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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

CARLOS GARAU, et al., Plaintiffs and Appellants, v. TORRANCE UNIFIED SCHOOL DISTRICT, Defendant and Appellant.	B231114, B232442, B238798 (Los Angeles County Super. Ct. No. BC313368)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County. Kevin C. Brazile, Judge. Affirmed in part; and reversed and remanded in part.

Olga H. Garau, in pro per, and for Plaintiffs and Appellants.

Burke, Williams & Sorensen and Richard R. Terzian for Defendant and Appellant.

The three separate appeals and one cross-appeal at issue here arise out of a lawsuit filed in 2004 by Attorney Olga Garau on behalf of her husband Carlos Garau and the couple's then school-aged daughters, Liliana Garau and Odalys Garau, against the Torrance Unified School District (TUSD) alleging causes of action for constitutional violations and statutory breaches, and seeking damages, declaratory and injunctive relief based on a claim that TUSD had denied them a free and equal public education. More specifically the Garaus complain that TUSD had imposed certain fees, charges and financial burdens upon them (and other students) for activities, supplies and programs in violation of the "free school" clause in the California Constitution. After a prolonged and active period of litigation involving several rounds of dispositive motions and arbitration, including a prior appeal in this court, the matter proceeded to a bench trial in late 2010. At the conclusion of the Garaus' case in chief the trial court granted TUSD's motion for judgment pursuant to Code of Civil Procedure section 631.8. At the same time, the trial court also issued an Order to Show Cause (OSC) why sanctions should not be imposed. The TUSD subsequently filed a motion for attorney's fees pursuant to Code of Civil Procedure section 1038 and a motion for sanctions under section 128.7. After judgment was entered in the case, the court granted the motion for sanctions and fees in favor of TUSD.

The Garaus appealed from: (1) the underlying judgment (appeal No. B231114), (2) the post-judgment fee and sanction order (appeal No. B232442) and (3) the post-judgment minute order directing the superior court clerk to enter the amount of costs, and fees awarded to TUSD into the final judgment (appeal No. B238798). TUSD filed a cross-appeal of the post-judgment fee and sanctions order.

As we shall explain, only the Garaus' claims with respect to the award of Code of Civil Procedure section 1038 attorney's fees against Olga Garau and the sanctions order have merit. Likewise, TUSD has demonstrated that in awarding fees under Code of Civil Procedure section 1038, the trial court failed to consider whether TUSD was entitled to fees incurred in connection with the causes of action for equitable relief. Accordingly,

we affirm the underlying judgment in appeal No. B231114 and reverse and remand the post-judgment orders in appeal No. B232442 and in appeal No. B238798.

FACTUAL AND PROCEDURAL HISTORY

A. Pre-Trial Litigation History

On September 15, 2003, the Garaus filed a claim pursuant to the Government Claims Act for damages arising from allegedly unlawful fees imposed by TUSD. On October 7, 2003, the TUSD rejected the claim. Thereafter, on April 6, 2004, the Garaus filed a verified original complaint which alleged seven causes of action based on various legal theories[1] and seeking various remedies (damages, injunction, declaratory relief) arising from the same factual allegations — purported violations of the California Constitution, statutes, and regulations. The central contention of all of the claims was that TUSD charged its students or their parents, or failed to pay for, various services, activities and supplies in violation of the "free public education" clause of the California Constitution (art. IX, § 5).

TUSD filed a demurrer to the second, third, fourth, fifth and sixth causes of action. On July 1, 2004, the trial court stayed the first through sixth causes of action while the Garaus litigated the seventh cause of action for writ of mandate. The Garaus then filed a petition for a writ of mandate under Code of Civil Procedure section 1085.

On August 20, 2004, Judge David Yaffe heard the motion and ruled that the Garaus lacked standing to pursue a writ because they failed to show they possessed a beneficial interest in the claimed fees and charges. Specifically, the trial court found that the Garaus had not shown that they had been required to pay, or that they had actually paid, any particular charge or fee. Accordingly, the court dismissed the seventh cause of

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[1] In the Garaus' complaint they alleged the following causes of action: (1) Breach of Mandatory Duty (Gov. Code, § 815.6) as the first cause of action; (2) Unlawful Solicitation (Civ. Code, § 1716) as the second cause of action; (3) Money Had and Received as the third cause of action; (4) Violation of Equal Protection (Cal. Const., art. I, § 7, art. IV, § 16) as the fourth cause of action; (5) Declaratory Relief as the fifth cause of action; (6) Injunctive Relief as the sixth cause of action; and (7) Mandamus as the seventh cause of action.

action "until a final judgment is entered with respect to the other causes of action in plaintiffs' complaint."

The stay of the other causes of action was lifted and on October 4, 2004, the trial court sustained the demurrer without leave to amend as to the second (unlawful solicitation), fourth (violation of equal protection), fifth (declaratory relief), and sixth (injunctive relief) causes of action and overruled the demurrer as to the third (common count—money had and received) cause of action. The court found that the claim for unlawful solicitation was invalid on its face because the Garaus were not deceived into believing that they were required to pay money to TUSD, and because they did not pay any money as a result of the solicitation. The court rejected the equal protection claim, finding as a matter of law that the Garaus could not show their rights were violated when, inter alia, they were provided with school supplies that others were not. The court then determined that what remained in the case – the third cause of action for money had and received – was a limited jurisdiction damages case because the parties agreed only $1,600 was at stake, and therefore the trial court reclassified the case and transferred it to the limited civil jurisdiction department.[2]

In February 2007 the case was referred to arbitration. The arbitrator issued an opinion rejecting all of the Garaus' claims, except a claim related to a $5.00 student planner they had been required to purchase. The Garaus sought a trial de novo.

Ultimately, the case was returned to unlimited jurisdiction status and assigned to Judge Kevin C. Brazile. In 2008, the court granted the Garaus' motion to amend the complaint in part, but leave to restate the claims for equal protection and unlawful solicitation was denied. The Garaus filed an amended complaint alleging all of the same causes of action as the original complaint with the exception of the unlawful solicitation

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[2] The Garaus filed an appeal of the reclassification order in appeal No. B180683 (see *Garau v. Torrance Unified School District* (2006) 137 Cal.App.4th 192). In *Garau*, the appeal centered on the appealability of the reclassification order, among other contentions. This Court dismissed the appeal, concluding that the reclassification order was not an appealable final judgment. (*Id.* at p. 193.)

claim. TUSD filed a demurrer to the complaint. The court sustained the demurrer as to the common count without leave to amend. On January 8, 2009, the Garaus filed the operative third amended complaint.

In November 2009, the trial court heard the TUSD's summary adjudication motion on the first cause of action, which sought damages for the TUSD's alleged breach of mandatory duties under the Government Claims Act. As an exhibit in support of the motion, TUSD attached a "Special Damages Chart" prepared by the Garaus for the 2007 arbitration, which summarized the items they claimed constituted their damages. The Garuas objected to the chart on the ground that it was not properly authenticated, and as a result the trial court denied the summary adjudication motion.[3]

B. The Operative Complaint and Trial Proceedings

The case proceeded on the third amended complaint, which contained three causes of action. The first cause of action sought damages for alleged violation of TUSD's mandatory duty under the Government Code to provide a free public education by charging for various goods and services. The second cause of action for declaratory relief sought a declaration that the charges and fees imposed by TUSD in violation of its mandatory duties was unlawful. The third cause of action was for injunctive relief to prevent future allegedly unlawful charges associated with the educational process. The second and third causes of action incorporated the first cause of action by reference and all three causes of action also incorporated the preliminary factual allegations. The third amended complaint related to allegedly unlawful charges made by TUSD for educational activities and sought three different remedies – damages, declaratory relief and injunction.

The preliminary "Factual Allegations" of the complaints remained substantially the same throughout every amendment. The Garaus alleged that they should not have

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[3] At his subsequent deposition, Carlos Garau acknowledged he had prepared the chart and at trial the Garaus offered the chart as their Exhibit No. 170.

had to pay for shoes and apparel for physical education class, optional videos of musical performances, earthquake kits, fees for college entrance and advanced placement examinations, and/or for health insurance for participation in high school sports activities. The operative complaint also alleged that the TUSD charged for some items that the Garaus conceded at trial they had never paid for, including graduation gowns, film for a school project that was provided by the school, and costs associated with participating in high school band or cheerleading activities.

In October 2010 three causes of action proceeded to a bench trial. Prior to commencement of the trial, TUSD filed several motions in limine. The trial court granted TUSD's motion No. 2 to limit evidence of damages "to within six months of the filing of a tort claim with the school district, which was filed on September 15, 2003."

On October 27, 2010, following presentation of the Garaus' case, the trial court granted the TUSD's motion for judgment pursuant to Code of Civil Procedure section 631.8. The trial court stayed the ruling to allow the Garaus the opportunity to present additional evidence on October 29, after which the decision was finalized. The trial court also issued an OSC for sanctions against the Garaus' counsel pursuant to Code of Civil Procedure section 128.7.

Thereafter on December 1, 2010, TUSD filed a motion for attorneys' fees pursuant to Code of Civil Procedure section 1038 and a motion for sanctions under section 128.7.

The Garaus filed a request for a statement of decision. TUSD submitted a proposed statement of decision and a proposed judgment. On December 23, 2010, the court entered judgment for TUSD. In entering the judgment the court reserved jurisdiction to determine the amount of attorneys' fees and sanctions, and left blanks in the final judgment to allow the amounts awarded to be entered in the judgment at a later date. On January 3, 2011, the statement of decision was signed and filed by the trial court. TUSD filed a memorandum of costs, and the Garaus filed a motion to tax costs.

In early 2011, the trial court granted the motion for attorneys' fees under Code of Civil Procedure section 1038 in the amount of $89,233 against Carlos Garau and Olga Garau, and ordered sanctions under Code of Civil Procedure section 128.7 against Olga

Garau. On March 30, 2011, the trial court held a hearing on the motion to tax costs, and on April 21, 2011, awarded TUSD $7,655.44 in costs.

On February 22, 2011, the Garaus filed a notice of appeal from the judgment (appeal No. B231114).

Thereafter on April 15, 2011, the Garaus filed a notice of appeal from the post-judgment fee and sanctions orders (appeal No. B232442) and on May 4, 2011, TUSD filed a cross-appeal of the fee order. The Garaus did not file an appeal of the order awarding costs to TUSD, but on January 30, 2012, the Garaus filed an appeal from the December 11, 2011 minute order in which the trial court directed the superior court clerk to enter the amounts awarded for costs, attorneys' fees and sanctions in the final judgment (appeal No. B238798).

DISCUSSION

I. Appeal from the Underlying Judgment (Appeal No. B231114)

In the appeal from the underlying judgment, the Garaus raise a number of issues. Certain challenges relate to the merits of the case while other complaints are not directly related to the merits. We address the non-merit contentions first.

A. Claims Unrelated to the Merits

The Garaus assert that the judgment must be reversed because: (1) the underlying judgment failed to comply with California Rules of Court, rule 3.1590; and (2) they were denied an opportunity to present rebuttal evidence and present a closing argument.

1. Validity of the Judgment

Background. On October 27, 2010, after the Garaus concluded the presentation of their case, TUSD made an oral motion for a judgment pursuant to Code of Civil Procedure section 631.8. The next day, October 28, 2010, the court allowed the parties to argue the merits of the section 631.8 motion, and after argument the trial court indicated its tentative decision was to grant the motion, but stayed the order granting TUSD's motion to allow the Garaus to present rebuttal evidence. On October 29, 2010, the case was "reopened" to allow the Garaus to present additional evidence, and thereafter the

court lifted the stay, granted the motion for the judgment and adopted the tentative decision as its order.

On November 1, 2010, TUSD served the notice of ruling granting the motion for the judgment. Thereafter, on November 8, 2010, the Garaus filed a request for a statement of decision, and on November 15, the court issued an order directing TUSD to prepare a statement of decision in "response to the issues raised in [the Garaus'] request." On November 23, 2010, TUSD served a proposed statement of decision and judgment and on December 13, 2010, the Garaus filed objections to the statement of decision and judgment. On December 23, 2010, the trial court signed and filed the judgment. On December 29, 2010, the court issued a minute order overruling the Garaus' objections to the judgment and statement of decision and directing that "the judgment and the Statement of Decision submitted by the defendant will be filed and entered over the plaintiff's [sic] objections." On January 3, 2011, the trial court signed and filed the statement of decision.

Analysis. Under Code of Civil Procedure section 632, a court is obligated after a trial, upon a timely request by a party, to provide a statement of decision "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." Pursuant to California Rules of Court, rule 3.1590(a): "[o]n the trial of a question of fact by the court, the court must announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk." Under these circumstances, any party to the action could request a written statement of decision to address the principal controverted issues within 10 days after the tentative decision is announced. Rule 3.1590 also specifies the procedure to be followed once a statement of decision has been requested – the court can prepare and serve the proposed judgment and proposed statement of decision, or the court can order a party to prepare the statement of decision. (Cal. Rules of Court, rule 3.1590(f).) Thereafter the proposed statement of decision and proposed judgment must be prepared and served within 30 days of announcement or service of the tentative decision. (Cal. Rules of Court, rule 3.1590(f).) Under California Rules of Court, rule 3.1590(l) "[i]f a written judgment is required, the

court must sign and file the judgment within 50 days after the announcement or service of the tentative decision, whichever is later. . . ." (Cal. Rules of Court, rule 3.1590(l).) Rule 3.1590 also affords the trial court discretion to extend the times prescribed by the rule or excuse noncompliance with the time limits contained in the rule. (Cal. Rules of Court, rule 3.1590(m).)

