Filed 10/10/17 Hosac v. County of Los Angeles CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GEORGE I. HOSAC et al., Plaintiffs and Appellants, v. COUNTY OF LOS ANGELES, Defendant and Appellant.	B267998 (c/w B268679, B271190) (Los Angeles County Super. Ct. No. BC501293)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed with modifications.

Hurrell Cantrall, Thomas C. Hurrell and Melinda Cantrall for Defendant and Appellant.

Hayes & Ortega, Dennis J. Hayes and Tracy J. Jones for Plaintiffs and Appellants.

This appeal pertains to a recoupment action under Government Code section 996.4[1] (Section 996.4 action) in which the judgment awarded: (1) attorney fees and costs incurred by two public employees in an underlying action (Cashline action); and (b) attorney fees and costs incurred by those same two public employees in pursuing the Section 996.4 action.

In the Cashline action, Cashline ATM, Inc. (Cashline) alleged that George L. Hosac (Hosac) and Reginald M. Franklin (Franklin)—two deputies of the Los Angeles County Sheriff's Department (LASD)—breached a contract they signed to provide the Los Angeles County Men's Central Jail (MCJ) with an automated teller machine (ATM), and to service that ATM. Their legal fees were $323,662.75. When Hosac and Franklin demanded that County of Los Angeles (County) pay their defense costs pursuant to section 996.4, County declined. Ultimately, the trial court dismissed Hosac and Franklin from the Cashline action.

Subsequently, Hosac and Franklin sued County in the Section 996.4 action to recover the attorney fees and costs they incurred in the Cashline action. The trial court granted summary judgment for Hosac and Franklin on the issue of County's liability under section 996.4,[2] and then granted their

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[1] All further statutory references are to the Government Code unless otherwise indicated.

[2] As a technical matter, summary judgment was improper because it did not eliminate triable issues as to damages. But the parties and the trial court consented to this procedure, so we will not question it.

two motions for attorney fees and costs. The first motion[3] pertained to, inter alia, the attorney fees they incurred in the Cashline action. Though Hosac and Franklin only incurred $323,662.75 in attorney fees in the Cashline action, the trial court used a lodestar multiplier to award them $473,510.75. The second motion pertained to $394,250 in attorney fees that Hosac and Franklin incurred in connection with prosecuting their rights in the Section 996.4 action. The trial court awarded Hosac and Franklin the amount they requested as an item of costs allowable pursuant to Code of Civil Procedure section 1033.5, subdivision (a)(10). In connection with those two motions for attorney fees and costs, the trial court did not reach the issue of costs. Rather, at a later date, the trial court directed Hosac and Franklin to file a joint memorandum of costs covering costs they incurred in the Cashline action and the Section 996.4 action. They did so.[4] Subsequently, in an amended judgment, the trial court included $18,184.73 in costs. Of that amount, $9,531.26 was attributable to costs incurred in the Cashline action.

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[3] As we detail in this opinion, the trial court utilized unorthodox procedures in the Section 996.4 action. We note that it is a misnomer to call the "first motion" a motion for attorney fees and costs because, in actuality, it was a trial brief on the issue of damages. Also, the hearing on the "first motion" was essentially a bifurcated damages trial conducted based on papers, declarations and exhibits. It was birfucated in the sense that the trial court only considered one aspect of damages (the attorney fees incurred in the Cashline action), and not the second aspect of damages (the costs incurred in the Cashline action).

[4] To the degree the memorandum of costs included costs in the Cashline action, it was a trial brief on an issue of damages.

County appeals on numerous grounds. It contends: Neither Hosac nor Franklin were entitled to summary judgment in the Section 996.4 action because either they were not acting within the scope of their employment, or they were guilty of fraud and/or corruption; even if they were entitled to recover under section 996.4, the trial court erred by applying a lodestar multiplier and awarding them more in damages than they incurred in attorney fees in the Cashline action; section 996.4 is not a fee-shifting statute, so the trial court erred by relying on that statute to award Hosac and Franklin attorney fees incurred in prosecuting their section 996.4 rights; and the trial court acted in excess of its jurisdiction when it improperly amended the judgment to add $9,531.26 in Cashline action costs after County filed its notice of appeal.

Hosac and Franklin filed a protective cross-appeal in which they argue that if an award of attorney fees for prosecuting their section 996.4 rights cannot be awarded pursuant to that statute, then those fees should be awarded pursuant to Code of Civil Procedure section 1021.5.

The trial court properly determined there was no triable issue as to liability, and it had jurisdiction to include $9,531.26 in Cashline action related costs in the judgment. However, we conclude the trial court erred when it applied a lodestar multiplier and awarded, as damages, more in attorney fees than Hosac and Franklin incurred in the Cashline action. As a result, the judgment must be reduced by $149,848, the difference between the amount they incurred and the amount the trial court awarded using a lodestar multiplier. In addition, we conclude that section 996.4 does not authorize an award of attorney fees as costs. However, Hosac and Franklin's cross-appeal has merit,

and we conclude the award of attorney fees as costs in the Section 996.4 action can be affirmed based on Code of Civil Procedure section 1021.5.

The judgment shall be modified to reflect that the award of attorney fees in the section 996.4 action is based on Code of Civil Procedure section 1021.5 rather than section 996.4. In addition, the judgment shall be modified to reflect that the total award of damages plus costs is reduced to $736,097.48.

As modified, the judgment is affirmed.

FACTS

LASD

LASD maintains a chain of command. Its sworn personnel are distinguished by rank, which relates to the level of responsibility within the chain of command. Personnel must follow the orders and directives of superior officers. Supervisors are responsible for the work and conduct of their subordinates.

These rules governing LASD personnel are set forth in the Los Angeles County Sheriff's Department Manual of Policies and Procedures (LASD Manual). LASD employees must review this manual, and an employee can be disciplined for failing to comply with it.

The LASD Manual distinguishes sworn personnel in descending order as follows: Sheriff, Undersheriff, Assistant Sheriff, Division Chief, Area Commander, Captain, Lieutenant, Sergeant, and Deputy Sheriff.

