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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

YUNUEN CAMPOS, Plaintiff and Respondent, v. JOHN M. KENNEDY et al., Defendants and Appellants.	B266663 (c/w B268812) (Los Angeles County Super. Ct. No. BC518446)

APPEALS from a judgment and order of the Superior Court of Los Angeles County. Michael P. Linfield, Judge. Affirmed as to judgment; reversed and remanded with directions as to order.

Law Offices of Gregory R. Ellis and Gregory R. Ellis for Defendants and Appellants.

Magnanimo & Dean, Lauren A. Dean and Audrey L. Priolo for Plaintiff and Respondent.

Defendants and appellants John M. Kennedy, M.D. and John M. Kennedy, M.D., Inc. (collectively Kennedy) appeal from a judgment following a jury's verdict in favor of plaintiff and respondent Yunuen Campos (Campos) on her sexual battery claims. The jury awarded Campos $200,000, and the trial court added a $25,000 statutory penalty. Kennedy contends the trial court made two erroneous evidentiary rulings that require reversal of the judgment. We disagree and affirm the judgment. Kennedy also appeals from the trial court's award to Campos of $2,924,830 in statutory attorney fees. We reverse the attorney fees order and remand the matter to the trial court with directions to conduct further proceedings to determine whether a multiplier should be used to enhance the lodestar amount of fees.

BACKGROUND[1]

On April 10, 2013, Campos, a cardiac stenographer, was assigned to work at Kindred Hospital South Bay, where she had only worked three times. Kennedy was working there as a cardiologist. Campos had never met Kennedy before. Campos performed imaging tests on one of Kennedy's critically ill patients. After Campos completed the tests, Kennedy followed her into the doctor's lounge. Campos testified that, despite her protests, Kennedy proceeded to press his body against her from behind, grinded against her, squeezed her breasts, put his hand down her scrub pants, squeezed her buttocks, forced her hand onto his penis, and inserted his finger into her vagina. Campos immediately reported the incident, including to the police. Kennedy denied ever touching Campos.

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[1] Because Kennedy does not make a substantial evidence challenge, we set forth only the basic facts.

Campos sued Kennedy, Kindred Healthcare Operating, Inc. and KND Development 53, LLC doing business as Kindred Hospital South Bay (collectively Kindred) on several causes of action.[2] Kindred entered into a good faith settlement with Campos for $247,500. The case proceeded to trial against Kennedy in April 2015. The jury was deadlocked (seven to five in favor of Campos) and the trial court declared a mistrial. A second trial took place in June 2015. The jury found in favor of Campos (10 to 2) and against Kennedy on the three causes of action it was asked to decide—sexual battery, violation of the Ralph Civil Rights Act (Civ. Code, § 51.7), and gender violence (Civ. Code, § 52.4). The jury awarded Campos damages of $200,000, to which the trial court added a $25,000 statutory penalty pursuant to Civil Code section 52, subdivision (b)(2). The jury found that Kennedy did not act with malice, oppression or fraud. The judgment declared that "Plaintiff Yunuen Campos is the prevailing party on the causes of action of the Complaint tried herein." The judgment was entered on July 8, 2015, and Kennedy filed an appeal from the judgment on September 4, 2015. Thereafter, the trial court awarded Campos attorney fees of $2,924,830 pursuant to Civil Code sections 52, subdivision (b)(3) and 52.4, subdivision (a), and costs of $84,090.34.

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[2] In the operative second amended complaint, Campos sued only Kennedy for common law battery, common law assault, and sexual battery; sued only Kindred for negligent supervision and retention; sued Kindred and John M. Kennedy, M.D., Inc. (Doe 2) for violations of the Ralph Civil Rights Act and the Tom Bane Civil Rights Act; and sued all defendants for gender violence and intentional infliction of emotional distress.

Kennedy's appeal from the attorney fees order was consolidated with his earlier appeal.[3]

DISCUSSION[4]

I. Exclusion of Evidence of Campos's Prior Uncharged Bad Acts

Kennedy contends the trial court committed reversible error "by excluding evidence that eight months before Campos accused Kennedy of assaulting her, she had falsely claimed to be the victim of an assault and kidnapping in order to extort $5,500" from her boyfriend Bertram Fuller (Fuller).

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

Campos moved in limine to exclude evidence of her "alleged uncharged [prior] bad acts," which she described in 10 categories. At issue here is her alleged prior false assault, kidnapping, and extortion scheme. Specifically, in August 2012, Campos texted Fuller and begged him to contact her. When he did not respond, Campos called him and allegedly falsely claimed she had been physically assaulted and was hospitalized. She also claimed she was being held for $10,000 in ransom. In some of her texts she

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[3] Kennedy also appealed from an amended judgment, filed October 28, 2015, that was identical to the prior judgment with the exception that the amount of attorney fees and costs was added in.