The purpose of California Rules of Court, rule 3.1590, "is to create 'a comprehensive method for informing the parties and ultimately the appellate courts of the factual and legal basis for the trial court's decision' by requiring the trial court to issue a statement fairly disclosing its determination of all material, factual issues involved in the action. [Citation.]" (*Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 128.) As another court observed, "[t]he Legislature, by its enactment of section 632, and the Judicial Council, by its adoption of California Rules of Court, rule 232 [now rule 3.1590] . . . , have created a comprehensive method for informing the parties and ultimately the appellate courts of the factual and legal basis for the trial court's decision. [¶] A statement of decision prepared in conformity to the established procedure may be vitally important to the litigants in framing the issues, if any, that need to be considered or reviewed on appeal. Parenthetically, such a statement may render obvious the futility of an appeal. Eventually, a careful issue identification and delineation may also be of considerable assistance to the appellate court." (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1128-1129, fn. omitted.) "[W]here a request for a statement of decision has been made and an inadequate statement or no statement whatsoever has been provided, then each appeal is inevitably based upon what is tantamount to a claim that the judgment is not supported by substantial evidence. This in turn requires both the litigants and the appellate court to conduct an examination of the entire record in order to properly review the trial court decision." (*Id.* at p. 1130.) This places an unnecessary burden on the parties and the appellate court. (*Ibid*.)

Consequently, when a trial court enters judgment without issuing a statement of decision when one is timely requested, the court commits per se reversible error. (*Miramar, supra*, 163 Cal.App.3d at pp. 1129-1130.) The proper procedure where such

error has occurred is for the appellate court to remand the case to the trial judge who heard the matter with instructions that he or she completes the process of preparing and entering a statement of decision. (*Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1531.)

Before this court, the Garaus assert the judgment is void because it was filed *before* the court signed and filed the statement of decision. While it is true that the court signed and filed the judgment prior to the statement of decision, we do not agree that this circumstance renders the judgment infirm as a matter of law, or in this case warrants a reversal. Indeed, there is no requirement in the rules of court, code of civil procedure or the relevant case law that the statement of decision be signed and filed prior to the judgment. Of course to ensure that a statement of decision (when required) is actually timely prepared and filed it is a good practice for the trial court to file the statement of decision either before or simultaneously with the judgment. Nonetheless, the potential reversible error arises, not by filing the documents out of order, but instead in those situations where the court fails to file a statement of decision when required to do so.

Here a statement of decision was timely prepared and served by the TUSD. The Garaus were given an opportunity to object to the statement and those objections were considered and rejected by the trial court. The trial court signed and filed the statement of decision, which apprised the parties and this court of factual and legal bases for the trial court's decision. Hence the underlying purpose of California Rules of Court, rule 3.1590 was served notwithstanding the fact that the statement of decision was filed after the judgment. The Garaus have not demonstrated that they suffered any prejudice from these circumstances and the remedy they seek would provide them no relief. Because a statement of decision was filed in this case, reversal on the basis of this claimed error would serve no purpose.

We reach a similar conclusion with respect to the Garaus' complaint that the judgment violated California Rules of Court, rule 3.1590(l) because the judgment was signed and filed more than 50 days after the service of the tentative decision. Here the court filed the judgment on December 23, 2010, which is 53 days after TUSD served

notice of the tentative decision. The Garaus have not articulated any harm that they suffered because the court signed and filed the judgment three days late. They were not denied any opportunity to present their case below or at this court as a result. Thus we conclude that the violation of the time frame set forth in California Rules of Court, rule 3.1590(l) does not warrant reversal.

2. Rebuttal Evidence and Closing Argument

The Garaus complain that they were not given the opportunity to present rebuttal evidence prior to the court granting the motion for a judgment, and that granting the motion deprived them of the right to present a closing argument. Neither the record nor the law supports these contentions.

Preliminarily we note that "the case law is entirely unclear as to whether the court has the discretion to permit a plaintiff to reopen his case once the defendant has brought a section 631.8 motion." (*National Farm Workers Service Center, Inc. v. M. Caratan* (1983) 146 Cal.App.3d 796, 807.) Nonetheless, in this case on October 28, 2010, when the trial court announced that it was inclined to grant TUSD's motion for judgment, the court "stayed" the order to allow the Garaus to "reopen" the case to present "rebuttal evidence." The next day the Garaus presented that evidence and were given an opportunity to argue the merits of their case. Thus they were given the opportunity to reopen the case and had sufficient time after the court announced its decision to grant the motion for a judgment to present new evidence and arguments.

In addition, with respect to the Garaus' contention about closing argument, we observe that "[o]ral argument in a civil proceeding tried before the court without a jury, is a privilege, not a right, which is accorded to the parties by the court in its discretion." (*Oil Workers Intl. Union v. Superior Court* (1951) 103 Cal.App.2d 512, 581.) Moreover, review of the transcript indicates that counsel had ample opportunity to argue the case at every stage of the case. It is difficult to see how a concluding argument would have been anything but repetitious.

Finally, the Garaus have not shown prejudice. The Garaus have not brought forward any evidence or suggested any arguments they would have presented but were denied the opportunity to present.

B. Challenges to the Merits

The Garaus assert a number of challenges that relate to the merits of the judgment. The challenges that relate to pre-trial rulings are: (1) they were not required to file a Government Code claim against TUSD to pursue their claims against the district, and thus the trial court erred in ruling that certain of their claims were barred by the statute of limitations in Government Code section 911.2; (2) the court erred in concluding that the Garaus lacked standing to pursue their claims against the TUSD; (3) the trial court erred in sustaining the demurrer without leave to amend on certain of their claims; (4) the trial court erred in denying their "declaratory relief motion"; (5) the court erred in denying trial subpoenas for certain witnesses; and (6) the trial court erred in granting TUSD's motions *in limine*. The Garaus also challenge the sufficiency of the evidence supporting the court's order granting motion for a judgment. We address the pre-trial rulings first.

1. <u>Government Code Claim Filing Requirement</u>

The Government Claims Act provides for and limits tort liability of governmental agencies in California. (Gov. Code, § 815.) Presentation of a claim to the public entity and its rejection of the claim by the public entity are jurisdictional prerequisites to maintaining a civil suit against a public entity tortfeasor. (*City of San Jose v. Superior Court of Santa Clara County* (1974) 12 Cal.3d 447, 454; *Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1992) 8 Cal.App.4th 729, 732.) Under certain circumstances, however, a claimant may be excused from complying with the claims presentation requirement and therefore claimant's failure to exhaust the administrative remedies under the Act will not serve to bar a subsequent lawsuit against the public entity.

Before this court, the Garaus claim that they were excused from the claims filing requirement in Government Code section 945.4 for a variety of reasons. As a result, they argue, the trial court erred when it precluded them from pursuing certain claims for which

the Garaus had failed to show that they had timely exhausted its available administrative remedies. We do not agree. As we shall explain, the Garaus' claim that they were excused or exempt from complying with the Government Claims Act represents a departure from the theory they pursued at trial.

a. Government Code Section 946.4

The Garaus assert that any failure to timely file a Government Code claim against TUSD was excused under Government Code section 946.4 because TUSD failed to comply with Government Code section 53051.

Under Government Code section 946.4, subdivision (a), a failure to file a Government Code claim does not bar an action against the public agency if, during the period of 70 days immediately after the cause of action accrues, the agency has failed to file in the Roster of Public Agencies, in the office of the Secretary of State and with the county clerk, information concerning itself which substantially conforms to the requirements of Government Code section 53051. The latter section, in turn, requires that within 70 days after its creation the governing board of each agency shall file with the Secretary of State and the clerks of those counties in which it maintains an office a statement containing (1) its name and address, (2) the name and address of each member of the governing board, and (3) the name, title and address of the officers. Within 10 days of any change in the foregoing data, an amended statement reflecting the changes must be filed. (Gov. Code, § 53051.) "The purpose of the statute requiring information for the Roster of Public Agencies was to provide a means for identifying public agencies and the names and addresses of designated officers needed to enable or assist a person to comply with any applicable claims procedure." (*Tubbs v. Southern California Rapid Transit Dist.* (1967) 67 Cal.2d 671, 676.)

The Garaus claim that they did not have to comply with the Government Claims Act based upon asserted failure of TUSD to comply with Government Code section 53051.

There is no evidence in the record before us to assess this issue because the Garaus raised it too late. In the complaints filed in this action, including the operative third

amended complaint, the Garaus proceeded on the theory that TUSD breached a mandatory duty under Government Code section 815.6 in various ways by charging fees for programs and activities. The Garaus also pled that they had timely complied with the Government Code claims presentation requirement under Government Code section 945.4, that their claim had been rejected and that they had exhausted their administrative remedies. TUSD's answer asserted affirmative defenses including that the Garaus' claims were barred by the statute of limitations in Government Code section 945.6 and that as to some of the claims the Garaus had failed to exhaust their administrative remedies.

At no time prior to trial did the Garaus proceed on any theory that they were excused from complying with the claims act based on some purported failure of TUSD to satisfy Government Code section 53051 or for any other reason. As a result neither party developed evidence nor conducted discovery on this issue prior to trial. In fact this issue did arise until after the court granted TUSD's motion *in limine*, in which the court ruled that the Government Code claims requirement applied in the case and thus, limited the Garaus from pursuing any claim against TUSD beyond the statutory limitations period in the Government Code. Thereafter, during the trial the Garaus attempted to elicit testimony from a former district official about TUSD's compliance with Government Code section 53051, but the trial court cut short the Garaus' counsel's questions on the matter ruling that the witness was unqualified to provide testimony on the issue.[4] As a result, the Garaus' argument before this court that TUSD failed to comply with Government Code section 53051 is not based on evidence in the record, but instead on their unsubstantiated belief. Having failed to develop the trial record on this fact intensive matter, we conclude the Garaus have not carried their burden on appeal to demonstrate reversible error.

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[4] The court eventually allowed the Garaus' counsel to make a brief inquiry on the issue, and the witness testified that she did not know whether or not the TUSD had complied with Government Code section 53051.

b. **Government Code Section 905 Exemptions**

The Garaus also claim they were entitled to an exemption from filing a Government Code claim under Government Code section 905, subdivisions (a) and (h). None of these arguments has merit.

The Garaus argue that their complaint contained "taxpayer suit allegations," and thus Government Code section 905, subdivision (a) exempted them from the requirement that they file a Government Code claim. We disagree.

Government Code section 905, subdivision (a) provides an exception to the claims filing requirement for "(a) Claims under the Revenue and Taxation Code or other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification, or adjustment of any tax, assessment, fee, or charge or any portion thereof, or of any penalties, costs, or charges related thereto. . . ." (Gov. Code, § 905 subd.(a).)

The Garaus have not shown that this exemption applies in this case. The operative complaint in this case does not contain any "taxpayer suit allegation." The Garaus did not present a claim under the Revenue and Taxation Code or claim a tax refund or adjustment. Furthermore the Garaus have not alleged that they complied with any "other statute proscribing procedures for the refund . . ." as provided under Government Code section 905, subdivision (a). A claimant's status as a taxpayer, standing alone, is not sufficient to trigger this exemption.

Similarly misplaced is the Garaus' argument that Government Code section 905, subdivision (h) applies. It provides an exception to the claims filing requirement for "[c]laims that relate to a special assessment constituting a specific lien against the property assessed and that are payable from the proceeds of the assessment, by offset of a claim for damages against it or by delivery of any warrant or bonds representing it." (Gov. Code, § 905, subd. (h).)

The Garaus assert that Government Code section 905, subdivision (h) excuses them from compliance with the claims act. They assert that the fees TUSD imposed upon them caused financial burdens upon their personal property and also that TUSD recorded abstracts of judgment against their real property.

The Garaus' arguments lack merit. They have not presented any authority to support the claim that a fee for a school activity or program in any way constitutes a "special assessment constituting a specific lien against the property assessed." We are not convinced this was the type of situation the Legislature intended in crafting this exemption. The claim about a "lien" imposed on the Garaus' real property also does not support appellant's reliance on Government Code section 905, subdivision (h). Any "lien" on the Garaus' property arose from the abstracts of judgment recorded by TUSD. The abstracts relate to the *post-judgment* fee awards. The lien did not exist prior to the Garaus initiating the lawsuit and thus could not serve as the basis for the Government Code section 905, subdivision (h) exemption.

c. **Government Code Section 905.1 Exemption**

The Garaus claim they were not required to comply with the Government Code claims filing required by Government Code section 905.1, which exempts actions against public entities for "taking of, or damage to" property. The Garaus assert that TUSD's conduct amounted to a "taking of property." In making this argument, the Garaus recognize that they did not plead this claim in the trial court, and ask that we give them leave to amend their complaint to allege the claim. We deny this request as it would be futile to amend to assert a "taking of property" claim. The conduct alleged in this case does not amount to a taking of private property for the purposes of Government Code section 905.1.