Franklin was a Deputy Sheriff. Between 2006 and March 2014, Hosac was the Operations Sergeant of MCJ, and was Franklin's supervisor and superior. Robert Olmsted (Olmsted) was Division Captain, Unit Commander and Facility Manager of MCJ between December 2006 and April 2008. When he was

promoted to Area Commander, he was succeeded by Daniel Cruz (Cruz).

LASD does not have the authority to enter into leases or contracts. Nor do LASD's employees have that authority. Any contract must be processed by proper County authorities.

Employee Funds

The LASD Manual provides that funds "maintained by employees for their own purposes shall conform to basic standards." Unit commanders are responsible for employee funds. The responsibilities include appointing a unit fund administrator to take on various duties such as reviewing bank statements, etc. Such funds are subject to, inter alia, the following rules: individual participation in employee funds shall be voluntary; employee funds shall not be intermingled with any LASD or County monies; surplus money from any employee fund should be used to benefit those employees contributing to the funds; and funds may be used for any worthwhile purpose approved by unit commanders.

Central Jail Employee Fund

The Central Jail Employee Fund (Employee Fund) was established for the personnel at MCJ. The Captain of MCJ has used the Employee Fund to finance the renovation of an employee fitness center within MCJ, the construction of an employee barbecue area on the premises, and the construction of a memorial dedicated to officers killed in the line of duty. Also, it was used to finance holiday parties and fundraisers, and to make charitable donations to benefit the community. As a result, the Employee Fund contributed to better working conditions at MCJ as well as an overall increase in the morale of its employees.

In 2006, Olmsted appointed Hosac as the administrator of the Employee Fund. Per the LASD Manual, he fulfilled his responsibilities during normal working hours as part of his regular assignment. He was authorized to make credit transactions on behalf of the Employee Fund. At no point did he receive extra compensation for performing administrative duties.

MCJ's Interest in Acquiring an ATM

In February 2008, Olmsted directed Franklin to research the feasibility of installing an ATM at MCJ, to identify vendors for the acquisition of an ATM, and to report his progress up the chain of command to Hosac. The assignment was to be performed as part of Franklin's regular job duties during work hours. Olmsted ordered Hosac to supervise Franklin.

The purpose of the ATM was to provide a valuable service for the convenience of the public, the employees, and the inmates in custody at the jail. At the time, noncredit union MCJ employees did not have access to cash on the premises. Frequently, MCJ employees would leave the facility and walk or drive significant distances to their nearest bank. In addition, visitors did not have access to cash that they could deposit into commissary accounts for inmates.

Franklin reported his research of ATM vendors to Hosac. In late February 2008, while on duty, Hosac met with Dominic DeBellis (DeBellis), the chief executive officer (CEO) of Cashline ATM, Inc. (Cashline). Franklin attended the meeting, which was introductory in nature, on Hosac's orders. Hosac designated Franklin as the point of contact, and told DeBellis that he could communicate with Franklin concerning Cashline's services. Subsequently, Franklin and DeBellis exchanged communications, which Franklin reported to Hosac.

The Cashline Contract

On August 11, 2008, Hosac met with DeBellis in the Operations Office of MCJ. On Hosac's orders, Franklin attended the meeting. They signed and/or initialed the Cashline contract.

The Cashline contract was labeled "ATM Processing Agreement."

On page 1 of the Cashline contract, MCJ was listed as the business entering into the contract. Franklin was listed as the principal owner and/or partner of MCJ. At the bottom of the page, the Cashline contract stated, "I understand that based on the Patriot Act[,] ownership of an ATM now constitutes the requirement of a background check to ensure principal owners do not have a criminal record or are on probation." Underneath the Patriot Act statement, Franklin initialed saying he agreed to cooperate with "these requirements."

Hosac signed page 2 of the Cashline contract on behalf of the "Customer." The words "Authorized Signature" appeared under the signature line.

Pages 3 through 5 contained boilerplate language. Page 6 of the contract was labeled "ACH Authorization Release."[5] It stated that "LA County Sheriffs hereby authorizes Genpass to initiate ACH transfer entries for" adjustments, error corrections, daily transaction settlement, and maintenance. It further stated that adjustments would be sent to the Employee Fund.

Page 7 was designated exhibit A to the Cashline contract. It provided: "The following amendment is made with regard to the Processing agreement for the LA County Sheriff County Jail

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[5] ACH means automated clearing house. (*Credit Managers' Assn. v. Brubaker* (1991) 233 Cal.App.3d 1587, 1596.)

ATM. [¶] The term is a beta Test for 6 months. Upon the expiration of that period[,] the LA [C]ounty Sheriff Department will purchase the ATM, Return the ATM, or Continue with the contractual agreement period of the processing agreement. [¶] The purchase price of the ATM is [$]4000.00. [¶] LA County Sheriff [Department] assume[s] care and return of the ATM to its original or near original condition, baring normal use, excluding vandalism and or theft. [¶] . . . [¶] Vault Cash will be provided by LA County Sheriff [Department][.]"

Hosac signed exhibit A on behalf of "LA County Sheriff Department." DeBellis signed on behalf of Cashline.

Installation and Operation of the ATM; Purchase of the ATM

Hosac ordered Franklin to contact the appropriate personnel within MCJ for the installation of electrical outlets, telephone, and/or internet ports so that Cashline could install the ATM at MCJ. The ATM was installed at MCJ on August 15, 2008. Hosac signed the invoice for the installation of the ATM. "LA County Sheriff Department" was named as the customer. In September 2008, Cruz issued checks to Cashline totaling $25,000 from the Employee Fund. The checks were used to fill the ATM with cash. On September 22, 2008, Cruz authorized the purchase of the ATM for $4,000. Hosac used funds from the Employee Fund and completed the purchase the same day.