[4] Campos's request that we take judicial notice of pleadings in another lawsuit is denied.

allegedly pretended to be her assailants and threatened Fuller. Campos told Fuller she had paid $4,500 of the ransom, and that if he did not pay the remaining $5,500, the kidnappers would harm him or his family. Fuller placed $5,500 in Campos's mailbox as directed. The trial court granted the motion in limine, with the exception of one matter not relevant here.[5]

Kennedy argues the evidence of Campos's alleged uncharged prior bad acts should have been admitted because (1) it was relevant to his defense that Campos had fabricated the allegations that he sexually assaulted her as part of a scheme to extract money from him, (2) it was admissible under Evidence Code section 1101, subdivision (b) to prove this common scheme, (3) it was admissible under Evidence Code section 780 as having "[a] tendency in reason to prove or disprove the truthfulness" of Campos's testimony, and (4) its probative value was not outweighed by the other considerations set forth in Evidence Code section 352.

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[5] The minute order granting the motion in limine is silent as to the trial court's reasons. Nevertheless, we reject Campos's argument that Kennedy failed to present an adequate record for our review because there is no reporter's transcript of the hearing on the motion. Kennedy explains that the motion was heard in chambers during the final status conference and no reporter was present. Additionally, Campos does not suggest that our analysis depends on any argument made at the hearing or that any evidence was adduced at the hearing. We likewise reject Campos's argument that Kennedy failed to make a sufficient offer of proof, since the evidence had been previously discussed not only in a motion to compel Campos's deposition answers, but on several other occasions, as indicated by Campos herself in her motion in limine.

We do not address these individual arguments because even if the exclusion of evidence was an abuse of discretion there was no prejudice. "The erroneous exclusion of evidence is grounds for reversal if, in light of the entire record, it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Brown v. County of Los Angeles* (2012) 203 Cal.App.4th 1529, 1550; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 ["reasonable probability" means "a *reasonable chance*, more than an *abstract possibility*"].) Here, the jury still heard abundant evidence of Campos's reputation for dishonesty and other negative characteristics.

Fuller testified that on "several occasions" Campos feigned crying and could produce what appeared to be real tears. He observed her pretending to be hysterical on different occasions. He testified that she bruises easily and can make it look like she is hurting. Fuller also testified that he was harassed by Campos and had to get another cell phone. He also testified that he was in a knockdown, wrestling match with Campos where she scratched him up and ripped his shirt.

Another former boyfriend of Campos, Richard Mateos (Mateos), testified that his relationship with Campos soured because he started finding out "a lot of shady things about her." He testified that Campos was "untrustworthy," "a habitual liar," she "stole" from him, and she made threats to his son's mother using his phone to make it look like they had come from him. He testified that Campos sometimes called him when she was supposedly crying, but he did not believe her crying was real. Campos told him that Kennedy had grabbed her by both wrists when he attacked her, but on the night of the incident she had

not shown any discomfort in her wrists. Although Campos was anemic and bruised easily, Mateos saw no bruises or marks on her body, including on her wrists or shoulders. As time passed, Mateos asked Campos more questions about the sexual assault, but the answers did not add up. After meeting with her attorneys, Campos told Mateos that her attorneys said she would not have to worry about money or house payments anymore because Kennedy would likely settle rather than risk going to trial. When Campos and Mateos broke up, Campos stole many items from him. He was particularly upset about a pool stick he had owned for many years. Her attorneys asked him whether he would refrain from filing a police report if the items were returned. Mateos agreed. The pool stick was returned, but other items were not.

Kennedy's expert witness, Barry T. Hirsch (Hirsch), testified that Campos was "malingering," which "is the nice professional way that we say somebody is lying." He explained that "in some cases, there is not what we can find in motivation. Some people have basically, what we call, pathological liars. They lie for reasons we cannot find." When asked whether Campos's identification of herself as a registered nurse when she was not in fact a registered nurse factored into his opinions, Hirsch testified: "Yes. [¶] . . . [¶] It was another example of her lying." He also testified that in his opinion the symptoms Campos self-reported to her own expert "were malingered. They were lied, lied about."

Despite this evidence, which seriously undermined Campos's credibility, the jury still accepted her version of the facts. We are convinced there is no reasonable probability that

Kennedy would have received a more favorable outcome if the evidence of her alleged prior bad acts had been admitted.

