

Baskin's evidence directly demonstrated elements (1) and (3) of the catalyst theory, which concern the parties' conduct. Regarding element (1), the relevant causal relationship was admitted by Kirkland, who testified that Baskin's suit motivated Hughes to provide the path she sought. Regarding element (3), Pezeshkpour's pre-litigation

letters constituted the requisite efforts at settlement, as the letters identified the path Hughes then offered Baskin -- which passed behind parked cars -- as a significant barrier to her access, and invited Hughes to work with her resolve the matter without litigation.

The record further demonstrates that Baskin achieved her result "by threat of victory," for purposes of element (2). (*Tipton-Whittington*, *supra*, 34 Cal.4th at p. 608.) As explained in *Graham*, element (2) requires an inquiry into the action's objective merit, not Hughes's subjective beliefs regarding the action. (*Graham*, *supra*, 34 Cal.4th at p. 575.) "The trial court must determine that the lawsuit is not 'frivolous, unreasonable or groundless' [citation]." (*Ibid.*, quoting *Stivers v. Pierce* (9th Cir. 1995) 71 F.3d 732, 752, fn. 9 (*Stivers*).) That determination "is not unlike the determination [the court] makes when asked to issue a preliminary injunction, i.e., not a final decision on the merits but a determination at a minimum that '"'the questions of law or fact are grave and difficult."' [Citations.]" (*Graham*, *supra*, at pp. 575-576, quoting *Wilms v. Hand* (1951) 101 Cal.App.2d 811, 815.)

Applying those standards, we conclude that Baskin's section 55 claim cannot be viewed as frivolous, unreasonable, or groundless. As Baskin noted in her opposition to the fee request, the trial court denied Hughes's motion for summary judgment on the FAC, which asserted claims relying on the theory of liability underlying her section 55 claim for equitable relief. Ordinarily, such a

ruling implies that the trial court found that Baskin's claims had some objective merit. (See *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 819-820 [for purposes of defeating malicious prosecution claim, denial of defense summary judgment motion commonly shows the existence of "probable cause," that is, that the underlying action was not objectively meritless].) We regard the questions of law that Baskin presented as """grave and difficult""" (*Graham*, *supra*, 34 Cal.4th at p. 576), based on our review of Baskin's theory of liability in her appeal from the judgment in *Baskin I.*

Although the trial court was entitled to reject Baskin's undisputed showing, provided it did not act arbitrarily (*Ortzman v. Van Der Waal* (1952) 114 Cal.App.2d 167, 171), the court's ruling shows that it failed to give due legal effect to Baskin's evidence for a different reason. In granting Hughes's fee request, the court stated that it had found Hughes to be the prevailing party when it permitted Hughes to seek an award of costs under Code of Civil Procedure section 1032. However, it is well established that the catalyst theory, when applicable, determines the selection of the prevailing party under Civil Code section 55, rather than the definitions of "prevailing party" found in Code of Civil Procedure section 1032, subdivision (a). (*Mundy*, *supra*, 186 Cal.App.4th at p. 259; *Molski*, *supra*,164 Cal.App.4th at p. 786; *Donald v. Cafe Royale, Inc.* (1990) 218 Cal.App.3d 168, 184-185.) As explained above, Baskin must be regarded as the prevailing party under section 55 on the catalyst theory.

Hughes contends Baskin's section 55 claim for injunctive relief necessarily lacked objective merit, for purposes of element (2). Pointing to the trial court's determinations following the bench trial on liability, Hughes characterizes Baskin's action as frivolous and "a typical shakedown scheme." The crux of Hughes's argument is that Baskin did not establish that the injunctive relief she sought was "required by law."