Termination of the Cashline Contract

Olmsted contacted Gary Tse (Tse), the Director of the Facilities Planning Bureau at LASD, and indicated that MCJ staff had entered into a contract with a vendor to provide ATM services, and then had purchased an ATM. Olmsted stated that he did not approve the purchase, and he sought Tse's opinion and

advice regarding how to handle the contract. Tse informed Olmsted that LASD and its employees did not have authority to enter into a contract, and he should contact County Counsel for advice on how to handle the matter.

On December 11, 2008, Olmsted ordered Hosac to terminate the Cashline contract. Hosac notified DeBellis of the termination. A few weeks later, the ATM was uninstalled and placed in storage by MCJ staff.

No Disciplinary Action

LASD did not take disciplinary action against Hosac and Franklin for any act or omission regarding the Cashline contract.

The Cashline Action

Cashline sued County, LASD, Hosac, Franklin and the Employee Fund for breach of contract. The County initially provided Hosac and Franklin with a defense. Less than a year later, County and LASD were dismissed from the Cashline action, and County withdrew its defense for Hosac and Franklin. They requested that County continue providing a defense. It declined. The Professional Peace Officers Association (PPOA) assumed the defense. PPOA, Hosac and Franklin retained the law firm of Hayes & Cunningham, LLP (Hayes Firm). The Hayes Firm provided a joint defense for Hosac, Franklin and the Employee Fund.

Cashline filed a fourth amended complaint (Cashline FAC) for breach of contract against the Employee Fund as an unincorporated association, and Hosac and Franklin were named as individual members of that association. The Cashline FAC alleged that the purchase of the ATM ended the six-month beta-test and triggered a five-year contractual term. The FAC further alleged that Cashline unilaterally exercised its right to extend

the initial five-year term for an additional five years, for a total term of 10 years. The Cashline FAC prayed for liquidated damages of $33 per day for the alleged remaining term of 117.5 months and thereby sought to recover $116,325 in damages and attorney fees as costs.

On behalf of its clients, the Hayes Firm filed a cross-complaint against Cashline and DeBellis alleging, inter alia, conversion on the theory Cashline made $8,970 in unauthorized withdrawals from the Employee Fund. Eventually, the Hayes Firm filed a first amended cross-complaint.

After trial in the Cashline action, the trial court dismissed Hosac and Franklin with prejudice. The trial court ruled that the purchase of the ATM exercised an option that triggered a five-year term, but also ruled that the liquidated damages clause was unenforceable. At the conclusion of the case, the trial court entered a net judgment in favor of the Employee Fund for $4,054.55.

The Hayes firm billed a discounted rate of $200 an hour for attorneys and between $50 and $100 an hour for paralegals and legal secretaries. In total, it billed $323,662.75 for time spent by attorneys, paralegals and legal secretaries on the Cashline action. PPOA paid the Hayes Firm.

The Section 996.4 Action; Cross-Motions for Summary Judgment; Outstanding Matters Related to Hosac and Franklin's Recovery under Section 996.4; Hosac and Franklin's Motion for Costs.

Hosac and Franklin sued County to recover their defense costs under section 996.4, and then moved for summary judgment and/or summary adjudication as to liability. In the alternative, they moved for summary adjudication of County's seventh

affirmative defense alleging, inter alia, that Hosac's and Franklin's claims failed because they acted with fraud, corruption or malice. County filed a cross-motion for summary judgment.

On February 18, 2015, the trial court granted Hosac and Franklin's motions for summary judgment on liability, concluding they were acting within the scope of their employment and entitled to recover the defense costs that they incurred in the Cashline action. The parties and the trial court agreed Hosac and Franklin's damages would be quantified in connection with a later proceeding. At a subsequent hearing, the trial court stated, "It may be that we will need to have some argument on these points," and further stated, "I think what you need to do is file a motion for an award of attorney's fees based on this."

On April 8, 2015, Hosac and Franklin filed a motion for attorney fees, costs and expenses incurred in the Cashline action. They represented that they incurred $323,662.75 in attorney fees, $20,784.53 in costs, and $30,958.75 with respect to paralegal/legal secretary expenses. They asked the trial court to use a lodestar multiplier and award $495,872 in attorney fees.

A few days subsequent, on April 10, 2015, the trial court denied County's motion for summary judgment.

The motion for attorney fees incurred in the Cashline action was heard on August 18, 2015, and decided on August 20, 2015. The trial court used a lodestar multiplier and determined that Hosac and Franklin were entitled to recover $473,510.75 in attorney fees incurred in the Cashline action. The trial court's order was silent regarding the related costs and expenses.

On September 25, 2015, Hosac and Franklin filed a motion (Cost Motion) to recover the fees, costs, and expenses incurred in prosecuting the Section 996.4 action. As authority for the

requested recovery, they relied on section 996.4 as well as Code of Civil Procedure sections 128.5 and 1021.5.

County's First Notice of Appeal

On October 19, 2015, County filed a notice of appeal stating that it was appealing "from the August 20, 2015 order on [Hosac and Franklin's] motion for attorneys' fees, and from all judgments and/or appealable orders embraced therein, and from all orders that are separately appealable."

Interlocutory Judgment; Further Proceedings

On October 26, 2015, the trial court entered an interlocutory judgment in favor of Hosac and Franklin for $473,510.75 with respect to their substantive recovery in the section 996.4 action.[6]

The Cost Motion was heard on November 10, 2015 and taken under submission. It was granted on December 4, 2015. Based on section 996.4, the trial court concluded that Hosac and Franklin were entitled to recover $394,250 in attorney fees incurred in the Section 996.4 action. Regarding Code of Civil Procedure section 1021.5, the trial court concluded it was inapplicable because "it is clear that any supposed public benefit arising from vindication of public employees' interest in state-

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[6] This judgment was interlocutory and therefore not appealable because the trial court had yet to determine Hosac's and Franklin's right to collect costs and expenses incurred in the Cashline action. (7 Witkin, Cal. Procedure (5th Ed. 2008), Judgment, §§ 7-13, pp. 551-557.) At a hearing on November 10, 2015, the trial court stated, "We don't have a judgment yet," and thereby implicitly recognized that the prior judgment was interlocutory.

provided legal representation was entirely secondary to vindication of plaintiffs' own personal and economic interests."