II. Admission of Testimony of Rosalie Ladua (Ladua)[6]

Kennedy contends the trial court committed reversible error by admitting the (video) testimony of Ladua, a medical assistant at Kaiser Permanente (Kaiser). Ladua testified that in 2001, she was reading the schedule on a wall when Kennedy spoke to her and stood too close to her. She was "surprised" because she thought she was alone. She was "so shocked when [she felt] him next to [her]" that she reported the incident to her supervisor.

Kennedy moved in limine to exclude Ladua's testimony on the grounds that it was not relevant and was inadmissible character evidence. Before the trial court ruled on the motion, opening statements commenced. Campos's attorney stated that when she asked Kennedy at his deposition whether he was ever the subject of a complaint of inappropriate conduct when he worked at Kaiser 15 years ago, he said no, but Kaiser's records showed that an investigation was conducted and he "was spoken to" and "given a letter" about his treatment of women. Kennedy's counsel objected, and the trial court instructed the jury as follows: "Opening statement is what counsel believes the evidence will show. You'll be making your decision on what the evidence is, not upon any opening statements."

Immediately upon beginning his opening statement, Kennedy's attorney showed portions of Ladua's testimony on a screen and read it to the jury. Kennedy's attorney then stated,

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[6] While the parties refer to her as "Ladau," it is spelled as "Ladua" in the reporter's transcript. We follow the reporter's transcript.

"the evidence will show that the plaintiff has scoured the earth to find bad information about Dr. Kennedy and 15 years ago he surprised somebody at a hospital where he worked."

Later during trial, the trial court granted Kennedy's motion in limine to exclude Ladua's testimony. Campos's attorney then pointed out that Kennedy's attorney had displayed the testimony for the jury. The trial court agreed with Kennedy's attorney that the testimony was not relevant. But the court found that since Kennedy's attorney had specifically placed Ladua's testimony on the projector, read it to the jury, and then talked about it in more than a passing reference, her testimony would be permitted.

We agree that evidence of a 15-year-old incident in which Kennedy startled a coworker by standing too close to her was only marginally relevant at best and probably should have been excluded. The problem here, though, is that Kennedy's attorney opened the door, as the trial court noted. While Campos's attorney mentioned in opening statement that Kennedy had denied being the subject of a complaint of inappropriate conduct at work 15 years ago, her attorney did not mention Ladua's testimony in any way. Kennedy's attorney, however, introduced the actual testimony by projecting it onto the screen for the jury to read. Because he introduced a portion of Ladua's testimony, the trial court was within its discretion to permit Campos to admit other portions of her testimony.

In any event, the evidence was not prejudicial. As Kennedy acknowledges, nothing described by Ladua constitutes sexual assault or harassment. We have reviewed Ladua's brief testimony. In the remaining portions of her testimony played to the jury, Ladua described Kennedy's demeanor as "friendly" and "nice." She also stated that while other employees were casual

and sometimes hugged and touched each other, she did not like hugging or touching people. The jury could have reasonably inferred that Ladua was particularly sensitive. We do not find it reasonably probable that the jury would have reached a different verdict if this evidence had been excluded.

III. Attorney Fees

Kennedy contends the attorney fees award should be vacated or at least substantially reduced. An award of attorney fees is reviewed for an abuse of discretion. (*Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549, 550.) An experienced trial judge is the best judge of the value of professional services rendered in his or her court, and therefore our review is highly deferential. (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239 (*Nichols*).) Nevertheless, "reversal is appropriate where there is no reasonable basis for the ruling or the trial court has applied 'the wrong test' or standard in reaching its result." (*Ibid.*)

A. The Pleadings and Ruling

As the prevailing party on her claims for violation of the Ralph Civil Rights Act (Civ. Code, § 51.7) and gender violence (Civ. Code, § 52.4), Campos moved for statutory attorney fees (Civ. Code, §§ 52, subd. (b)(3), 52.4, subd. (a). The supporting declaration of her lead trial attorney, Frank A. Magnanimo (Magnanimo), summarized the nature of the litigation services provided to Campos in this heavily litigated case, which included numerous pleadings and motions, discovery disputes, and two jury trials. Also attached were copies of the time records reflecting the hours worked on behalf of Campos. Magnanimo's declaration, as well as the declarations of the other attorneys working on behalf of Campos, described their experience,

expertise and relevant background information. The hourly rates charged by Campos's attorneys were listed as follows: Magnanimo $650 (partner, admitted to bar in 1994); Lauren A. Dean (Dean) $650 (partner, admitted to bar in 1994); Audrey L. Priolo $550 (associate, admitted to bar in 2005); and Rebecca L. Gombos $550 (associate, admitted to bar in 1997). The motion sought a total of $3,390,990 in attorney fees, which consisted of $1,695,495 (total hours multiplied by hourly rates, known as the "lodestar") times two. Also attached to the motion were three expert declarations by other attorneys attesting to the competence, skill, and reasonable hourly rates charged by Campos's lead attorneys, as well as the propriety of a 2.0 multiplier.