In our view, Hughes's contention fails under *Graham*. The Supreme Court derived elements (1) and (2) of the catalyst theory from a two-pronged test employed by several circuits of the United States Court of Appeals. (*Graham*, *supra*, 34 Cal.4th at p. 575.) Noting that some circuits referred to that test's second prong as the "'required by law' prong," the court characterized it as "tantamount to a finding that the lawsuit was 'not frivolous, unreasonable, or groundless,'" relying on *Stivers*, *supra*, 71 F.3d at page 752, footnote 9. (*Graham*, *supra*, at p. 575.) In adopting the two-prong test as the basis for elements (1) and (2), the court expressly approved the formulation of the second prong, as set forth in *Stivers*. (*Ibid.*)

*Stivers* provides dispositive guidance regarding Hughes's contention. There, the plaintiffs sought injunctive relief and damages after an administrative board denied their applications for licenses as private investigators. (*Stivers*, *supra*, 71 F.3d at pp. 739-740.) In an effort to settle the claim for injunctive relief, the board agreed to reconsider one plaintiff's applications, and following a special meeting,

it granted the applications. (*Ibid.*) After that ruling, the plaintiffs dismissed their claims for injunctive relief as moot. (*Id.* at p. 740.) Later, the trial court granted summary judgment in favor of the board and its members on the remaining claims for damages, concluding that the plaintiff whose applications had been approved raised no triable issues whether the board's original rulings were improper. (*Ibid.*) The plaintiffs then requested a fee award as the prevailing parties on their claims for injunctive relief, relying on the catalyst theory. (*Ibid.*) The trial court denied the request, reasoning that the second prong of the test noted above was not satisfied because the plaintiffs' claims for damages failed on the merits. (*Id.* at pp. 752-753.)

In reversing the denial of the fee request, the Ninth Circuit stated: "A plaintiff who obtains a favorable settlement is *not* required to demonstrate that he would have prevailed on the merits in order to be considered a prevailing party. . . . [¶] Here, the plaintiffs have raised substantial legal and factual questions. Their claims are by no means frivolous, unreasonable, or groundless. Accordingly, there is no doubt that the plaintiffs have satisfied the [second] prong."[6] (*Stivers*, *supra*, 71 F.3d at

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[6] Although the Ninth Circuit also reversed the summary judgment against the plaintiffs in part, the court explained that the grant of summary judgment, if fully correct, would not necessarily have foreclosed the plaintiffs from obtaining their attorney fees. (*Stivers*, *supra*, 71 F.3d at p. 752.)

pp. 739-740.) For the reasons discussed above, that rationale also applies here. In sum, the trial court erred in ruling that Hughes was the prevailing party for purposes of a fee award under section 55.

D. *Inextricably Intertwined Fees*

We further conclude that had Hughes been the prevailing party under section 55, the fee award would be improper because Hughes requested fees inextricably intertwined with its defense of the other claims. As explained below, *Turner* bars the fee award.

Although Hughes's fee request excluded the fees it incurred regarding Baskin's claims for damages in the FAC, Hughes sought *all* the fees it incurred in defending itself against the claims in the original complaint. That complaint asserted a DPA claim for injunctive relief under section 55 *and* an Unruh Act claim for injunctive relief and damages under section 52. Hughes requested only the fees that accrued before the filing of the FAC, but offered no basis for apportioning its fees between the section 55 claim and the Unruh Act claim in the original complaint. Under *Turner*, that failure mandated the denial of Hughes's fee request in its entirety. (*Strong v. Walgreen Co.* (S.D. Cal. 2014) 992 F.Supp.2d 1050, 1051-1053.)

Before the trial court and on appeal, Hughes has contended that *Turner* is inapplicable to its fee request, arguing that Pezeshkpour admitted that prior to the filing of the FAC, she focused exclusively on litigating Baskin's

section 55 claim for injunctive relief. That contention fails, however, as Pezeshkpour acknowledged only that before she filed the FAC, she litigated Baskin's *claims* for injunctive relief, which included the Unruh Act claim.

Furthermore, even if Pezeshkpour's statements are reasonably understood to mean that she attended *solely* to the claims for injunctive relief, notwithstanding the original complaint's prayer for damages, *Turner* precludes Hughes's fee request. In *Turner*, the plaintiff sought injunctive relief -- but not damages -- under the DPA and the Unruh Act. (*Turner*, *supra*, 193 Cal.App.4th at p. 1055.) *Turner* thus stands for the proposition that when a defendant prevails on injunctive relief claims asserted under both acts, permitting the defendant to recover fees under section 55 that are inextricably intertwined with the section 52 claim would frustrate the legislative intent underlying the unilateral fee award provision in section 52. (See *Turner, supra,* at p. 1071.)[7]