The order stated: "Evaluation of costs and expenses will be undertaken upon any review of the Memorandum of Costs."

Hosac and Franklin filed two cost memorandums, one to recover costs in the Cashline action and one to recover costs in the Section 996.4 action. The trial court's clerk contacted the Hayes Firm and indicated that it needed to file a combined memorandum of costs.

On December 3, 2015, Hosac and Franklin filed an amended memorandum of costs seeking $20,069.91 in costs.

County's Second Notice of Appeal

On December 21, 2015, County filed a notice of appeal from "the December 4, 2015 post-judgment order awarding attorneys' fees to [Hosac and Franklin]. [County] appeals from all appealable orders embraced therein (including from any orders made during the hearing of the motion on or around November 10, 2015) and from all orders that are separately appealable."

Hosac and Franklin's Appeal

On January 12, 2016, Hosac and Franklin noticed an appeal from "judgment after an order granting a summary judgment motion," and referenced an order entered on November 18, 2015.

Amended Judgment

On February 18, 2016, the trial court entered an amended judgment awarding Hosac and Franklin $473,510.75 in attorney fees incurred in the Cashline action, $394,250 in attorney fees incurred in the Section 996.4 action, and $18,184.73 in costs incurred collectively in both actions. The total amount of the judgment in favor of Hosac and Franklin was $885,945.48.

County's Third Notice of Appeal

On March 24, 2016, County filed a notice of appeal from, inter alia, the February 18, 2016, amended judgment in favor of Hosac and Franklin. County purported to appeal from "all appealable orders embraced therein, and from all orders that are separately appealable."

DISCUSSION

I. Standard of Review.

"An order granting summary judgment is subject to de novo review. [Citation.]" (*Moreno v. Quemuel* (2013) 219 Cal.App.4th 914, 917–918.) Like the trial court, we employ a three-step analysis: "'First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]' [Citation.]" (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 71.)

II. Section 996.4.

"If after request a public entity fails or refuses to provide an employee or former employee with a defense against a civil action or proceeding brought against him and the employee retains his own counsel to defend the action or proceeding, he is entitled to recover from the public entity such reasonable attorney's fees, costs and expenses as are necessarily incurred by him in defending the action or proceeding if the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity, but he is not entitled to such reimbursement if the public entity establishes,"

inter alia, "that he acted or failed to act because of actual fraud, corruption or actual malice[.]" (§ 996.4.)

III. Hosac and Franklin were Acting Within the Scope of Employment.

Conduct is within the scope of employment if it was a risk arising out of the employment, and if the conduct was not so unusual or startling that it would seem unfair to make a loss resulting from the risk a part of the employer's cost of doing business.[7] (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1003–1004 (*Farmers*).) This test has been rephrased as whether the risk was a generally foreseeable consequence of the employee's activity. (*Ibid.*; *Lazar v. Thermal Equipment Corp.* (1983) 148 Cal.App.3d 458, 465 (*Lazar*).)

"One traditional means of defining this foreseeability is seen in the distinction between minor 'deviations' and substantial 'departures' from the employer's business. The former are deemed foreseeable and remain within the scope of employment; the latter are unforeseeable and take the employee outside the scope of his employment." (*Lazar*, *supra*, 148 Cal.App.3d at p. 465.)

If the main purpose of the employee's conduct remains the employer's business, "'it does not cease to be within the scope of

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[7] *Farmers* explained, "As used in the Tort Claims Act, '[t]he phrase "scope of his employment" is intended to make applicable the general principles that the California courts use to determine whether the particular kind of conduct is to be considered within the scope of employment in cases involving actions by third persons against the employer for the torts of his employee.' [Citation.]" (*Farmers*, *supra*, 11 Cal.4th at p. 1003.) Thus, scope of employment analysis for section 996.4 is the same as scope of employment analysis for respondeat superior.

the employment by reason of incidental personal acts, slight delays, or deflections from the most direct route.'" (*Lazar*, *supra*, 148 Cal.App.3d at p. 465.) Accordingly, "[t]he fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer. [Citation.] For example, acts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal to himself and not acts of service, do not take him outside the scope of his employment.' [Citation.]" (*Ibid*.)

Whether an employee has acted within the scope of employment is ordinarily a question of fact. It becomes a question of law when the facts are undisputed, and there is only one possible inference. (*Farmers, supra,* 11 Cal.4th at p. 1019; *San Diego Police Officers Assn. v. City of San Diego* (1994) 29 Cal.App.4th 1736, 1742.)

Here, there is only one possible inference, which is that Hosac and Franklin were acting within the scope of their employment.

The main purpose of Hosac and Franklin's conduct was the business of MCJ. Per the LASD Manual, the Unit Managers (Olmsted and then Cruz) were responsible for the Employee Fund. Olmsted appointed Hosac as administrator. Also, Olmsted ordered Franklin to research the acquisition of an ATM for MCJ, and ordered Hosac to supervise Franklin. The purpose of the ATM was to benefit employees and the public at MCJ by making the environment more service oriented, positive and safe. Hosac and Franklin attended to the ATM project as part of their regular duties during work hours, and they did not receive extra compensation for their efforts. Nor did they personally benefit

from their conduct other than by obtaining the same convenience of the ATM as everyone else. The meeting at which the Cashline contract was executed was in an MCJ office. After the execution of the contract, Cruz used the Employee Fund to fill the ATM with cash. He later instructed Hosac to exercise the option and purchase the ATM using money from the Employee Fund. Cruz impliedly concluded as Unit Commander that the ATM was desirable and proper. There is a reasonably deducible inference that personnel at MCJ were not aware that LASD and LASD staff lacked the authority to enter into a contract on behalf of LASD or County.[8] Finally, after Olmsted had the ATM removed, neither Hosac nor Franklin were disciplined, which implies LASD believed the actions of Hosac and Franklin were understandable.