The Garaus assert a claim for "damages" based on TUSD's charging fees to students and parents. Government Code section 905.1, refers to section 19 of Article I of the California Constitution which proscribes the government's ability to take property by inverse condemnation. "Inverse condemnation" occurs when there is a public taking of, or interference with, land without formal eminent domain proceedings. (*Serra Canyon Co., Ltd. v. California Coastal Com'n* (2004) 120 Cal.App.4th 663, 669.) Below, the Garaus did not present evidence that this case in any way involved inverse condemnation, nor have they presented any convincing argument on appeal as to how their complaint could be amended to assert a plausible claim on that basis. In addition, the Garaus have

not shown that this exemption has ever been applied outside the context of eminent domain or public works projects, or why it should be given such an expansive interpretation. (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 378-379 ["Neither the 'taken' nor the 'or damaged' language ever has been extended to apply outside the realm of eminent domain or public works to impose a Constitution-based liability, unamenable to legislative regulation, for property damage incidentally caused by the actions of public employees in the pursuit of their public duties. On the contrary, such property damage, like any personal injury caused by the same type of public employee activity, has – throughout the entire history of section 19 – been recoverable, if at all, under general tort principles, principles that always have been understood to be subject to the control and regulation of the Legislature"]; italics omitted.)

d. Exemption Based on Public Policy

The Garaus' final contention centers on an argument that they should be exempt from compliance with the Government Claims Act because claimants charged an administrative fee of $25 to file a claim and that charging the filing fee to vindicate the right to a free public education violates public policy because it burdens the Constitutional right to a free public education.

The Garaus do not cite to any relevant legal authority for this proposition. Nor could this court locate any support for it. The Garaus have not shown that the state charging an administrative fee to file a government code claim in anyway relates to or imposes upon the right to a free education. The filing fee was not imposed by TUSD and in no way constitutes an activity that is an integral component of public education under the law. In any event, the appropriate remedy for any such financial burden would be to seek exemption from paying the filing fee, not to presume waiver of the claim filing requirements.

2. Standing

The Garaus argue that the lower court, both in connection with the lower court's 2004 order denying their motion for a writ of mandate and later at trial, erred in concluding that they lacked standing to assert their claims.

Preliminarily we note that this court previously considered and summarily rejected these standing arguments when the Garaus filed a petition for a writ of mandate in this court seeking an order directing the lower court to reverse its denying of the petition for a writ of mandate and allowing them to amend to revive their declaratory relief and injunctive relief causes of action. In addition, the Garaus were subsequently allowed to proceed to trial on their declaratory and injunctive relief claims and to present evidence to demonstrate the injuries alleged notwithstanding the pre-trial prior rulings related to standing. Nonetheless, because in granting the motion for a judgment the trial court ruled that with respect to the equitable claims that the Garaus lacked standing, we address the Garaus' standing arguments.

Standing includes "a blend of constitutional requirements and prudential considerations" that center upon whether the complaining party is the proper party to invoke the court's jurisdiction. (*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* (1982) 454 U.S. 464, 471; see also Code Civ. Proc., § 367 ["[e]very action must be prosecuted in the name of the real party in interest"].) Under federal law, standing necessarily requires a party show that he or she personally suffered an immediate and actual injury as a direct result of the unlawful conduct of the defendant. (*Valley Forge, surpa*, 454 U.S. at pp. 472, 475; *Warth v. Seldin* (1975) 422 U.S. 490, 498.) The plaintiff can only assert his or her own legal rights, not the legal rights or interests of third parties or the public in general. (*Valley Forge, supra,* 454 U.S. at pp. 474-475, 477.) Under California law, standing also requires an actual injury inflicted upon the plaintiff who must have "'some special interest to be served or some particular right to be preserved or protected'" apart from the interest held in common with the public at large. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361-363.) As the court explained in *California*

Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16: "One who invokes the judicial process does not have 'standing' if he . . . does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." (*Id.* at pp. 22–23.)

Here, the Garaus claim they have standing to assert their claims under three theories: actual injury; their status as "taxpayers" under Code of Civil Procedure section 526a; and public interest-citizen standing. As noted elsewhere, the Garaus were allowed to proceed to trial on their substantive claims in which they claimed they suffered an actual injury. Thus, our analysis focuses on the two other theories.

a. "Taxpayer" Standing

The Garaus claim that they had standing to assert their causes of action based on their status as taxpayers rather than any personal interest in the litigation. Taxpayer standing is set forth in Code of Civil Procedure section 526a which provides: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities." (Code Civ. Proc., § 526a.)

A taxpayer may sue to enjoin wasteful expenditures by state agencies as well as local governmental bodies (Code Civ. Proc., § 526a; *California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1281) and also to enforce the government's duty to collect funds due the State. (*Vasquez v. State of California* (2003) 105 Cal.App.4th 849, 855.) While the statute speaks of injunctive relief, taxpayer standing has also been extended to actions for declaratory relief. (*Van Atta v. Scott*

(1980) 27 Cal.3d 424, 449-450.) The purpose of the statute allowing taxpayers to sue to enjoin wasteful expenditures and to enforce government's duty to collect funds due the state is to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of the standing requirement; accordingly, the statute has been construed liberally. (*Cates v. California Gambling Control Com.* (2007) 154 Cal.App.4th 1302, 1308.) Actions under taxpayer standing provisions do not seek to vindicate private rights as they do not authorize individual taxpayers to recover money; instead, taxpayer suits provide a general citizen a remedy for controlling illegal government activity. (*California State Parks Foundation v. Superior Court* (2007) 150 Cal.App.4th 826, 842.) The goal of the statute allowing a taxpayer the right to bring an action to restrain an illegal expenditure of public money without a showing of special injury is the necessity of prompt action to prevent irremediable public injury, i.e., the unlawful or illegal expenditure of public funds. (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 749.)

In our view, Code of Civil Procedure section 526a did not confer "taxpayer" standing upon the Garaus. Their complaint does not contain any claims based on the illegal expenditure of public funds; rather, their claims center on assertions that TUSD unlawfully collected funds. The Garaus mention the expenditure of public funds only in connection with their complaint that the TUSD retained lawyers to defend this action. The payment of defense legal fees in this action post-date the events and conduct alleged in the complaint and in no way could confer standing upon the underlying claims.

b. Public Interest-Citizen Standing

The Garaus assert they have standing (without actual injury) based on the public interest-citizen standing.

As a general rule, legal standing to petition for a writ of mandate requires the petitioner to have a beneficial interest in the writ's issuance. A petitioner is beneficially interested if he or she has "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. [Citations.] [¶] Beneficially interested parties are 'in fact adversely affected by

governmental action' and have standing in their own right to challenge that action. [Citation.] A beneficial interest must be 'direct and substantial.' [Citation.] [A] . . . petitioner [lacks a beneficial interest if he or she] will gain no direct benefit from its issuance and suffer no direct detriment if it is denied. [Citation.]" (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 913.)

"A petitioner who is not beneficially interested in a writ may nevertheless have 'citizen standing' or 'public interest standing' to bring the writ petition under the 'public interest exception' to the beneficial interest requirement. [Citation.] The public interest exception 'applies where the question is one of public right and the object of the action is to enforce a public duty—in which case it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the public duty enforced. [Citations.]' [Citation.] The public interest exception '"promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." [Citations.]' [Citation.]" (*Id.* at pp. 913-914.)

Also in considering whether the public interest exception applies, the court examines whether individual persons who are beneficially interested in the action would find it difficult or impossible to seek vindication of their own rights. (See *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist*. (1992) 11 Cal.App.4th 1513, 1519.)

The California Supreme Court has cautioned, however, that "[n]o party . . . may proceed with a mandamus petition as a matter of right under the public interest exception. . . . 'Judicial recognition of citizen standing is an exception to, rather than repudiation of, the usual requirement of a beneficial interest. The policy underlying the exception may be outweighed by competing considerations of a more urgent nature.'" (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 170, fn. 5 (*Plastic Bag Coalition*); see also *Nowlin v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1529, 1538 [citizen standing may be "nullifie[d]" by "'competing considerations of a more urgent nature'"].) "[T]he propriety of a citizen's suit requires a judicial balancing of interests, and the interest of a citizen may be considered sufficient when the public duty is sharp and the public need weighty." (*Waste Management of Alameda County, Inc. v.*

County of Alameda (2000) 79 Cal.App.4th 1223, 1232-1233, disapproved on other grounds in *Plastic Bag Coalition, supra,* 52 Cal.4th at pp. 169-170.)

Furthermore courts have generally denied citizen standing to parties whose interests in the litigation arose from something other than their "broader public concerns" regarding the alleged public duty at issue. (*Plastic Bag Coalition, supra,* 52 Cal.4th at p. 169.) For example, in *Carsten v. Psychology Examining Com. of the Board of Medical Quality Assurance* (1980) 27 Cal.3d 793, a member of the Psychology Examining Committee of the Board of Medical Quality Assurance (PEC) filed a petition for writ of mandate alleging that the PEC had, over plaintiff's dissenting vote, adopted a testing method that violated certain statutory duties. The Supreme Court held that although the plaintiff's petition sought to enforce a public duty, she did not have standing to pursue the case under the public interest exception. The court explained that the plaintiff's suit did not arise from her "everyday experience as . . . [a] citizen, but [rather] from [her] experiences in government" (*Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1258): "While it is true that this petitioner is not only a board member but also a [citizen], it is as a board member that she acquired her knowledge of the events upon which she bases the lawsuit." (*Carsten v. Psychology Examining Com. of the Board of Medical Quality Assurance, supra,* 27 Cal.3d at p. 799.) "Thus, her challenge to the decision was motivated by interests arising from her service on the board, rather than by broader public concerns." (*Plastic Bag Coalition, supra,* 52 Cal.4th at p. 169.)

In this case the public interest standing exception was properly rejected because it is clear that the Garaus' claims are driven by their personal motives rather than interest of citizenship. In the operative complaint, the Garaus alleged that the lawsuit originated in 2002 when they "first learned and complained about a $15 class fee for a Life Managed (Home Economics) class sought to be charged to Liliana at Hull Middle School." The complaint lists additional fees which the Garaus claim were sought for various other programs. Furthermore, the Garaus have not demonstrated that any of these claims would evade judicial review in absence of extending public interest standing to them.

In sum, at trial the Garaus were given a full and fair opportunity to assert a number of claims. At trial, they were permitted to present their best arguments and evidence to challenge more than 20 programs, activities and events. Consequently we find no error with respect to the trial court's rulings on standing.

3. Order Sustaining the Demurrer

The Garaus assert the trial court erred when in October 2004 it sustained the demurrer without leave to amend on their "money had and received" cause of action, "tax payer claim," equal protection cause of action and "takings claim."

The Garaus have not established reversible error with respect to these matters. First, as TUSD points out with respect to the "money had and received claim," the Garaus have not demonstrated how allowing them to proceed on that claim would have changed the outcome at trial. The essential elements of a cause of action for "money had and received" are (1) a statement of indebtedness of a certain sum, (2) consideration made by the plaintiff, and (3) nonpayment of the debt. No recovery for money had and received can be had against a defendant who never received any part of the money or equivalent item at issue. (*First Interstate Bank v. State of California* (1987) 197 Cal.App.3d 627, 635.) Indeed, the Garaus failed to demonstrate that TUSD engaged in unlawful conduct or illegally collected any fee or payment from them during the statutory period.

Second the Garaus never pled a "takings claim" nor, in light of the analysis above, would such a claim be viable. Likewise the Garaus have not pointed to any evidence they could have presented to support a viable "taxpayer" claim in this case.

Finally, although the court dismissed the equal protection claim prior to trial, the Garaus continued to argue this legal theory and presented evidence on it at trial. In the statement of decision the trial court concluded that the Garaus were not denied equal protection or subject to disparate treatment given that they were provided the same education as other students and provided the required educationally necessary school supplies, materials and equipment and other items as were other students, free of charge.

The Garaus have not demonstrated error in connection with the court's conclusions with respect to the equal protection claim.

4. "Declaratory Relief Motion"

The Garaus argue the trial court erred in denying their "motion for declaratory relief." We disagree.

The trial court rejected the motion finding that it was "tantamount to a motion for summary adjudication" that failed to comply with the requirements for filing such a motion—it lacked supporting evidence and a separate statement, and that it failed to satisfy the required 75-day notice requirements under Code of Civil Procedure section 437c, subdivision (a). The trial court resolution was correct. Although self-styled as a "motion for declaratory relief," the motion sought a pre-trial summary determination of the substantive claims. It was a summary adjudication motion on the declaratory relief cause of action, requesting an order granting declaratory relief in their favor and a determination of rights and duties with respect to the underlying claims. Accordingly, the court did not err in denying the motion.

5. **Denial of Trial Subpoenas and Interrogatory Responses**

The Garaus argue they were denied a fair trial and right to present evidence when the trial court quashed trial subpoenas for: (1) a former superintendent of TUSD, (2) a member of the TUSD Board of Education; and (3) the current PTA president of the elementary school the Garau children had attended. The Garaus contend that the court's quashing of these subpoenas denied them due process and amounted to "structural error" in the trial warranting reversal.

The Garaus claim that the former TUSD superintendent and the member of the TUSD Board of Education had relevant information about TUSD's policies, and practices. The Garaus claimed that the PTA president could provide evidence about TUSD's current conduct in soliciting funds and imposing charges and fees upon students and families.

We find no reversible error with respect to the court's order. The trial subpoenas for these witnesses were served less than two weeks before trial, and TUSD moved to

quash the subpoenas. TUSD presented declarations from both the former superintendent and Board member to show they had no evidence to offer—no personal knowledge or relevant information. In the declarations the witnesses also referred to other administrators with relevant knowledge. Given the status of these witnesses as high-ranking officials in the TUSD, the Garaus had the burden to show that there was a compelling reason to command their appearance at trial. (*Westly v. Superior Court* (2004) 125 Cal.App.4th 907, 911.) The Garaus did not demonstrate that either of these witnesses had unique personal knowledge of the relevant information. (See *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1289.)

Likewise TUSD showed that the PTA president had no personal knowledge or relevant evidence to present in the case. Her children attended the elementary school well after the Garau children attended the school, and there was no showing that she had knowledge of the solicitation efforts or fees collected by TUSD at any time.