Kennedy opposed the motion, arguing that Campos was not the prevailing party because Kennedy was entitled to an offset in the amount of Kindred's good faith settlement with Campos that reduced the judgment below zero; the hourly rates charged by Campos's attorneys were excessive and differed from those charged by them in other cases; no multiplier should be applied; and the time sheets reflected work performed on behalf of Kindred and not Kennedy.

In reply, Campos argued the trial court lacked jurisdiction to amend the judgment by reducing the amount awarded; Kennedy was not entitled to an offset in any event; he had waived any right to seek an offset; and the amount of attorney fees sought was reasonable.

The trial court issued a 29-page ruling, granting the motion for attorney fees in part. The court reduced the lodestar requested by $233,080, as reflecting either duplicative work or work not related to Kennedy, for a new lodestar of $1,462,415.

The court found the hourly rates charged were reasonable and that a 2.0 multiplier was appropriate under the factors set forth in *Ketchum v. Moses* (2001) 24 Cal.4th 1122 (*Ketchum*), resulting in total attorney fees of $2,924,830. Before addressing the *Ketchum* factors, the court noted that "[a]lthough some trial judges only award a multiplier in unusual cases, this Court understands *Ketchum* to advise that a multiplier should normally be awarded." The court rejected Kennedy's remaining arguments.

B. Settlement Offset

Kennedy argues that Campos is not entitled to *any* award of attorney fees because she is not the prevailing party under Code of Civil Procedure section 1032. He reasons that pursuant to Code of Civil Procedure section 877, subdivision (a),[7] he is entitled as a matter of right to an offset in the amount of Kindred's $247,500 good faith settlement with Campos. Since the judgment awarded against him was $225,000, he concludes that the offset reduces his judgment to below zero and therefore Campos is no longer the prevailing party.

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[7] Code of Civil Procedure section 877 provides: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater."

The problem here is one of timing. The jury rendered its verdict in favor of Campos on June 17, 2015. The judgment awarding $225,000 in damages to Campos was filed on July 8, 2015. Kennedy filed a notice of appeal from the judgment on September 4, 2015. He raised the issue of offset for the first time in his opposition to the motion for attorney fees, which he filed on September 22, 2015. "'As a general rule, a duly perfected appeal divests the trial court of further jurisdiction in the cause except with respect to collateral matters [such as a motion for new trial].' [Citations.] After perfection of an appeal, the trial court 'may not vacate or amend a judgment or order valid on its face, or do any other act which would affect the rights of the parties or the condition of the subject matter.' [Citation.]" (*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 641, fn. omitted; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189; Code Civ. Proc., § 916 ["the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order"].) "The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it." (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938.) Thus, "[t]he trial court's power to enforce, vacate or modify an

appealed judgment or order is suspended while the appeal is pending." (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.)

The parties are in agreement that the filing of an appeal does not deprive the trial court of jurisdiction to award attorney fees. But Kennedy was not merely disputing the amount of fees. Rather, he was seeking to have the judgment against him reduced to zero. In other words, he was seeking to have the judgment substantively amended. (See *Wade v. Schrader* (2008) 168 Cal.App.4th 1039, 1048 ["And there are cases in which the trial court has applied a settlement credit by amending the judgment to reflect the credit"]; *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 840 [finding motion for apportionment of damages under section 877 made after trial to be the equivalent of an "'amended judgment'"]; *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268 [same]; *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1334 ["any reduction for prior settlements is made *before* the entry of judgment"].) As such, the trial court was without power to reduce the judgment while the appeal was pending.

C. Multiplier of 2.0

"In determining a reasonable attorney fee award under fee-shifting statutes . . . , a court begins by deciding 'the reasonable hours spent' on the case and multiplying that number by 'the hourly prevailing rate for private attorneys in the community conducting *noncontingent* litigation of the same type.' [Citation.] The result is called the 'lodestar' figure." (*Nichols, supra*, 155 Cal.App.4th at p. 1240, citing *Ketchum, supra*, 24 Cal.4th at p. 1133.) "The court may then adjust the lodestar figure in light of a number of relevant factors that weigh in favor of augmentation or diminution." (*Nichols, supra,* at p. 1240.) Such factors include the "(1) the novelty and difficulty of the questions

involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." (*Ketchum, supra*, at p. 1132.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action." (*Ibid*.)