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[8] Summary judgment can be granted based on reasonably deducible inferences if they are not contradicted by other reasonably deducible inference. (Code Civ. Proc., § 437c, subd. (c).) The conduct of Olmsted, Cruz, Hosac and Franklin leads to the reasonably deducible inference that they did not understand that Hosac and Franklin could not sign the Cashline contract. It appears that Olmsted did not understand this until he was told by Tse.

Eliza Jung, a real property agent for County, declared that she informed Franklin that an authorized signature from LASD was required before the final document was executed between the selected vendor and County. As a result, it is arguable that Franklin had notice he could not sign. But that does not mean he knew that Hosac could not sign, or that Hosac could not authorize Franklin to participate in the making of the Cashline contract. In any event, Franklin was in no position to go against the orders of his superiors.

If Hosac had obtained approval and an authorized signature, it is apparent from the record the result would have been acceptable. Thus, it is not the result that is at issue, it is how Hosac and Franklin got there. As a consequence, what they did was only a minor deviation from LASD's business. Moreover, due to the hierarchical organization of LASD, and the lack of LASD personnel knowledge that they lacked the authority to enter into contracts, what Hosac did was not so unusual or startling that it would seem unfair to make any related loss a part of County's cost of doing business. This is all the more so for Franklin, who was ordered to accompany Hosac to the meeting where the Cashline contract was executed, and who initialed the Cashline contract in the presence of his direct supervisor on the project.

County urges us to reach the opposite result, but this urging is to no avail because it rests on positions we cannot accept.

In County's view, there is a bright line rule: An unauthorized act falls outside the scope of employment. Thus, County contends Hosac and Franklin could not have been acting within the scope of their employment because they lacked the authority to enter into the Cashline contract. But, as explained in *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296–297, "an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts. [Citations.]" Thus, unauthorized conduct can be within the scope of employment.

Based on *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209, County urges us to reject section 996.4 liability in this case because it does not satisfy the policy behind the respondeat superior doctrine. County cites this passage: "Recently, we articulated three reasons for applying the doctrine of respondeat superior: (1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury. [Citations.]" (*Ibid*.) Then County argues that section 996.4 liability is not necessary to prevent recurrence of the type of conduct occurring here, or to ensure compensation for victim's like Cashline, because third party vendors like Cashline are charged with knowledge of a public employee's inability to contractually bind a public entity. (*Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1479) Also, County argues that it did not benefit from any loss to Cashline caused by Hosac and Franklin.

Underlying this argument is the notion that the policy behind the respondeat superior doctrine must be fulfilled in the section 996.4 context. We disagree. Though the scope of employment analysis in a section 996.4 action borrows from scope of employment analysis for respondeat superior liability, the two types of actions are not the same. Section 996.4 has its own policy, which is that public employees sued because of acts or omissions within the scope of employment are entitled to a defense unless they acted with fraud, corruption or malice.

Neither does *Zamudio v. State of California* (1998) 62 Cal.App.4th 673 (*Zamudio*) provide County with any justification for refusing to pay Hosac and Franklin's defense costs. The

Zamudio court held that the California Youth Authority (CYA) did not have to defend a counselor who was sued in his capacity as president of the California Correctional Peace Officers' Association (CCPOA) chapter at the Fred C. Nelles School (Nelles School) for male juvenile offenders. The court explained the "gist of the lawsuit is that [the plaintiff] breached his duty as union representative by failing to put on his 'union hat' to protect [Nelles School counselors from sex discrimination in the workplace]. Had [the plaintiff] not been a union officer, he would not have been sued. The lawsuit had nothing to do with acts or omissions stemming from [the plaintiff's] status as a CYA youth counselor." (*Id*. at pp. 678–679.) As a consequence, the *Zamudio* court went on to conclude the plaintiff's union duties were not within the scope of his employment. (*Id*. at p. 679.)

The distinctions between this case and *Zamudio* are readily apparent. The plaintiff in *Zamudio* was not required by the CYA to be president of his CCPOA chapter. Nor was there a CYA manual that gave its employees duties related to the CCPOA. Here, in contrast, the LASD Manual placed Unit Commanders in charge of employee funds, and permitted Unit Commanders to appoint fund administrators. Hosac was appointed the fund administrator by Olmsted, a superior officer, and was in no position to refuse. Also, Franklin was under orders to look into the acquisition of an ATM, and Hosac was under orders to supervise Franklin. As a consequence, their pursuit of an ATM at MCJ was the enterprise of the LASD, not some other organization.

Further, the *Zamudio* plaintiff was in a union which had its own officers and employees, and its own income source, budget and responsibilities. The court noted that "[l]ike public entities

with respect to their employees, unions generally are responsible for the tortious conduct of their officers, agents and employees," and the CCPOA had a manual establishing that employees, officers and job stewards would be provided with the cost of legal defense as to any duty of fair representation claim or malpractice claim made against them. (*Zamudio*, *supra*, 62 Cal.App.4th at p. 680.) The Employee Fund did not have employees, and did not provide for a defense if people associated with it were sued for conducting its business.

This is not a case where the defendants were wearing two hats. Rather, they were wearing LASD hats while working on an assigned project.

V. No Triable Issue Regarding Matters not Raised Below.

Once Hosac and Franklin established that they acted within the scope of their employment, they shifted the burden to County to show a triable issue as to the section 996.4 cause of action or a defense to that claim. (Code Civ. Proc., § 437c, subd. (p)(1).) County does not argue that it met its burden of proof below. Glossing over that issue, it suggests we should reverse summary judgment in favor of Hosac and Franklin based on new arguments raised for the first time on appeal, namely that relief under section 996.4 is barred by public policy and the California Constitution's proscription against public gifts, and because Hosac and Franklin are guilty of fraud or corruption. These arguments fail. Points not raised in the trial court will not be considered on appeal. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

County contends it raised its public policy arguments below when it argued that "[a]s a matter of law, [Hosac and Franklin] were not authorized to enter into the [Cashline contract] on

behalf of [County]." Based on this, County posits Hosac and Franklin "were on full notice [County] was arguing summary judgment was improper given [they] were not authorized signers to any contract on behalf of [County] and/or its agencies based upon [County's] charter, and they had substantial opportunity to prepare an opposition to the argument." It cites *West Chandler Boulevard Neighborhood Assn. v. City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1517 [record indicated parties raised an issue sufficiently to give opposing parties and the trial court the opportunity to address the issue, so the reviewing court declined to find that the issue had been waived]. A review of County's opposition papers below indicates that it argued lack of authorization to enter into the Cashline contract only to support the contention that Hosac and Franklin were not acting with the scope of employment. In no way did County's papers alert the trial court or Hosac and Franklin that County was raising a public policy defense.