Finally, the Garaus have not shown reversible error based on the denial of motion to compel a further response to the form interrogatory seeking information about "who witnessed the incident." TUSD had objected to the interrogatory as vague and ambiguous and overbroad. Before this court, the Garaus do not suggest what relevant witnesses they might have discovered and what relevant evidence those witnesses could have provided had TUSD been ordered to provide a further response.

6. Motions in Limine

The Garaus argue that the trial court erred in granting TUSD's motions[5] in limine.

Based on the six-month statute of limitations in Government Code section 911.2, subdivision (a), the court ruled that the Garaus were barred from pursuing any claims

[5] Before this court the Garaus claim that the court erred in granting all three of the motions in limine. The trial court, however, denied two of the motions in limine—motion in limine No. 1 which sought to exclude evidence on lawful charges and fees and motion in limine No. 3 which sought to exclude evidence on those claims for which TUSD claimed the Garaus lacked standing. The court granted only the motion in limine No. 2 to exclude all claims based on events prior to six months prior to filing the original complaint.

based on conduct pre-dating March 15, 2003—six months prior to the filing of the Government Code claim with the district. The Garaus claim that they were "unfairly surprised" by this ruling.

First, the Garaus have not demonstrated any legal error with respect to the court's ruling on motion. In addition, given that TUSD pled the statute of limitations – Government Code section 911.2 – in its answer as an affirmative defense, the Garaus cannot reasonable claim any unfairness or surprise.

7. Court Should Have Entered Judgment in Favor of The Garaus

The Garaus assert that the trial court erred in granting the Code of Civil Procedure section 631.8 motion for a judgment in favor of TUSD because the evidence presented did not support the court's ruling. They argue that they were entitled to judgment on the underlying causes of action because they proved that TUSD violated the constitution and mandatory statutory duties by charging fees, seeking reimbursements or donations for programs, activities and events that should have been provided for free of charge based on the right to a free public education in the California Constitution.

We begin our analysis with Code of Civil Procedure section 631.8, the law pertaining to public education and then examine the court's ruling in light of evidence presented at trial.

a. Code of Civil Procedure Section 631.8 and the Standard of Review

Code of Civil Procedure section 631.8 provides, in pertinent part: "(a) After a party has completed his presentation of evidence in a trial by the court, the other party . . . may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in [Code of Civil Procedure] [s]ections 632 and 634, or may decline to render any judgment until the close of all the evidence. The court may consider all evidence received, provided, however, that the party against whom the motion for judgment has been made shall have had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the

presenting party to have been adverse to him, and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party." (Code Civ. Proc., § 631.8, subd. (a).)

"'"The purpose of . . . section 631.8 is 'to enable the court, when it finds at the completion of plaintiff's case that the evidence does not justify requiring the defense to produce evidence, to weigh evidence and make findings of fact.' [Citation.] Under the statute, a court acting as trier of fact may enter judgment in favor of the defendant if the court concludes that the plaintiff failed to sustain its burden of proof. [Citation.] In making the ruling, the trial court assesses witness credibility and resolves conflicts in the evidence. [Citations.]"' [Citation.] [¶] '"The standard of review of a judgment and its underlying findings entered pursuant to section 631.8 is the same as a judgment granted after a trial in which evidence was produced by both sides. In other words, the findings supporting such a judgment 'are entitled to the same respect on appeal as are any other findings of a trial court, and are not erroneous if supported by substantial evidence."' [Citations.] '"[W]hen the decisive facts are undisputed, [however,] the reviewing court is confronted with a question of law and is not bound by the findings of the trial court. [Citation.] In other words, the appellate court is not bound by a trial court's interpretation of the law based on undisputed facts, but rather is free to draw its own conclusion of law."' [Citations.]" (*Plaza Home Mortgage, Inc. v. North American Title Co., Inc.* (2010) 184 Cal.App.4th 130, 135.)

b. Public Education Law

Since 1849 when the first state Constitution was adopted, the state has been constitutionally required to provide for a system of common schools in California. (Cal. Const., art. IX, § 3.) Since the Constitution of 1879, this constitutional requirement has included a free school guarantee. (Cal. Const., art. IX, § 5; *Hartzell v. Connell* (1984) 35 Cal.3d 899, 906 (*Hartzell*).) Specifically, article IX, section 5 of the California Constitution provides, "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

Hartzell is the landmark Supreme Court case interpreting California's free school provision. *Hartzell* involved a challenge to the fees imposed by a school district for participation in extracurricular activities such as music, drama and sports. The plaintiff claimed that such fees violated the constitutional right to a free education. The Supreme Court agreed, concluding that the free school guarantee extended to school activities, both curricular and extracurricular, that are educational in character. (*Hartzell, supra,* 35 Cal.3d at p. 911 ["[E]xtracurricular activities constitute an integral component of public education. Such activities are generally recognized as a fundamental ingredient of the educational process"].)

Thereafter, in *Arcadia Unified School District v. State Department of Education* (1992) 2 Cal.4th 251 (*Arcadia*), the Supreme Court revisited the "educational in character" analysis. The *Arcadia* Court stated that to determine if activity is educational in character for the purpose of the free education clause, a court must examine whether the activity in question is "an integral, fundamental part of education or a necessary element of any school activity." (*Id.* at p. 262.) In *Arcadia* the issue was whether the Education Code section that authorized school districts to charge pupils for transportation to and from school violated the free school guarantee. The *Arcadia* Court held it did not, concluding that the free school guarantee did not extend to noneducational supplemental services, and that transportation was not an "educational activity." (*Id.* at p. 263.) The Court further observed that: "Students are not required to use the same means of transportation as their classmates in order to get to school to receive an education; individual students may choose different modes of transportation to suit their own circumstances. Unlike textbooks or teachers' salaries, transportation is not an expense peculiar to education. Without doubt, school-provided transportation may enhance or be useful to school activity, but it is not a necessary element which each student must utilize or be denied the opportunity to receive an education." (*Id.* at p. 264.)

Notwithstanding the "free school" guarantee, the California Constitution and the Education Code also give school districts discretion to provide any program or activity, or to act in any manner which is not in conflict with or inconsistent with the law or the

purpose for which the school district was established. (Cal. Const., art. XI, § 14; Ed. Code, § 35160.) Furthermore, California Code of Regulations section 350 prohibits school districts from imposing any fee, deposit or charge not authorized by law. (Cal. Code Regs., tit. 350.)

c. The Court's Statement of Decision

At trial, the Garaus sought to prove that approximately 20 programs, events and/or activities provided by TUSD violated the free school clause of the California Constitution or other education statutes. The trial court rejected all of the Garaus' claims.

The trial court set forth its rationale for granting the motion for judgment in the statement of decision. The court granted judgment on the first cause of action for breach of mandatory duty for a number of reasons. First, the court found that TUSD did not impose any fees or charges upon the Garaus for any books, school supplies, materials, (i.e., items including paper, pens, pencils, markers, erasers, sharpeners, glue, science boards, notebooks) athletic shoes and apparel for physical education, team uniforms, planners, lab fees, graduation caps and gowns, college entrance exam fees, field trips, athletic team transportation, musical instruments, or earthquake kits during the applicable statute of limitations period—"within six (6) months prior to filing of the only Government Claim on September 15, 2003." The court also noted that the Garaus had conceded that they never amended (or filed a new) Government Code claim to "raise any new facts or circumstances occurring after September 15, 2003 as the basis for monetary liability against the District."

The court noted that the only item that the Garaus proved they paid for was a $5 student planner at Hull Middle School, but that expenditure occurred in August 2002—more than a year before they filed their Government Code claim.

The court further found that the Garaus' testimony about their expenditures on various personal items they claimed to be required by the school to be "non-credible, implausible, and untrustworthy." Second, the court determined that the "lists the District provided to students and parents, including Plaintiffs, that set forth supplies, materials, or items students could have for a given class, during the applicable statute of limitations

period . . . were optional items, and none of the items were mandatory for the students to provide."

Third the court concluded, that in any event, a number of the events and programs which the Garaus had challenged were not subject to legally improper charges. For example, the court observed that TUSD was not legally required to pay for college entrance exams, field trips, transportation, caps and gowns, and projects that the student takes homes and keeps. The court summarized its findings with respect to the Garaus' first cause of action thusly: "In short, plaintiff's claims for damages for breach of mandatory duty were not warranted by existing law, did not have evidentiary support, and appeared to have been proffered for an improper purpose such as causing unnecessary delay or needlessly increasing the cost of litigation. As such there was not reasonable cause to bring this action against the District and proceed to trial, and plaintiff could not have had a good faith belief that there was a justifiable controversy, particularly as to the claims for athletic clothes and shoes, health insurance premiums, optional videotapes of musical performances and printer ink and toner."

The trial court similarly rejected the second and third causes of action for declaratory and injunctive relief. As to both claims the court concluded that the three individual Garaus—Carlos, Liliana and Odalys—lacked standing, that their claims were moot and there was "no actual, present, or justiciable controversy between Plaintiffs and the District." Specifically, the court noted that Carlos had not been a student in the district for 30 years, that Liliana had graduated in 2008 and that Odalys was a senior in high school. The court found that "[p]laintiffs presented no evidence of payment to the District of any fee or charge for any potentially required education supplies or material since at least 2002. Plaintiffs have been allowed to participate in all educational activities without charge."

The court found that because there had also been a change in circumstances and a termination of certain fees and programs, certain claims were moot and no longer in controversy: "a. A fee was charged for a middle school planner, only on one occasion in 2002. b. Middle school lab and materials fees were changed to non-required donations.

c. The [Gifted and Talented Student (GATE)] program has been terminated at the District."

The court also concluded that the Garaus' "alleged claims of denial of an education, disparate treatment, and denial of equal protection, are totally and completely without merit." The court found that the Garaus were not denied an equal education or equal protection and they were in fact provided the same education that was provided to other students of the TUSD, including all of the necessary supplies, equipment and materials free of charge. The court held the TUSD had not violated any statute or constitutional provision. The court concluded that the Garaus' claims for equitable relief were not warranted by existing law and did not have evidentiary support.[6]

As we shall explain, sufficient evidence in the record supported the trial court's order granting the motion for judgment on the Garaus' complaint.

d. The Garaus' Contentions

The court properly rejected all three of the Garaus' causes of action. The first cause of action for breach of a mandatory duty fails because the Garaus did not demonstrate that the damages they sought and the charges and fees that they challenged were imposed during the relevant statute of limitation time period provided in Government Code section 911.2, subdivision (a). In addition, the claim for damages and the causes of action for equitable relief also lack merit because the Garaus failed to prove that they (a) participated in or paid fees for the challenged programs, events and activities; and/or (b) that any charges and fees imposed violated any law or were unauthorized.

i. Activities Barred by Government Code section 911.2.

The trial court concluded that the Garaus' claim for a breach of a mandatory duty under the Government Code was limited to the six-month period prior to September 15,

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[6] As TUSD points out, notwithstanding the fact that the trial court sustained the demurrer on the equal protection claim, the Garaus continued to argue the claim at trial. Our review of the record from the trial convinces us that the Garaus failed to show that they were denied equal protection or subject to disparate treatment in any respect.

2003, when the Garaus filed their Government Code claim. As a result all claims occurring before March 15, 2003, would be barred by the statute of limitations. As the court properly observed, this would preclude any action based on the $5 fee the Garaus paid for the class planner in 2002.

In addition, during the relevant statutory period Liliana was in middle school and Odalys was an elementary school student. The Garaus never amended their Government Code claim or filed a new claim based on events occurring after September 2003. Thus, they failed to exhaust their administrative remedies with respect to the charges and fees that they alleged were imposed by the high school. Accordingly none of those claims support their cause of action for damages for breach of mandatory duty. Thus, the trial court properly found that as a matter of law the Garaus could not obtain redress based on claims centering on high school graduation caps and gowns, required medical examinations for high school athletics and health clearances to participate in high school athletics, driver education classes, health insurance, college entrance exam fees, high school identification cards, high school dance and sporting events admissions, and transportation for high school extracurricular activities.

ii. Activities in which The Garaus never Participated or that Were not Subject to Fees and Charges by TUSD

As we shall explain, even if they were not barred by the statute of limitations in the Government Code, the Garaus' claims for damages, declaratory and injunctive relief fail because the Garaus did not participate in many of the programs, events and activities they complain about and/or they have not shown those programs, events and activities were subject to district fees or charges.

Clothing and Uniforms. The Garaus complained that TUSD's dress code for physical education classes required parents to purchase clothing in violation of the free school clause in the California Constitution.

The evidence in the record shows that TUSD did not impose fees or charges for shoes or clothing for physical education, and that the Garaus never paid the district for any of these items. Specifically the Garaus did not present evidence that middle school

and elementary students were required to wear special garments for physical education.

In addition, as noted above, although well outside the six-month time frame in their Government Code claim, the Garaus did not show that they participated in physical education classes at Torrance High School, or that they purchased a particular set of clothing from the school to participate in the course. Notably Education Code section 49066, subdivision (c) provides that no student can be penalized by the school for wearing non-standard physical education apparel.[7] (Ed. Code, § 49066.)

The evidence presented at trial showed that both Odalys and Liliana satisfied their physical education requirements by participating in two years of school team athletics and that they were provided team uniforms by the school free of charge.

Instrumental Music. Likewise although the Garaus complained about fees imposed for the use of musical instruments, uniforms for the school band, the Garaus did not present any evidence during the trial that they participated in the instrumental music program or that fees were improperly charged to those students who did participate.

Chorus clothing. The Garaus claimed that the elementary school required certain attire for the chorus programs.

TUSD pointed out that chorus shirts were made available to students for purchase, and that students were asked to wear a white shirt and dark pants for performances. However, the Garaus did not present evidence that specific attire was required to participate in chorus or that participation in chorus was subject to any fees or charges.