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[7] In *Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 943-944, this court offered an explanation why the fee award provisions relating to injunctive relief in the DPA and the Unruh Act differ, that is, why the DPA provision is bilateral and the Unruh Act provision is unilateral. Under the DPA, section 55 affords injunctive relief to persons ""potentially aggrieved,"" thus permitting virtually any disabled person to seek such relief. (*Flowers v. Prasad, supra,* at p. 943.) In contrast, section 52 limits injunctive relief to disabled persons whose personal rights were threatened or violated.
(*Fn. is continued on the next page.*)

Relying primarily on *Molski*, *supra*, 164 Cal.App.4th 786 and *Jankey v. Lee* (2012) 55 Cal.4th 1038 (*Jankey*), Hughes urges us to reject *Turner*. We decline to do so, as neither decision identifies any error in *Turner*.

In *Molski*, which predated *Turner*, the plaintiff initiated a federal action under the ADA, the DPA, and the Unruh Act, alleging that a winery violated access standards for disabled persons. (*Molski*, *supra*, 164 Cal.App.4th at pp. 788-789.) After the federal court dismissed the state law claims for lack of jurisdiction, the plaintiff dismissed his remaining ADA claim for injunctive relief because the defendant had remediated the alleged barriers to access. (*Molski, supra,* at p. 789.) The plaintiff then reasserted his DPA and Unruh Act claims in state court, seeking damages and injunctive relief. (*Molski, supra,* at p. 789.) Upon ruling that the claims were moot and barred under the principles of res judicata, the trial court issued a section 55 fee award to the winery encompassing all the fees it incurred in the state action. (*Molski,* at pp. 790-791.) In affirming the award, the appellate court did not address whether it contravened the Legislature's intent in enacting the unilateral fee award provisions in the DPA and the

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(*Flowers v. Prasad,* at p. 943.) The bilateral provision in section 55 thus "reflects an apparent legislative intent to discourage potentially meritless requests for injunctive relief, in view of the broad class of persons entitled to make such requests." (*Flowers v. Prasad,* at p. 944.)

Unruh Act, as that issue was not presented. (*Molski, supra,* at pp. 790-793.) For that reason, nothing in *Molski* calls into question the reasoning or result in *Turner*. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 243 ["[A]n opinion is not authority for an issue not considered therein"].)[8]

In *Jankey*, the court expressly declined to address the issue decided in *Turner*. There, a wheelchair user asserted claims against a store under the ADA, the DPA, and the Unruh Act, alleging that a four-inch step at the store's entrance prevented him from wheeling into the store. (*Jankey*, *supra*, 55 Cal.4th at pp. 1042-1043.) Among other relief, the plaintiff sought an injunction to remediate the step. (*Ibid*.) After the store prevailed on all the plaintiff's claims, it successfully requested a fee award under section 55. (*Jankey, supra,* at p. 1043.) Our Supreme Court examined and rejected three contentions raised by the plaintiff, namely, (1) that section 55 fee awards were not mandatory for prevailing defendants, (2) that the ADA pre-

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[8] Hughes also directs our attention to *Jones v. Wild Oats Markets,* Inc. (S.D.Cal. 2006) 467 F.Supp.2d 1004, 1012 and *Goodell v. Ralphs Grocery Co.* (E.D. Cal. 2002) 207 F.Supp.2d 1124, 1126, which approved section 55 fee awards encompassing fees incurred in connection with other provisions of the DPA and the Unruh Act. Because those decisions predate *Turner* and do not examine the issue presented in *Turner*, they offer no guidance regarding that issue.

empted the award, and (3) that the award improperly encompassed fees the store incurred in litigating the section 55 claim and the ADA claims. In discussing item (3), the court concluded that nothing in the ADA or section 55 barred an award "for overlapping work done to defend against both ADA and section 55 claims." (*Jankey,* at p. 1056.) The court further concluded that the plaintiff had failed to preserve a contention based on *Turner* -- "that section 55 does not authorize fees for work overlapping with [the] Unruh Civil Rights Act and section 54.3 defense" -- stating: "Because the issue is . . . waived, we do not consider it." (*Id.* at p. 1056, fn. 16.) In sum, we conclude that the fee award was improper under *Turner*.

## DISPOSITION

The award of attorney fees is reversed, and the matter is remanded to the trial court with directions to vacate the award and enter a new order denying Hughes's motion for an award of attorney fees. Baskin is awarded her costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

MICON, J.*

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*Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.