The foregoing aside, public policy does not aid County because it dictates rather than prohibits Hosac and Franklin's recovery. The scenario at bar is of the type for which section 996.4 was enacted.

VI. Hosac and Franklin were Entitled to Recover Defense Costs Incurred in the Cashline Action, but not More than They Actually Incurred.

County maintains that Hosac and Franklin are not entitled to recovery because PPOA paid their defense costs. If they are entitled to recovery, County posits that they are not entitled to anything more than they incurred, and that the trial court erred by enhancing Hosac's and Franklin's recovery by using a lodestar

multiplier that should only apply to awards under fee shifting statutes.

On the first point, County is wrong. Section 996.4 provides recovery for defense costs an employee necessarily incurs. Attorney fees are incurred by a litigant if they are incurred on his or her behalf even if he or she does not pay them. (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 373 (*Lolley*).) County argues we should not follow *Lolley* because it involved a fee shifting statute rather than section 996.4. This argument misses the mark. The purpose of section 996.4 is to make a public entity liable for the cost of doing business. If an employee is sued for something he or she did within the scope of employment, then that cost is statutorily assignable to the employer unless the employee acted with fraud, corruption or malice. It would violate the policy of section 996.4 to shift that expense away from the public entity.

On the second point, we agree with County.

When interpreting a statute, our goal is to discern the intent of the Legislature. This is accomplished by looking at the statutory language and giving effect to the usual and ordinary meaning of the words. We must be sensitive to the context of the words and the purpose of the statute, keeping in mind that a statute must be given a reasonable and commonsense interpretation. Our interpretive goal is to achieve wise policy. (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 997.) Finally, it is beyond dispute that when statutory language is clear and unambiguous, """there is no need for construction, and courts should not indulge in it."""" (*California Ins. Guarantee Assn. v. Liemsakul* (1987) 193 Cal.App.3d 433, 439.)

Section 996.4 has a plain and unambiguous meaning. It permits recovery of defense costs necessarily incurred. We

conclude that "necessarily incurred" means actually incurred and necessary for the defense. Thus, the statute prohibits recovery of any attorney fee that was not actually incurred, or any attorney fee incurred but unnecessary because it was either excessive or not needed for the defense. Here, the Hayes Firm only billed $323,662.75 for attorney fees. Those are the only attorney fees actually incurred by Hosac and Franklin.

Hosac and Franklin contend the trial court properly applied a lodestar multiplier because it is the accepted method for calculating reasonable attorney fees. But the lodestar analysis is used for making attorney fee awards in connection with fee-shifting cases. (*Roos v. Honeywell Internat., Inc.* (2015) 241 Cal.App.4th 1472, 1490–1491.) In other words, it applies where a statute, contract or equitable principle requires one party to pay his or her opponent's attorney fees separate and apart from the substantive relief obtained in an action. Here, the Cashline action attorney fees constituted the substantive relief obtained in the action, not a fee award.

The recovery of attorney fees incurred in the Cashline action must be reduced to $323,662.75, the actual fees billed.

VII. The Award of $394,250 in Attorney Fees Incurred by Hosac and Franklin in Prosecuting their Section 996.4 Rights is not Supported by that Statute; Nonetheless, the Award Must be Affirmed Because it is Supported by Code of Civil Procedure Section 1021.5.

Each party to a lawsuit must pay its own attorney fees unless a contract, statute or other law provides. (*K.I. v. Wagner* (2014) 225 Cal.App.4th 1412, 1420–1421.) Section 996.4 does not permit an employee to recover attorney fees in an action to

enforce his or her section 996.4 rights.[9] The award cannot be upheld based on that statute, and therefore the assertion on this point made by County in its appeal is well-taken. But that does not end the matter. In their protective cross-appeal, Hosac and Franklin contend that if section 996.4 does not apply, we should conclude the trial court erred by not applying Code of Civil Procedure section 1021.5.

As we discuss, Code of Civil Procedure 1021.5 applies as a matter of law, and Hosac and Franklin's award can be affirmed on that basis.

A. Motion to Dismiss Hosac and Franklin's Appeal.

As a preliminary matter, we note that County filed a motion to dismiss Hosac and Franklin's appeal. It lacks merit and is hereby denied.

In its appellate briefs and its motion to dismiss, County contends we do not have jurisdiction over the Code of Civil Procedure section 1021.5 issue because Hosac and Franklin's notice of appeal pertains to a "[j]udgment after an order granting summary judgment" and does not refer to a postjudgment order granting attorney fees. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1007–1008 [an appellate

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[9] The parties discuss this issue at length in their briefs. We need not dissect all their arguments. Suffice it to note that section 996.4 allows an employee to recover defense costs in a prior action. It is not susceptible to the interpretation that the employee can recover attorney fees for successfully prosecuting section 996.4 rights. (*County of San Diego v. Alcoholic Beverage Control Appeals Bd.* (2010) 184 Cal.App.4th 396, 401 [no need to consult extrinsic aids when construing a statute unless susceptible to more than one interpretation].)

court has no jurisdiction to review an award of attorney fees made after entry of the judgment unless the order is separately appealed].) This presupposes Hosac and Franklin's notice of appeal followed entry of an appealable judgment. It did not because the October 26, 2015, order was interlocutory given that the trial court had not decided the entire controversy, i.e., it still had to determine the amount of costs and expenses incurred by Hosac and Franklin in the Cashline action.