Graduation gowns. The Garaus complained that TUSD charged students for graduation caps and gowns.

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[7] Section 49066(c) provides: "(c) No grade of a pupil participating in a physical education class, however, may be adversely affected due to the fact that the pupil does not wear standardized physical education apparel where the failure to wear such apparel arises from circumstances beyond the control of the pupil." (Ed. Code, § 49066, subd. (c).)

First, the Garaus did not present any evidence that they participated in any graduation ceremony during the relevant statutory time period. Second, at trial they conceded that they had been provided graduation caps and gowns free of charge. Finally, the evidence presented at trial indicated TUSD does not require students to wear caps and gowns to graduate or participate in the graduation ceremonies.

School Supplies. The Garaus asserted that TUSD failed to provide the basic school supplies. They claimed TUSD should have supplied them with backpacks and calculators and science materials including science boards for projects as those items were necessary to student success.

Under Education Code section 38118 "[w]riting and drawing paper, pens, inks, blackboards, blackboard erasers, crayons, lead pencils, and other necessary supplies for the use of the schools, shall be furnished under direction of the governing boards of the school districts." (Ed. Code, § 38118.) Based on the evidence presented in the record it appears that there were sufficient school supplies available at the Garaus' schools. They failed to demonstrate that they were denied any particular supplies. Specifically, with respect to calculators the evidence presented at trial showed that calculators were made available to students. The Garaus did not prove they had to supply their own calculator or were denied a calculator by the school. Likewise there was no evidence in the record that the Garaus were ever charged any fees related to science materials. Finally, although TUSD did not supply students with backpacks, the Garaus did not carry their burden to show that a backpack is an item that is "an integral, fundamental part of education or a necessary element of any school activity" under *Hartzell.* Backpacks are not items peculiar to education, and thus the school district's failure to supply a backpack free of charge does not violate the California constitutional right to a free education.

Field Trips. The Garaus argued that the TUSD was not permitted to pass on the cost of field trips to students and their families. This claim fails because the Garaus failed to present evidence that the fees for field trips were imposed upon students, including the Garaus. In fact, pursuant to Education Code section 35330, subdivision (b) "No pupil shall be prevented from making the field trip or excursion because of lack of

sufficient funds. To this end, the governing board shall coordinate efforts of community service groups to supply funds for pupils in need." (Ed. Code, § 35330.) There was no evidence that TUSD acted in a manner contrary to that prescribed in Education Code section 35330.

ii. Activities for Which Fees and Charges May Be Imposed.

Finally, the Garaus challenge activities, events and programs for which the law allows the TUSD to collect fees or donations. The court properly entered judgment for TUSD to the extent the Garaus' causes of action were based on those programs.

GATE programs. The Garaus complain that the TUSD asked parents to pay for GATE weekend, summer school and parent education programs. They argue that charging to participate in the programs violates the constitutional guarantee to free education. The Garaus' attack against the GATE program fails.

GATE is a special program that school districts may offer gifted and talented students as a supplement to the regular instruction provided by the schools. (See Ed. Code, § 52200 et, seq.) TUSD's participation in the program is optional; the district is not legally bound to offer a GATE program. (See Ed. Code, § 52206 ["The governing boards of school districts that *elect* to provide programs . . . ."].) Nor do the governing statutes preclude TUSD from seeking financial donations for any of its programs. (See Ed. Code, § 41032, subd. (a) ["The governing board of any school district may accept on behalf of, and in the name of, the district, gifts, donations, bequests, and devises that are made to the district or to or for the benefit of any school or college administered by the district. The gifts, donations, bequests, and devises may be made subject to conditions or restrictions that the governing board may prescribe."].)

Preliminarily we note that the Garaus' challenge to the GATE program is moot to the extent that it seeks equitable relief. TUSD presented evidence at trial that it no longer offered a GATE program in the district. In addition, although the Garaus claimed to have paid to participate in GATE parenting workshops, GATE summer school programs and for GATE materials, they failed to supply proof of these claims. In any event, they do

not dispute that any GATE student was denied access to the program based on an inability to pay nor did they show that any monies collected were anything other than donations.

Summer Athletic Program. On appeal, the Garaus complain about a "summer athletic program" which TUSD purportedly offered for a fee to high school students. First, as TUSD points out, the Garaus did not challenge this program in the trial court, and there was no evidence presented at trial on the matter. Nonetheless, the Garaus' claim would fail. According to TUSD the program it is not offered for school credit and is not offered during the school year. The Garaus have not carried their burden to show that the program is educational in character under *Hartzell.*

Earthquake Kits. The Garaus maintain that the elementary school children in TUSD are required to bring an earthquake kit to school and that such kits have an educational purpose and thus should be provided by the district free of charge.

The evidence presented at trial showed that TUSD schools have emergency supplies, that students in elementary school were permitted, but not required to leave earthquake kits at school which were returned to the students at the end of the school year. The evidence also showed that the kits were not used for any educational purpose. The Garaus' claim centering on the earthquake kit fails.

Health Insurance. The Garaus sought to have TUSD pay the health insurance premiums for their entire family during the period in which the Garaus participated in high school athletics, claiming that those expenses were educational in nature because insurance is required for a student to participate in athletic programs. The Garaus' claim lacks merit not only because it falls outside the statute of limitations period in the Government Code, but also because it lacks legal and evidentiary support.

Education Code section 32221 requires that school districts provide health and accident insurance for members of school athletic teams. (Ed. Code, § 32221.) This section further states that the school district is not required to provide such insurance for students who are covered by private insurance. (Ed. Code, § 32221, subd. (c).)

The Garaus' effort to seek reimbursement for family medical insurance premiums during the period in which the Garau children participated in high school athletics is specious. First, whether or not the Garaus had their own private insurance, there was no evidence that TUSD failed to comply with Education Code section 32221. Second, the Garaus did not present any evidence to support this claim below, nor do they cite to any legal authority for this novel theory. The fact that an activity, here, high school athletics, may qualify as educational in nature under *Hartzell* does not convert any and all expenses having any connection to that activity into costs that must be borne by the school district. The expense at issue must be educational in nature to trigger the school's obligation to pay under the free education guarantee – such is the teaching of *Arcadia.* Here the Garaus have not shown that family health insurance is educational in nature or an expense rationally related to education.

Compelled Medical Examinations. The Garaus contend that TUSD cannot require students to pay for medical examinations required as a pre-requisite to participate on high school athletic teams by the California Interscholastic Federation (CIF).

School districts are permitted under the Education Code to enter into associations, such as the CIF, to enact and enforce rules relating "to eligibility for and participation in, interscholastic athletic programs among and between schools." (Ed. Code, § 35179, subd. (d).) Furthermore, CIF eligibility rules do not violate the free school guarantee. (*Ryan v. California Interscholastic Federation-San Diego Section* (2002) 94 Cal.App.4th 1048, 1073-1074 [upholding CIF authority to enact and enforce eligibility determinations].) Given these authorities, TUSD did not violate the Garaus' rights, nor are the Garaus entitled to recoup the costs of medical examinations that were required by the CIF as a prerequisite to their participating on high school athletic teams.

Liability Releases. The Garaus complain that Education Code section 35330 violates the free education clause because it amounts to an implied waiver of liability for certain school activities and that the waiver illegally passes on any costs associated with the risk to parents. In our view, Education Code section 35330 does not violate the California Constitution.

Education Code section 35330, subdivision (d) provides, in pertinent part: "All persons making the field trip or excursion shall be deemed to have waived all claims against the district, a charter school, or the State of California for injury, accident, illness, or death occurring during or by reason of the field trip or excursion." Any cost or expense is speculative and uncertain. The liability release is not educational in nature. The waiver provision is tangential to the educational process so as not to implicate the free school guarantee of the constitution. (*Ryan v. California Interscholastic Federation-San Diego Section*, *supra*, 94 Cal.App.4th at p. 1074 ["the recognized fundamental right to an education does not give rise to a constitutionally protected conferred benefit to every minute component of the educational process."].)

College Testing Fees. The Garaus complain that students have to pay fees for college entrance and advanced placement exams. They assert that the school district should pay these expenses for families under *Hartzell.* We disagree.

As we conclude elsewhere, here the Garaus did not take any college entrance exams during the time period at issue and thus their claim is time barred. In any event, the "free school" guarantee only extends to K-12 education. (*Levi v. O'Connell* (2006) 144 Cal.App.4th 700, 707-708 ["The common schools under section 5 [of Article IX of the California Constitution] are the schools that provide what has become known as grades K through 12. Colleges and universities are not included. That is, section 5 constitutionally provides for a single standard and uniform system of free public K–12 education. The free school guarantee of section 5 does not provide for free college education."].) Furthermore, the Education Code anticipates that students will pay fees for exams used for college admission or college class placement. (Ed. Code, § 99151, subd. (c).)[8] The Garaus have not provided any convincing argument that TUSD was legally required to pay any advanced placement or college entrance exam fees for any student.

[8] Education Code section 99151, subdivision (c) provides: "'Standardized test' or 'test' means any test administered in California *at the expense of the test subject* which is used for the purposes of admission to, or class placement in, postsecondary educational institutions or their programs, or any test used for preliminary preparation for those tests.

Locks for Student Lockers. The Garaus assert that lockers are integral to the educational experience and that TUSD was required to supply locks to secure student lockers. We are not convinced.

The evidence presented at trial showed that high school lockers at TUSD schools had built-in combination lockers. TUSD pointed out the lockers used by students during physical education classes did not have built in locks because different students used those lockers during the school day. Nonetheless, the evidence in the record showed that locks were not required to be used on those lockers. In any event, the Garaus have not demonstrated that locks are an integral part of the educational experience.

Admission Charges for Games, Dances and Fees for Student Identification Cards. The Garaus claim that TUSD should pay the costs of students' attendance at high school dances and athletic games as well as the costs of student identification cards issued by the Associated Student Body of the TUSD high schools. They argue that these events and activities are educational in nature because they are critical to a student's social development.

The Garaus have not shown that the law required the TUSD to pay student admission to these social events. Dances, athletic events and student identification cards do not fall within the free school clause of the California Constitution. This issue was addressed in *Hartzell* when the Supreme Court, in explaining what activities qualified as "educational in character" in the context of the free school guarantee, stated "[e]ducational activities are to be distinguished from activities which are purely recreational in character. Examples of the latter might include attending weekend dances

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[¶] 'Standardized test' or 'test' includes, but is not limited to, the Preliminary Scholastic Aptitude Test, the Scholastic Aptitude Test, the College Board Achievement Tests and Advanced Placement Tests, the ACT Assessment, the Graduate Record Examination, the Medical College Admission Test, the Law School Admission Test, the Dental Admission Testing Program, the Graduate Management Admission Test, and the Miller Analogies Test. [¶] The standardized test does not include a test, or part of a test, which has been in use for less than five years, or which is administered . . . for the purposes of meeting graduation requirements of secondary schools and postsecondary educational institutions." (Ed. Code, § 99151, subd. (c).)

or athletic events." (*Hartzell v. Connell, supra,* 35 Cal.3d at p. 911, fn. 14.) Likewise student identification cards were used only in connection with these social events. As a result, these items cannot support the Garaus' causes of action.

Transportation other than to home and school. The Garaus argued that TUSD had no authority to charge for transportation for extracurricular activities. They argued that transportation is integral to participating in the activity— marching band, sports teams, cheerleading and debate, and since those activities cannot be subject to charges then the transportation for these activities cannot be subject to charges and fees.

As TUSD points out, given that the Supreme Court in *Arcadia* held that transportation to and from *school* is not educational in character, then transportation to and from social events and athletic games would also fall outside the free school guarantee. The Garaus have not presented any authority to support a contrary conclusion.

TUSD Debtors lists. The Garaus argue that it was illegal and unconstitutional for the TUSD to maintain a list of students who owe funds to the district. This argument lacks merit. Pursuant to Education Code section 48904, subdivision (a)(1), TUSD can seek redress for lost, stolen or destroyed school property. The Garaus have not presented any authority to support their claim that imposing such liability offends the constitution.

In view of all of the foregoing we conclude that the Garaus have failed to demonstrate reversible error with respect to the underlying judgment in the appeal of case No. B231114.

II. Appeal and Cross-Appeal from the Order Granting Attorney's Fees and Sanctions (Case No. 232442)

A. Appeal

1. Factual Background

On October 27, 2010, after the Garaus presented their case in chief, TUSD made an oral motion for judgment under Code of Civil Procedure section 631.8 and an oral motion for attorney's fees under Code of Civil Procedure section 1038. The trial court granted the section 631.8 motion, and on its own motion issued an OSC as to whether sanctions under Code of Civil Procedure section 128.7 should be imposed against Mr.

Garau and his counsel, Ms. Garau, for maintaining a frivolous and meritless lawsuit. The court set a hearing date for the OSC and the section 1038 motion for January 28, 2011, and established a briefing schedule for the motions: December 1, 2010 for the written motions; January 10, 2011 for the Garaus' written oppositions, and January 17, 2010 for TUSD's reply briefs.

Thereafter on December 1, 2010, TUSD filed the motion for fees under Code of Civil Procedure section 1038 and a motion for sanctions under Code of Civil Procedure section 128.7 seeking $596,221 in fees in defending the litigation. The court entered judgment in the case on December 23, 2010, and reserved jurisdiction to determine the amount, if any, of the fees and sanctions.

On January 28, 2011 the court heard the motions for sanctions and fees. The minute order for the hearing indicates that the court granted the motion for sanctions under Code of Civil Procedure section 128.7, and denied the Code of Civil Procedure section 1038 motion pursuant to the legal analysis in the tentative ruling. The minute order further disclosed that the amount of the sanctions was taken under submission.