Kennedy does not challenge the use of the lodestar methodology. Nor has he adequately developed any arguments regarding the "very high hourly fee" adopted by the trial court. What he does properly challenge is the trial court's application of a 2.0 multiplier. In determining that the lodestar amount should be increased by such a multiplier, the trial court stated: "Although some trial judges only award a multiplier in unusual cases, this Court understands *Ketchum* to advise that a multiplier should normally be awarded." This understanding is incorrect. *Ketchum* stated: "Of course, the trial court is not *required* to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case . . . . We emphasize that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar." (*Ketchum,* 24 Cal.4th at p. 1138.)

In *Nichols, supra*, 155 Cal.App.4th 1233, the appellate court reversed an attorney fees award with a 1.33 multiplier based on the trial court's mistaken belief that it was required to impose a multiplier. (*Id.* at p. 1241.) "We take it then as established principle that a trial court's decision whether to apply a multiplier is a discretionary one, as the Supreme Court's decision in *Ketchum* made clear." (*Ibid; see also Galbiso v. Orosi*

Public Utility Dist. (2008) 167 Cal.App.4th 1063, 1089 ["the application of a fee multiplier is never mandatory but remains a matter reserved to the trial court's sound discretion"].) *Nichols* further stated: "[W]e conclude the trial court's mistaken understanding that a multiplier was required inevitably short-circuited the process of evaluating all the relevant factors that may have militated in favor of augmentation or diminution of the lodestar. Any meaningful consideration of relevant factors was cut off due to the court's misconception, and thus there was a failure to exercise its proper discretion. To put it another way, the court applied the wrong standard and thereby abused its discretion." (*Nichols, supra,* at p. 1242.) We reach the same conclusion. Like *Nichols*, we "cannot say how the [trial] court would have ruled had it not believed it was obligated to apply a multiplier." (*Ibid.*) "Accordingly, we will reverse the attorney fee order and remand to allow the trial court to exercise its sound discretion to impose a multiplier (or not) based upon a consideration of all the relevant factors," (*ibid.*) which include the following:

1. The novelty and difficulty of the questions involved

The trial court correctly acknowledged "[t]he issues addressed in this sexual assault case were not particularly novel." Nevertheless, the court found the case presented "difficult issues of fact" that required extensive motion practice requiring three dozen hearings and two jury trials. But the extensive motion practice, the two jury trials, and all the motion hearings had already been accounted for in the number of hours allowed for determining the lodestar amount. *Ketchum* prohibits

improper double counting. (*Ketchum*, *supra,* 24 Cal.4th at p. 1142.)

2. The skill displayed by the attorneys

Ketchum noted: "The factor of extraordinary skill, in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar. A more difficult legal question typically requires more attorney hours, and a more skillful and experienced attorney will command a higher hourly rate." (*Ketchum, supra*, 24 Cal.4th at pp. 1138–1139.) "Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable. Nor should a fee enhancement be imposed for the purpose of punishing the losing party." (*Ketchum, supra,* 24 Cal.4th at p. 1139.)

3. The contingent nature of the fee award

Under *Ketchum* the contingent nature of a case may be a proper basis for applying a multiplier. (*Ketchum*, *supra*, 24 Cal.4th at p. 1136.) Any application of a multiplier, however, must avoid "unfair double counting" of factors already included in the calculation of the lodestar amount. (*Id.* at p. 1138.) Campos sought hourly attorney fees of $650 for two partners and $550 for two associates. In opposing the attorney fees motion, Kennedy submitted evidence that one of the partners, Dean, charged hourly rates of $300 and $350 in defending Campos in another case, and that her hourly rate for a contingency case was $650.

The trial court found it was not unusual for attorneys to charge different rates for different cases, and found the hourly rates of $650 and $550 to be reasonable.

Additionally, the trial court stated that based on its experience of handling sexual harassment and assault cases, Campos had a 50 percent chance of winning at trial. The court found that—because Campos's attorneys would only get paid if she won and there was only a 50 percent chance of winning—a multiplier of 2.0 was justified. Under such reasoning, however, a multiplier would be required in every contingency case, and a multiplier of 2.0 required whenever there is only a 50 percent chance of winning. Such an approach, however, involves no exercise of discretion by a trial court and is therefore not the law.

DISPOSITION

The judgment is affirmed. The order awarding attorney fees is reversed and remanded with directions to the trial court to conduct further proceedings to determine whether a multiplier should be used to enhance the lodestar amount. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