The only final and appealable judgment was the February 18, 2016, amended judgment. Thus, Hosac and Franklin's notice of appeal was premature. Pursuant to the California Rules of Court, it must be construed as being filed immediately after entry of the amended judgment because it was filed after the trial court announced its intended ruling regarding the section 996.4 attorney fees but before the amended judgment was rendered. (Cal. Rules of Court, rule 8.100(d)(2).) The trial court's December 4, 2015, order granting attorney fees in the Section 996.4 action was an interim order that is reviewable in connection with Hosac and Franklin's appeal from the amended judgment. (*Rao v. Campo* (1991) 233 Cal.App.3d 1557, 1565; *Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1132–1134 [in connection with an appeal from a judgment, Code of Civil Procedure section 906 permits review of any interim, nonappealable order that substantially affects the rights of a party].)

Even if Hosac and Franklin's appeal did not encompass the trial court's ruling that Code of Civil Procedure section 1021.5 was inapplicable, we would reach the issue because a respondent is allowed to assert a nonappealed legal theory—even one rejected by the trial court—when urging affirmance.

(*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1121 [considering a statute of limitations issue urged by respondent even though it was rejected by trial court].)

B. The Merits.

Typically, the denial of attorney fees under Code of Civil Procedure section 1021.5 is reviewed for an abuse of discretion. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213–1214.) But review is de novo when the determination of whether the criteria for an award of attorney fees and costs amounts to a question of statutory construction. (*Ibid*.)

Code of Civil Procedure section 1021.5 provides, in part: "Upon motion, a court may award attorneys' fees to a successful party against one or more 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 nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, 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."

1. *Important Right Affecting the Public Interest*.

We find it undeniable that section 996.4 embodies an important right affecting the public interest. Though unclear, the trial court presumably did not conclude otherwise. This is with good reason.

"[T]he question whether there was an important public interest at stake merely calls for an examination of the subject matter of the action—i.e., whether the right involved was of sufficient societal importance. [Citation.]" (*Beasley v. Wells*

Fargo Bank (1991) 235 Cal.App.3d 1407, 1417 (*Beasley*), overruled on other grounds in *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1151.) Section 996.4 encourages public employees to freely perform their duties. (*See Johnson v. State of California* (1968) 69 Cal.2d 782, 792 [employee indemnification scheme in sections 825 to 825.6 designed to limit the personal threat of suit or liability, and is "centered on assuring the zealous execution of official duties by public employees"].) Also, it encourages public entities to provide a defense instead of passing on the cost of doing business. As to whether this issue is properly committed to us, we note that "[n]ormally [an] appellate court will be in a better position to assess whether a given legal action has had a significant impact on the law. . . . Except in rare situations[,] this does not require either [the trial court or appellate court] to make factual findings based on testimony from live witnesses of varying credibility. It is in the true sense a question of law." (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 10 (*Los Angeles Police Protective League*).) For all these reasons, we conclude section 996.4 is of sufficient societal importance.

2. *Significant Benefit to the General Public*.

On this element, it is once again unclear whether the trial court took a position. This element favors an award.

Regarding significant benefit analysis, "courts check to see whether the lawsuit initiated by the plaintiff was 'demonstrably influential' in overturning, remedying, or prompting a change in the state of affairs challenged by the lawsuit. [Citations.] . . . As for what constitutes a 'significant benefit,' it 'may be conceptual or doctrinal, and need not be actual and concrete, so long as the public is primarily benefited.' [Citation.]" (*Karuk Tribe of*

Northern California v. California Regional Water Quality Control Bd., North Coast Region (2010) 183 Cal.App.4th 330, 363.) A trial court must assess the significance of the benefit as well as its impact "'from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case.' [Citation.] The 'extent of the public benefit need not be great to justify an attorney fee award.' [Citation.]" (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 894.)

Moreover, the enforcement of an existing right "does not mean that a substantial benefit to the public cannot result. Attorney fees have consistently been awarded for the enforcement of well-defined, existing obligations. [Citations.]" (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318.)

Based on the foregoing, it is apparent that Hosac and Franklin conferred a significant benefit on the public by enforcing the important right set forth in section 996.4 and opposing County in its attempt to abandon the defense of employees who were sued for conduct within the scope of employment. Encouraging peace officers to respect the chain of command—-which is what indemnification in this action accomplishes by ensuring peace officers like Hosac and Franklin are not left to their own devices when they are sued—enures to the benefit of the general public of our state. Without indemnity, peace officers may engage in the type of second guessing of their duties that would be anathema to law enforcement.[10]

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[10] This point is most salient as to Franklin. Everything he did was under the direct and immediate supervision of Hosac. Requiring Franklin (or a third party on his behalf) to pay his

Our conclusion is backed by cases in which Code of Civil Procedure section 1021.5 fees were held recoverable when public employees sued to enforce their rights. (*Baggett*, *supra*, 32 Cal.3d 128; *Edgerton v. State Personnel Bd.* (2000) 83 Cal.App.4th 1350 [enforcement of the privacy rights of public employees subject to drug testing]; *Wilkerson v. City of Placentia* (1981) 118 Cal.App.3d 435 (*Wilkerson*) [firefighter engineer filed a successful writ compelling a city to pay him lost wages for the period of his wrongful discharge]; *Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583 [writ petition seeking to compel the State Personnel Board to consider an employee's applications for two higher civil service positions after those applications had been rejected based on an invalid regulation].)

Alongside this observation, we heed the teaching of *Los Angeles Police Protective League*, which explained that all the "factors under [Code of Civil Procedure] section 1021.5 are interrelated. . . . Where the benefits achieved for others are very high it will be more important to encourage litigation which achieves those results. Accordingly, it will be more important to offer the bounty of a court-awarded fee than where the public

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attorney fees in this matter would only signal to peace officers that they must second guess their superiors.