The tentative ruling provided to the parties explained the court's rationale in ruling on the motions as follows: The court granted the motion for sanctions against Ms. Garau finding that the first cause of action for breach of a mandatory duty under the Government Code was frivolous. The court found that numerous items that the Garaus claimed to have been charged for by TUSD were either never assessed against the Garaus or were legally permissible charges: "The items that made up the first cause of action not only lacked a legal basis but also lacked factual and evidentiary support as well." The court also found other items for which the Garaus sought reimbursement (i.e., health insurance) for their daughters to be "clearly frivolous" or were admittedly not incurred in connection with the children's schooling. The court discussed other items, for example test fees, that the Education Code clearly permitted the school to collect. The court also

cited as frivolous the Garaus continued efforts to argue their equal protection claims and their efforts to cast the case as a "class action."[9]

The court denied Code of Civil Procedure section 128.7 sanctions for the second and third causes of action for declaratory and injunctive relief, notwithstanding the facts that the Garaus lacked standing to bring the claims, and/or that they were moot. The court ruled that: "it is possible that the Plaintiffs could have gained standing for the claims that were not mooted had the defendant committed continued violations against the Plaintiffs," noting that at the time one of the daughters was still in high school at the TUSD.

As for the Code of Civil Procedure section 1038 motion, the court concluded that the first cause of action was brought without objective reasonable cause for the same reasons the court had concluded that it was frivolous. Nonetheless, the court denied the motion reasoning that the proceeding was not brought in bad faith or absent reasonable cause because certain claims brought in the proceeding—the declaratory and injunctive relief requests—were not frivolous.

On February 15, 2011, on its own motion, the court reconsidered its order on the Code of Civil Procedure sections 1038 and 128.7 motions, and granted both motions. In the February 15, 2011 order the court ruled that Code of Civil Procedure section 128.7 sanctions against Olga Garau were appropriate (based on the first cause of action) for the same reasons as articulated in the original January 28, 2011 order. The court ordered sanctions, finding that although TUSD sought more than $500,000 in its fees motion, $25,000 represented the amount sufficient to deter the filing and pursuit of the meritless claim.

As for the Code of Civil Procedure section 1038 motion, the court adopted the rationale from the January 28, 2011 tentative ruling on the first cause of action. The court ruled that the claim was maintained without objective reasonable cause. The court thereafter concluded that although Code of Civil Procedure section 1038 did not provide

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[9] The Garaus never sought to certify a class action.

a basis for a fee award as to the second and third causes of action for injunctive and declaratory relief, the fee award was nonetheless appropriate based on the first cause of action.[10] Thereafter, the court ordered that the sanctions award of $25,000 and the fee award of $89,433 be treated as "concurrent awards," so that the total amount of the award would be $89,433. The court imposed the award only against Olga Garau. The court thereafter ruled that because it had reconsidered the January 28, 2010 order on its own motion, the fee and sanction order would be "stayed" for 25 days to allow any party to file a brief in support or opposition to the new order, and that the stay would remain in effect pending the completion of hearing on the arguments made in support or opposition.

On March 9, 2011, the Garaus filed a "Motion for Reconsideration" of the court's February 15, 2011 fee and sanctions order. The Garaus argued that the fee and sanction motions should have been denied because: (1) the law firm representing the district in the action was never properly retained, and thus, the TUSD did not "lawfully" incur any fees in the action; (2) the claim for Code of Civil Procedure section 1038 fees should have been included in TUSD's memorandum of costs, and failure to include them denied the Garaus the opportunity to move to tax and strike the fees; and (3) the amount awarded in fees was unjustified because it exceeded the amount of damages at issue. TUSD filed an opposition to the Garaus' motion and a brief in response to the court's order allowing for additional briefing. TUSD argued, among other things, that the court should hold a hearing to reconsider the limited issues of the amount of the award and on how the award should be apportioned between Olga and Carlos Garau. TUSD argued that both the fee

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[10] Specifically, the court found: "Although CCP section 1038 concerns 'proceedings,' not claims, this Court finds that the first cause of action falls within the bounds of 'proceedings' referred to in section 1038, because it was the only claim or cause of action that Plaintiffs brought under the California Tort Claims Act."

This reasoning reflects a change in the interpretation of the term "proceeding" from the analysis in the court's January 28, 2011 tentative ruling. In the tentative ruling, the court denied all fees under Code of Civil Procedure section 1038 because the court, having concluded that all three causes of action were part of the same "proceeding," determined that section 1038 fees were unwarranted because they could not have been awarded for the second and third causes of action.

award under Code of Civil Procedure section 1038 and the sanctions award under Code of Civil Procedure section 128.7 should have been ordered against Carlos Garau as well, not only Olga Garau.

After a hearing on March 30, 2011, the court issued a ruling, rejecting the Garaus' arguments. The court reconsidered and modified the February 15, 2011 fee and sanction order in only one respect—to reflect that Olga Garau and Carlos Garau "shall be jointly and severally liable" for the fees awarded under Code of Civil Procedure section 1038. Thereafter the court ordered the "stay" of the February 15 order lifted, and adopted the ruling (including the modification) as the final order. TUSD served notice of the order on April 5, 2011.

On April 15, 2011, the Garaus filed a notice of appeal of the February 15, 2011 fee and sanction order and the March 30, 2011 modification of the order. TUSD filed a notice of a cross-appeal on May 4, 2011.

2. Legal Analysis

a. Section 1038

Code of Civil Procedure section 1038 provides that "(a) In any civil proceeding under the California Tort Claims Act . . . the court, upon motion of the defendant or cross-defendant, shall, at the time of the granting of any summary judgment . . . determine whether or not the plaintiff . . . brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint. . . . If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party. . . ." (Code Civ. Proc., § 1038.) Section 1038 authorizes the defendants or cross-defendants to recover reasonable costs after prevailing on a dispositive motion (i.e., summary judgment, directed verdict, nonsuit, judgment before presentation of defense evidence, or other motion in an action for

indemnity or contribution). (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 856.)

"[D]efendants may recover defense costs under section 1038 if the trial court finds the plaintiffs lacked *either* reasonable cause or good faith in filing or maintaining the lawsuit." (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center, supra,* 19 Cal.4th at p. 853.) The "good faith" and "reasonable cause" requirements pertain not only to the actions initiation, but also its continued maintenance of the action. (*Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1252.)

Following the court's determination of the dispositive motion, and before the court discharges the jury or enters the requisite judgment, the defendant must also make a motion for defense costs, as the statute directs, alleging that the plaintiff did not bring or maintain the proceeding in "good faith" and with "reasonable cause." (Code Civ. Proc., § 1038, subds. (a), (c).) An award of defense costs may be made only on notice and an opportunity to be heard. (Code Civ. Proc., § 1038, subd. (a).) A section 1038 motion should be filed at the earliest practical time; and so long as it is filed prior to the entry of judgment, the court may rule on it after the entry of the judgment. (*Gamble v. Los Angeles Department of Water and Power* (2002) 97 Cal.App.4th 253, 259.)

The court's decision on "reasonable cause" is reviewed de novo, and the determination of "good faith" is reviewed for substantial evidence. (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860.) "Reasonable cause" in section 1038 "is synonymous with the term 'probable cause' in malicious prosecution law." (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 183.) "[P]robable cause to bring an action does not depend upon it being meritorious, as such, but upon it being arguably tenable, i.e., not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 824.)

In this context, "'[g]ood faith," or its absence, involves a factual inquiry into the plaintiff's subjective state of mind [citations]: Did he or she believe the action was valid? What was his or her intent or purpose in pursuing it? A subjective state of mind will

rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence." (*Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 932, disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7, italics omitted.) Good faith is linked to a belief in a justifiable controversy under the facts and law. (*Hall v. Regents of University of California* (1996) 43 Cal.App.4th 1580, 1586.)

With these principles in mind we turn to the claims concerning the award of fees under Code of Civil Procedure section 1038. The Garaus claim that the fee award is procedurally defective in a variety of respects and also fails on the merits. We address these contentions in turn.

1. Procedural contentions

Jurisdictional Issues. The Garaus assert that the trial court had no jurisdiction to rule on the Code of Civil Procedure section 1038 motion because the motion was heard *after* the judgment was entered in the case and reconsidered and modified *after* Garau filed the appeal of the underlying judgment. We disagree.

The motion for Code of Civil Procedure section 1038 fees was filed on December 1, 2010, prior to the entry of judgment in the case—December 23, 2010. When the court entered judgment it expressly reserved jurisdiction to determine the section 1038 (and section 128.7) motions. The Garaus have cited no authority for the proposition that the trial court must hear and decide a fee motion prior to the entry of judgment. Likewise our research has located no authority in support of that contention. The law only requires that the section 1038 motion be *filed* at the earliest practical time prior to the entry of judgment. (See *Gamble v. Los Angeles Department of Water and Power*, *supra*, 97 Cal.App.4th at p. 259.) TUSD complied with this timing requirement. The motion was filed prior to the entry of judgment and pursuant to the schedule the court established when it granted the dispositive Code of Civil Procedure section 1038 motion under Code of Civil Procedure section 631.8 motion. The court had jurisdiction to determine the merits of the motion, notwithstanding the fact that it was not heard and decided until after the entry of judgment in the underlying case.

Likewise, the trial court also retained jurisdiction to decide and even reconsider the Code of Civil Procedure section 1038 motion after the Garaus filed their notice of appeal of the December 23, 2010 judgment. The trial court retained jurisdiction to decide post-judgment fee and costs orders, notwithstanding the appeal from the underlying judgment. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 368 [One exception to the general rule that the trial court is deprived of jurisdiction once a notice of appeal is filed is that, during the pendency of an appeal, the trial court retains jurisdiction to award attorney fees and costs].) In addition, the post-judgment fee order once final was separately appealable from the underlying judgment. (See Code Civ. Proc., § 904.1; see also *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053 ["if a judgment determines that a party is entitled to attorney's fees but does not determine the amount, that portion of the judgment is nonfinal and nonappealable" until the amount of fees is determined].)

Furthermore, the court retained jurisdiction to reconsider its February 15, 2011 ruling on the Code of Civil Procedure section 1038 motion on its own motion and to amend it. (See *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1042 [court retains the inherent authority to reconsider and correct it own rulings]; *Francois v. Goel* (2005) 112 Cal. 4th 1094, 1107 [so long as the final judgment has not been entered in the matter the court can reconsider its own order without limitation].) Here at the January 28, 2011 hearing on the Code of Civil Procedure section 1038 and Code of Civil Procedure section 128.7 motions, the court preliminarily indicated its intent to grant the Code of Civil Procedure section 128.7 sanctions motion and deny the Code of Civil Procedure section 1038 motion for fees, and took the matter under submission to determine the amount to award TUSD. That matter was not yet final, and in fact remained under submission when on February 15, 2011 the court decided to reconsider the merits. Thus, the court retained jurisdiction to re-examine its prior determination.

Sufficiency of Notice. We reject the Garaus' complaint that they did not have sufficient notice or opportunity to oppose the Code of Civil Procedure section 1038 motion. The Garaus were first apprised of the section 1038 motion on October 27, 2010,

when TUSD made the oral motion for section 1038 fees. Thereafter, once the motion was filed on December 1, 2010, they were given more than a month—until January 10, 2010—to file an opposition. Moreover, they were given notice and an opportunity to oppose the court's order of February 15, 2011 that reconsidered and modified the original order. Accordingly, the lower court afforded all parties ample notice and opportunity to be heard on the matter of Code of Civil Procedure section 1038 fees.

Memorandum of Costs Contentions. The Garaus' argument that the section 1038 fee order is infirm as a matter of law because the request for fees was not included in the costs memorandum also lacks merit. The legal framework governing the recovery of litigation costs under the Code of Civil Procedure which defines allowable costs (Code Civ. Proc., § 1033.5) and under the rules of court which describes the procedures for filing the memorandum of costs (Cal. Rules of Court, rule 3.1700) applies to those litigation expenses which may be immediately entered by the clerk if the opposing party does not move to strike or tax costs. (*Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1015-1016.) This framework does not apply to costs, expenses and fees that may be ordered by the court based on the court's exercise of its discretion. (*Ibid.*) The types of costs and fees which require the court's assessment and exercise of discretion must be brought pursuant to a noticed motion, affording the party against whom the award is sought an opportunity to oppose the motion. Such is the case with the Code of Civil Procedure section 1038 motion in this case, which requires the court to evaluate and determine whether an award of fees is appropriate, i.e., whether the plaintiff initiated or maintained the action with reasonable cause or in good faith.

TUSD was not required to seek its Code of Civil Procedure section 1038 attorney's fees in a memorandum of costs. Furthermore, the Garaus received notice and an opportunity to oppose the section 1038 motion. The Code of Civil Procedure section 1038 proceeding in this case did not offend due process.

SLAPP Suit Argument. The Garaus assert that the fee order must be reversed because a Code of Civil Procedure section 1038 motion amounts to an impermissible "SLAPP" suit. They claim the motion "chills" the right to petition the government to

address grievances and denies a jury trial by allowing for a penalty which is the functional equivalent of a malicious prosecution action. This argument lacks merit.

An award of fees under Code of Civil Procedure section 1038 is not automatic. As the Supreme Court observed in *Kobzoff*, "a defendant may not recover section 1038 costs simply because it won a summary judgment or other dispositive motion; victory does not per se indicate lack of reasonable cause. That victory is simply the first step. Following the court's determination of the dispositive motion . . . the defendant must also make a motion for defense costs, as the statute directs, alleging that the plaintiff did not bring or maintain the proceeding in 'good faith' and with 'reasonable cause.' An award of defense costs may be made only on notice and an opportunity to be heard, and the court determines section 1038 liability as a matter of law. (§ 1038, subd. (a).) In seeking section 1038 costs, the defendant waives its right to malicious prosecution damages, to the extent the right exists." (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center, supra,* 19 Cal.4th at pp. 856-857, citations omitted.)

The purpose of Code of Civil Procedure section 1038 permitting public entities to recover defense costs in proceedings under the Government Claims Act is to discourage frivolous lawsuits against public entities by providing public entities with an alternative remedy to a constitutionally proscribed action for malicious prosecution. (*Gamble* v. *Los Angeles Dept. of Water and Power, supra,* 97 Cal.App.4th at pp. 258-259.) Such fees would not be appropriate in every action in which a government defendant prevails. It could not be applied against parties who, in good faith and with reasonable cause, seek redress against the government, even where the plaintiff does not prevail in the action. "Under section 1038, a reasonable and good faith attempt to change or modify the existing law should not result in a section 1038 award to the defendant." (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center, supra,* 19 Cal.4th at p. 863.) Thus, the statute serves to deter and chill the litigation ambitions of only those litigants who act in bad faith to bring frivolous claims against blameless public entities. A section 1038 motion is not akin to a SLAPP suit and it does not aim to discourage the public from bringing colorable claims against the government. Rather section 1038 is designed to

create an economic disincentive for frivolous lawsuits—an objective which has been endorsed by the Supreme Court in *Kobzoff*. (See *id.* at pp. 856-858.)

TUSD's Representation by Counsel. The Garaus also maintain that the court's fee order must be reversed because TUSD failed to properly retain its counsel and did not approve the defense provided by counsel. Neither of these arguments is availing.

TUSD presented evidence that its legal counsel had been retained pursuant to a contract with the district under guidelines adopted by the TUSD school board. Contrary to the Garaus' argument, neither the Education Code or the Public Contracts law require that contracts for such professional services, such as legal counsel, be sent out to public bid, nor must TUSD and its governing board approve every action, motion or litigation decision or strategy of counsel engaged in litigation on behalf of the district. (See Public Contract Code, § 20111, subd. (c); Gov. Code, § 53060.) In addition, TUSD was not required by law to use County Counsel as its legal representative. (Ed. Code, §§ 25204-25205.)

2. Merit Contentions

In addition to those challenges that relate to the procedural aspects of this appeal, the Garaus assert a number of arguments that relate to the merits. Before reaching the specific complaints about the merits, however, we examine the legal and evidentiary basis of the trial court's determination that the Garaus' action was not brought with objective reasonable cause.

Reasonable Cause. The court's decision on reasonable cause is reviewed de novo, and as a result this court is not bound by the determination of the lower court, but examines the matter independently. (See *Austin B. v. Escondido Union School Dist.*, supra, 149 Cal.App.4th at p. 888.) As noted elsewhere here, "reasonable cause" in Code of Civil Procedure section 1038 "is synonymous with the term 'probable cause' in malicious prosecution law." (*Clark v. Optical Coating Laboratory, Inc.*, *supra*, 165 Cal.App.4th at p. 183.) "[P]robable cause to bring an action does not depend upon it being meritorious, as such, but upon it being arguably tenable, i.e., not so completely lacking in apparent merit that no reasonable attorney would have thought the claim

tenable." (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 824.) Furthermore "reasonable cause" requirements pertain not only to the actions initiation, but also its continued maintenance of the action. (*Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1252.)

In our view, the action was not maintained with "reasonable cause." As described elsewhere in section I of this opinion, the Garaus' complaints about various fees and charges lacked merit—many of the charges and fees were legally authorized or involved items that were provided free of charge. Furthermore, the Garaus never participated in other activities that they complained about. The Garaus provided no proof that they were charged for or denied access to certain items and programs that the district was required by law to provide—such as basic school supplies, materials and books. The Garaus' counsel was aware that these claims lacked evidentiary support.

The Garaus' contentions also clearly lacked legal support and were offered without reasonable cause. The Garaus continued to argue an untenable equal protection argument throughout the case even after the argument had been repeatedly rejected as unsound by the court several times. The Garaus presented no reasonable argument why the statute of limitations should not apply to its mandatory duty cause of action. Throughout the litigation the Garaus have asserted that they brought the case "individually and on behalf of all other students and parents similarly situated," yet, it has never been approved of as a class action. The Garaus have never had "standing" to assert to seek damages or equitable relief related to items and programs that they participated in or for which they were never charged. Given the state of the law and evidence, some of the items and programs should never have been included in the Garaus' complaint in the first instance. Whatever the legal merit that may (or may not attach) to the general legal arguments about whether a school district can charge or seek donations from students for activities and programs, in our view, no reasonable attorney would have brought and pursued the claims in this case on behalf of these named parties. Accordingly, the Garaus' mandatory duty claim was not brought and maintained with objectively

reasonable cause. As we shall explain, none of the Garaus' efforts to assail the merits alters our conclusion.

Prevailing Party Argument. The Garaus argue that Code of Civil Procedure section 1038 fees were inappropriate because TUSD did not prevail in the action. The Garaus assert that TUSD did not "prevail" because it did not obtain a damage award; the case was not dismissed; and because "plaintiff's did obtain a declaration of rights and duties . . . although not in their favor, but which was nevertheless the type of relief sought by the second cause of action" for declaratory relief. In addition, the Garaus claim that they prevailed because the TUSD changed its policies as a result of the litigation. All of these claims are spurious.

First, TUSD did not seek a damage award against the Garaus. Nonetheless, it did obtain all of the relief it sought—after the presentation of the Garaus' case the court granted TUSD's motion for judgment under Code of Civil Procedure section 631.8. The trial court specifically found that TUSD was entitled to judgment on all three causes of action because TUSD did not breach any mandatory duties pursuant to any statute or constitutional provision. The court found that the first cause of action was not warranted by the law, the evidence and appeared to have been presented for an improper purpose such as causing unnecessary delay or increasing the costs of litigation. Furthermore as to the second and third causes of action the court found that the Garaus had no standing to sue, their claims were moot and presented no actual, present or justiciable controversy.

Second, the Garaus did not obtain the declaratory relief it sought—the court specifically found: "There is insufficient evidence of broad general interests in Plaintiffs' claims for declaratory relief TUSD obtained an unqualified victory in this action and was clearly the prevailing party. [¶¶] The District has not violated any statute or constitutional provision that can be the basis for declaratory relief. [¶¶] In short, plaintiff's claims for declaratory relief were not warranted by existing law, did not have evidentiary support, and appeared to have been proffered for an improper purpose such as causing unnecessary delay or needlessly increasing the cost of litigation."

Finally, there is no evidence that TUSD changed any of its policies as a result of this litigation. Evidence was presented at trial that TUSD continued to provide the school supplies and equipment required under the law as it had always provided both before and after the Garaus filed the complaint. Certain programs, such as the GATE program, were terminated by TUSD, while other fees—such as lab and material fees—were changed to donations, but there is no evidence that any of these changes came as a result of the Garaus' lawsuit. In sum, TUSD prevailed in this action.

Judicial Bias. The Garaus argue that the Code of Civil Procedure section 1038 motion (and the section 128.7 motion) should be reversed because the trial court Judge Brazile was biased and had a conflict of interest. Specifically the Garaus complain that at one time Judge Brazile's wife worked as the controller for the Los Angeles County Office of Education (LACOE), and thus she could "reasonably be presumed to have had ultimate oversight and responsibility over runaway litigation costs and attorneys' fees in question." This argument is not supported by the law or facts in this case.

First the fact of the former employment of a judge's spouse is not sufficient, standing alone, to prove bias or impermissible conflict of interest. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 103-104 [holding judge not required to disqualify himself based on former employment of spouse absent showing of any current personal or financial interest which would disqualify the judge or any evidence of conduct during the trial which would support an inference of partiality].) Second, the Garaus did not present any evidence that LACOE had to approve the legal bills at issue in this case or that the judge's wife as the controller for LACOE would have any involvement in reviewing the litigation costs in this case or in any other.

Circumstances Making the Award "Unjust". The Garaus also argue that trial court should have found an exception to a Code of Civil Procedure section 1038 fee award based on special circumstances of this case.

First, here as in the trial court, the Garaus argue that the imposition of the fee award would create a financial hardship upon them and the court should have considered the financial impact of the award in deciding whether to impose it against them. The

record is unclear as to whether the trial court considered the Garaus' financial circumstances in determining the amount of the award. Nonetheless, elsewhere here we conclude that the Code of Civil Procedure section 1038 fee award must be reversed and remanded to the trial court for further proceedings. Accordingly, in determining the amount to award on remand, the trial court should consider the financial circumstances of the award on the Garaus and the impact of the award upon them. (See *Garcia v. Santana* (2009) 174 Cal.App.4th 464, 476-477 ["In determining the amount of fees . . . the trial court must therefore consider the other circumstances in the case in performing the lodestar analysis. Those other circumstances will include, as appropriate, the financial circumstances of the losing party and the impact of the award on that party."].)

Second, the Garaus contend that the imposition of fees was unjust in view of the important rights—the right to a free public education—that the lawsuit sought to vindicate. The Garaus have no legal support for the contention that such an exception exists to Code of Civil Procedure section 1038. The Garaus nonetheless refer to litigation filed in 2010 by the American Civil Liberties Union against a number of California school districts and the State of California alleging that students were being charged for supplies and materials notwithstanding the clear legal prohibitions against charging for such items. *(Doe v. California* (L.A.Sup.Ct. case No. BC445151).) The Garaus' effort to link their case to *Doe* is unavailing. *Doe* was a class action in which evidence was presented that certain school districts had charged the class members for basic supplies, books and material that were clearly integral to the educational experience of the students and that the charges ran afoul of *Hartzell*. In contrast here, the Garaus presented no credible evidence that the Garau daughters suffered the deprivations alleged or were otherwise denied a free public education. In fact, the vast majority of programs, activities and materials described in the complaint were things that the law allowed schools to charge a fee for or were programs and items the school was not required to provide or supply. The fact that an unrelated lawsuit seeks to enforce the same underlying right does not transform the Garaus' case into a meritorious and worthy cause or provide a

basis for the court to reject an otherwise appropriate motion for Code of Civil Procedure section 1038 fees.

Third, the Garaus complain that the 1038 award is inappropriate because the court had expressed an intent not to impose those fees on the Garau daughters and yet, by imposing a fee award on Mr. Garau, the Garau daughters are adversely affected. This is not a reason to reverse the award. It is not uncommon for fee awards against a party in a lawsuit to have collateral effects on others. However, such collateral effects are not among the elements that a court must consider in deciding whether to impose fees under Code of Civil Procedure section 1038.

Imposition of Award Against Counsel. The Garaus argue that the order awarding fees is improper to the extent that it has been imposed against Ms. Garau, plaintiff's counsel, who was not a party to the litigation. Below, in its brief asking for limited reconsideration of the court's February 15, 2011 order, TUSD acknowledged that the Code of Civil Procedure section 1038 fee award should be imposed *only* against Mr. Garau, and not his counsel, Ms. Garau, and asked the court to modify its prior ruling accordingly. The trial court refused to do so, concluding that because Code of Civil Procedure section 1038 "does not specify the fees awarded pursuant to that section must only be awarded against Plaintiff, not his counsel" and because no case precluded awarding section 1038 fees against counsel, then the court was authorized to impose the fees against both Mr. Garau and his legal counsel Ms. Garau. In so doing, the court analogized the fee award under section 1038 to the sanctions award under section 128.7, which allows a sanction award to be imposed against a party or its counsel.

The trial court erred in imposing the section 1038 fees on the Garaus' counsel, Ms. Garau. As far as we are aware, there is no legal authority authorizing the leveling of section 1038 sanctions against the attorney of a litigant. The language of section 1038 expressly states that in determining whether to impose fees under the statute the court must determine whether "the *plaintiff, petitioner, cross-complainant, or intervenor* brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law . . . ." (Code Civ. Proc., § 1038, subd. (a),

italics added.) Code of Civil Procedure section 1038 does not make any mention of imposing such fees upon counsel. This stands in contrast to other sections of the same code, including Code of Civil Procedure section 128.7, which expressly states that sanctions may be imposed upon "the *attorneys*, law firms, or parties that have violated subdivision (b) or are responsible for the violation (see, e.g., Code Civ. Proc., § 128.7). In our view, if the Legislature had intended for Code of Civil Procedure section 1038 fees to be imposed upon legal counsel, it would have included such a provision in the statute; its omission from the statute supports our conclusion that section 1038 fees were not intended to be imposed against a plaintiff's attorney. Thus, while the section 1038 award imposed against Mr. Garau was proper, the award against Ms. Garau cannot stand. In sum, the trial court properly determined that TUSD was entitled to an award of section 1038 fees, but those fees should only have been imposed against Mr. Garau.

b. Code of Civil Procedure Section 128.7

Below, during the trial and after the Garaus presented their case, the trial court granted TUSD's motion for a judgment under the Code of Civil Procedure section 631.8 motion, and at the same time the court on its own motion issued an OSC as to whether sanctions under Code of Civil Procedure section 128.7 should imposed against Mr. Garau and his counsel Ms. Garau for maintaining a frivolous and meritless lawsuit. The court set a hearing date for the OSC (and the section 1038 motion) for January 28, 2011.