The words of *Baggett v. Gates* (1982) 32 Cal.3d 128, 143 (*Baggett*), which involved enforcement of Public Safety Officers Procedural Bill of Rights Act, are no less true here: "Since enforcement of [section 996.4] should help to maintain stable relations between peace officers and their employers and thus to assure effective law enforcement, [an officer's] action directly inures to the benefit of the citizenry of this state. [Citation.] No one can be heard to protest that effective law enforcement is not a 'significant benefit.'" (*Id.* at p. 143.)

benefits are less significant. Thus, the courts should be willing to authorize fees on a lesser showing of need than they might where the public benefits are less dramatic. This means the court sometimes should award fees even in situations where the litigant's own expected benefits exceed its actual costs by a substantial margin. [¶] In contrast, where the public benefits are rather modest the courts should award fees only where the litigant's own expected benefits do not exceed its costs by very much (or possibly are even less than the costs of the litigation)." (*Los Angeles Police Protective League*, *supra,* 188 Cal.App.3d at p. 10.)

Here, the public benefit is high. It is therefore important to encourage this type of litigation.

3. *Necessity and financial burden of private enforcement*.

Private enforcement of section 996.4 was necessary because this was not a case that County, the defendant, was going to champion. The only bone of contention regarding this element is the financial burden. It would appear the trial court relied on this element in its ruling.

The purpose of Code of Civil Procedure section 1021.5 "is to provide an incentive for '"the plaintiff who acts as a true private attorney general, prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate." [Citation.]' [Citations.]" (*Apple, Inc. v. Franchise Tax Bd.* (2011) 199 Cal.App.4th 1, 29 (*Apple*).) A trial court must determine "whether the cost of the claimant's victory transcends his personal interest—that is, whether the burden on the claimant

was out of proportion to his individual stake. [Citation.]" (*Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 230.) That said, Code of Civil Procedure section 1021.5 attorney fees can be awarded when a plaintiff sues solely to enforce his own rights. (*Robinson v. Chowchilla* (2011) 202 Cal.App.4th 368, 387 [court found important right and significant benefit to public when plaintiff sued alleging he was terminated from employment in violation of public policy and the Public Safety Officers Procedural Bill of Rights Act].)

In this case, the burden was out of proportion to Hosac's and Franklin's individual stakes in the Cashline action, and through them PPOA's stake, because the attorney fees in the Section 996.4 action exceeded those in the Cashline action.[11] Also, as explained by *Los Angeles Police Protective League*, a lesser showing is required under Code of Civil Procedure section 1021.5 when, as here, there is a significant public benefit. Consequently, the financial burden consideration favors an award of attorney fees to Hosac and Franklin.

4. *Interests of Justice*.

Hosac's and Franklin's attorney fees should not be paid out of the section 996.4 recovery. Otherwise, justice will be thwarted because, as a practical matter, their indemnity will be nullified given that it cost $394,250 in attorney fees to prosecute the Section 996.4 action to recover the $323,662.75 in attorney fees that Hosac and Franklin incurred in the Cashline action.

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[11] We understand Hosac and Franklin were not required to pay the Hayes Firm. Rather, they only had to assign their section 996.4 rights to PPOA. But due to *Lolley*, we consider Hosac, Franklin and PPOA as one.

5. *Appellate Relief*.

Wilkerson established that an appellate court can make the determination that Code of Civil Procedure section 1021.5 fees should be awarded. (*Wilkerson*, *supra*, 118 Cal.App.3d at p. 445.) Here, there is no dispute regarding the underlying facts. The determination of whether Hosac and Franklin are entitled to attorney fees under Code of Civil Procedure section 1021.5 amounts to a matter of statutory construction, which is a question of law. We conclude that Hosac and Franklin are entitled to an award of attorney fees.

The question remains as to whether to remand the matter so the trial court can assess the award amount. The answer is no. The parties do not dispute the amount of recoverable attorney fees billed in the Section 996.4 action. Specifically, County does not suggest that Hosac and Franklin should not recover $394,250 if those fees are otherwise supported by a statute. Thus, we will modify the judgment to reflect that attorney fees incurred in prosecuting the Section 996.4 action are awarded based on Code of Civil Procedure section 1021.5. (*Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361, 370, citing Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 11:73, p. 11-26 ["If the record indicates what the proper judgment or order should have been, the appellate court can reverse with directions to enter that judgment or order"].)

VIII. The Trial Court had Jurisdiction to Award $9,531.26 in Costs and Expenses Incurred in the Cashline Action.

County contends the trial court improperly amended the judgment to include costs and expenses incurred by Hosac and Franklin in the Cashline action because the amended judgment

was entered after County filed its October 19, 2015, notice of appeal. (*People v. Bhakta* (2008) 162 Cal.App.4th 973, 981 [a judgment cannot be amended by a trial court after a notice of appeal is filed].)

This contention lacks merit.

County's October 19, 2015, appeal was from the August 20, 2015, order awarding Hosac and Franklin the attorney fees incurred in the Cashline action. That was an interim order that was not appealable. It amounted to a determination of only one of two aspects[12] of Hosac and Franklin's damages, and it could not have deprived the trial court of jurisdiction to determine the other aspect. Tacitly, County suggests we should deem the October 19, 2015, appeal to be taken from the October 26, 2015, judgment. But that judgment was interlocutory in nature, and therefore not appealable, because it did not decide all the damages issues. (*In re Marriage of Fink* (1976) 54 Cal.App.3d 357, 361 [there can be only one final judgment; it is the judgment that effectively ends the lawsuit in the trial court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy].)

When the trial court entered the "amended judgment" on February 18, 2016, that was the only final judgment entered. Accordingly, the trial court had jurisdiction to include $9,531.26 in costs and expenses incurred in the Cashline action as the second of the two aspects of Hosac and Franklin's damages.

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[12] The two aspects are the attorney fees and the costs incurred in the Cashline action.

DISPOSITION

The judgment is modified to reflect that Hosac and Franklin are entitled to recover $323,662.75 in attorney fees incurred in the Cashline action; as a cost, they are entitled to recover attorney fees incurred in the Section 996.4 action in the amount of $394,250 pursuant to Code of Civil Procedure Section 1021.5; and the total judgment, including recoverable costs, is $736,097.48. As modified, the judgment is affirmed. Hosac and Franklin shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
GOODMAN

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