Thereafter on December 1, 2010, TUSD filed and served a motion for fees under Code of Civil Procedure section 1038 and a motion for sanctions under Code of Civil Procedure section 128.7 seeking $596,221 in fees in defending the litigation. The court entered judgment in the case on December 23, 2010, and reserved jurisdiction to determine the amount, if any, of the fees and sanctions. Subsequently, in March 2011, the court granted TUSD's motion for sanctions under Code of Civil Procedure section 128.7 and imposed $25,000 in sanctions against Garau's counsel, Olga Garau.

Before this court the Garaus contend that the sanctions order cannot be upheld under Code of Civil Procedure section 128.7 for a number of reasons, including that there

was noncompliance with the statutory "safe harbor" provisions in Code of Civil Procedure section 128.7 As we shall explain, we agree.

Safe Harbor Provision.

Code of Civil Procedure section 128.7, subdivision (b), states in pertinent part: "By presenting to the court . . . by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [¶] (2) The claims, defenses, and other legal contentions therein are warranted by existing law. . . . [¶] (3) The allegations and other factual contentions have evidentiary support. . . ." Code of Civil Procedure section 128.7, subdivision (c) provides that "[i]f, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." (Code Civ. Proc., § 128.7.)

Under the "safe harbor" provisions of Code of Civil Procedure section 128.7, a party must be given an opportunity to appropriately correct the offending conduct before a sanction can be imposed. (Code Civ. Proc., § 128.7, subd. (c)(1); *Barnes v. Department of Corrections* (1999) 74 Cal.App.4th 126, 130-131; *Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 441; *Goodstone v. Southwest Airlines Co.* (1998) 63 Cal.App.4th 406, 418-419.) Code of Civil Procedure section 128.7, subdivision (c), provides in part: "(1) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court

may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees. [¶] (2) On its own motion, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b), unless, within 21 days of service of the order to show cause, the challenged paper, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected." (Stats. 1998, ch. 121, § 2; Code Civ. Proc., § 128.7, subds. (c)(1) & (2).)

Thus, a party seeking sanctions under Code of Civil Procedure section 128.7 must follow a two-step procedure. First, the moving party must *serve* on the offending party a motion for sanctions. Service of the motion on the offending party begins the safe harbor period during which the sanctions motion may not be filed with the court. During the safe harbor period, the offending party may withdraw the improper pleading and thereby avoid sanctions. If the pleading is withdrawn, the motion for sanctions may not be filed with the court. If the pleading is not withdrawn during the safe harbor period, the motion for sanctions may then be filed. Pursuant to Code of Civil Procedure section 128.7, the trial court must follow a similar two-step procedure when it issues an OSC to impose sanctions. In addition, "[a] monetary sanction imposed after a court motion is limited to a penalty payable to the court and may not include or consist of monetary sanctions payable to a party." (*Malovec v. Hamrell*, *supra*, 70 Cal.App.4th at pp. 443-444.)

The purpose of the safe harbor provision of Code of Civil Procedure section 128.7 is to provide an opportunity for the offending party to withdraw or correct the improper pleading so as to avoid sanctions. (*Barnes v. Department of Corrections*, *supra*, 74 Cal.App.4th at pp. 130-131; *Malovec v. Hamrell*, *supra*, 70 Cal.App.4th at p. 441; *Goodstone v. Southwest Airlines Co.*, *supra*, 63 Cal.App.4th at pp. 418-419.) This permits a party to withdraw a questionable pleading without penalty, thus saving the court and the party's time and money litigating the pleading as well as the sanctions request. Thus, it is clear that a party can avoid any sanctions by withdrawing or

correcting its conduct. (Code Civ. Proc., § 128.7, subd. (c)(1); *Barnes v. Department of Corrections, supra,* 74 Cal.App.4th at pp. 130-131; *Malovec v. Hamrell, supra,* 70 Cal.App.4th at p. 441.) The safe harbor requirement contained in Code of Civil Procedure section 128.7, subdivision (c) is mandatory and neither a party nor the court is permitted to disregard it. (*Barnes v. Department of Corrections, supra,* 74 Cal.App.4th at p. 131; *Malovec v. Hamrell, supra,* 70 Cal.App.4th at p. 441; *Goodstone v. Southwest Airlines Co., supra,* 63 Cal.App.4th at p. 424; see also *In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1220, fn. 3.) Furthermore, both a party seeking sanctions and the trial court setting an order to show cause must leave sufficient opportunity for the offending party to choose whether to withdraw or correct the pleading before sanctions may be imposed. (*Malovec v. Hamrell, supra,* 70 Cal.App.4th at p. 442; see *Goodstone v. Southwest Airlines Co., supra,* 63 Cal.App.4th at p. 424.) The statute providing for sanctions for frivolous filings is not designed to be punitive in nature; rather, the goal is to avoid sanctions by withdrawal of the improper pleading during the safe harbor period. (*Martorana v. Marlin & Salzman* (2009) 175 Cal.App.4th 685, 699; *Cromwell v. Cummings* (1998) 65 Cal.App.4th Supp. 10, 14 ["[S]anctions under section 128.7 are not designed to be punitive in nature but rather to promote compliance with statutory standards of conduct"].)

Significantly, to effectuate the safe harbor provisions, a party may not bring a motion for sanctions unless there is some action the offending party may take to withdraw the improper pleading. (*Malovec v. Hamrell, supra,* 70 Cal.App.4th at p. 442.) A sanctions motion may not be brought after the conclusion of the case or a dispositive ruling on the improper pleading. (*Ibid.*) Thus, a sanctions motion challenging a complaint may not be brought following the sustaining of a demurrer without leave to amend. (*Cromwell v. Cummings, supra,* 65 Cal.App.4th Supp. at p. 13.) Nor may a sanctions motion challenging an amendment to a complaint to name Doe defendants be brought following the dismissal with prejudice of the fictitiously named defendants. (*Goodstone v. Southwest Airlines, supra,* 63 Cal.App.4th at p. 424.) Neither may a motion for sanctions for filing a bad faith or frivolous complaint be brought following the

granting of a defendant's motion for summary judgment. "Nonetheless, the . . . judge found and [defendant] argues that the 'safe harbor' provision is rendered a mere 'empty formality' when a motion for sanctions comes after summary judgment has been granted. We fully agree with that observation. By virtue of its nature, the 'safe harbor' provision cannot have any effect if the court has already rendered its judgment in the case; it is too late for the offending party to withdraw the challenged [pleading]. Given the futility of the 'safe harbor' provision in this context, [defendant] deduces that compliance is unnecessary. This is where we depart from [defendant's] logic. Rather than excusing [defendant's] noncompliance, we instead hold that [defendant] has given up the opportunity to receive an award of [section 128.7] sanctions in this case by waiting to file the motion until after the entry of summary judgment. As stated above, a motion for sanctions under [section 128.7] must be served on the offending party for a period of 'safe harbor' at least [30] days prior to the entry of final judgment or judicial rejection of the offending contention. A party seeking sanctions must leave sufficient opportunity for the opposing party to choose whether to withdraw or cure the offense voluntarily before the court disposes of the challenged contention." (*Ridder v. City of Springfield* (1997) 109 F.3d 288, 296-297.)

Application of Safe Harbor Here

In this case, there are several problems with the Code of Civil Procedure section 128.7 sanctions order imposed on the Garaus' counsel. First, the court issued the OSC the *same day* it granted TUSD's dispositive motion for judgment on the complaint. The court's OSC did not comply with Code of Civil Procedure section 128.7. (*Barnes v. Department of Corrections*, *supra*, 74 Cal.App.4th at p. 131 [on its own motion, a court may enter an order directing a party to show cause why it should not be sanctioned, but in so doing it *must* allow the party 30 days to appropriately correct the offending conduct].) In view of this timing there was nothing for the Garaus to do in the trial court to correct the prior conduct giving rise to the OSC. The Garaus had no opportunity to take corrective action; they could not dismiss the action as the court already granted the dispositive motion in favor of TUSD. In *Malovec v. Hamrell, supra,* 70 Cal.App.4th at

page 441, Division Five of this court held a trial court could not, on its own motion, impose sanctions against an attorney for filing and pursuing an improper action after a summary judgment was granted. The *Malovec* court concluded that the "safe harbor" provision must be complied with prior to the imposition of sanctions and could not be imposed where "it is too late for the offending party to withdraw the challenged [pleading]." (*Ibid.*; compare *Banks v. Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 Cal.App.4th 949 [Trial court did not lose jurisdiction to order sanctions against debtor's attorney for filing frivolous claim by sustaining creditor's demurrer to the complaint, where sanctions motion was served on debtor *before* court ruled on demurrer, but not filed or heard until *after* the demurrer was sustained]; see also *Day v. Collingwood* (2006) 144 Cal.App.4th 1116 [motion for sanctions for filing a frivolous action was not rendered moot by defendant's having served motion prior to entry of judgment and filed motion following entry of judgment of summary judgment dismissal in defendant's favor, as plaintiffs had full safe harbor period within which to dismiss action, but they failed to do so].) In effect, the Garaus did not have the benefit of any safe harbor in this case; and absent an opportunity for them to withdraw or correct the improper pleading the Garaus could not avoid sanctions.

Although TUSD does not make this argument in it appellate briefs, in the trial court TUSD suggested that the Garaus could have avoided sanctions if they had volunteered to relinquish or waive the right to appeal the judgment. TUSD did not present any legal authority in support of the idea that such measures would satisfy Code of Civil Procedure section 128.7, subdivision (c). But even were we to accept the proposition that a voluntary relinquishment of appellate rights somehow amounts to a "withdrawing or correcting" a filing in the trial court under Code of Civil Procedure section 128.7, we would nonetheless conclude the Code of Civil Procedure section 128.7 sanctions award should be reversed for other reasons.

Contrary to the express language in Code of Civil Procedure section 128.7 subdivision (c), TUSD served and filed its sanctions motion the *same day*—December 1, 2010 – thereby denying the Garaus the 21-day safe harbor between service and filing.

Sanctions are not available under Code of Civil Procedure section 128.7 where plaintiff failed to serve the sanctions motion 21 days before filing it. (*Muller v. Fresno Community Hosp. & Medical Center* (2009) 172 Cal.App.4th 887; *Cromwell v. Cummings, supra*, 65 Cal.App.4th Supp. at p. 13 [motion for sanctions against plaintiffs for signing improper pleadings violated "safe harbor" provisions of governing rule, where defendant served motion 21 days prior to the hearing and filed it three days later].) Moreover, the court's October 27, 2010 OSC did not serve to put the Garaus on notice that TUSD planned to seek sanctions. Likewise the fact that the motion was not heard until more that 21 days after it was filed also does not allow the Garaus to avoid sanctions. Service of the motion on the offending party begins the safe harbor period during which the sanctions motion may not be filed with the court. Thus, TUSD's Code of Civil Procedure section 128.7 motion is infirm; it should have been denied for failing to comply with the safe harbor provision.

Similarly, the court' OSC does not justify the $25,000 award of sanctions to TUSD. "A monetary sanction imposed after a court motion is limited to a penalty payable to the court and may not include or consist of monetary sanctions payable to a party." (*Malovec v. Hamrell, supra*, 70 Cal.App.4th pp. 443-444; see Code Civ. Proc., § 128.7, subd. (d) ["the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation"].) Thus, the sanctions awarded to TUSD based on the OSC cannot support the award of sanctions and must be reversed.

In view of the foregoing, we conclude that the order imposing sanctions under Code of Civil Procedure section 128.7 must be reversed.[11]

[11] In view of our conclusion here, we do not assess the merits of the other arguments that the parties made in connection with the Code of Civil Procedure section 128.7 award.

B. Cross-Appeal

TUSD has filed a cross-appeal of the trial court's order awarding $89,233 in attorney fees under Code of Civil Procedure section 1038. TUSD asserts that trial court erred in determining the amount of fees to award.

1. Factual Background

In its motion for fees under Code of Civil Procedure section 1038, TUSD sought $596,221 in attorney's fees incurred in defending the litigation. In the February 15, 2011 ruling on the motion, the trial court granted the motion as to the first cause of action for breach of mandatory duty under the Government Code, concluding the claim was maintained without objective reasonable cause. Nonetheless, the court denied the Code of Civil Procedure section 1038 motion as to the second and third causes of action. Specifically, the court stated: "According to CCP section 1038, any civil proceeding under the California Tort Claims Act that is dismissed by the court pursuant to any nonsuit of motion for judgment, due to a finding of lack of good faith and without reasonable cause, entitles the defendant to an award of a [sic] reasonable defense costs, such as attorney's fees. This Court finds that the first cause of action was the only proceeding brought under the California Tort Claims Act, because there is no requirement for compliance with the Tort Claims Act when a party is seeking injunctive or declaratory relief. Although CCP section 1038 concerns 'proceedings,' not claims, this Court finds that the first cause of action falls within the bounds of 'proceedings' referred to in section 1038, because it was the only claim or cause of action that Plaintiffs brought under the California Tort Claims Act."

The court then determined the amount of fees under Code of Civil Procedure section 1038 as follows:

> "Since there has been no categorization of hours based upon the three causes of action pursued by Plaintiffs, this Court concludes that it would be excessive and unreasonable to award Defendant the entire $596,221 in attorney's fee being sought, because this Court has found that the second and third causes of action were not frivolous nor brought under the Tort Claims Act. Therefore, this Court concludes that a percentage of

> the total fees being sought is appropriate here. Based upon this Court's review of the pleadings, records and files in this action, as well as the Court's personal observation of the attorney's advocacy, and participation in these proceedings, the Court concludes that 15% ($89,433) of the total amount of fees being sought is an appropriate award of defense costs under section 1038."

2. Analysis[12]

On the cross-appeal, TUSD complains that the court erred when it arbitrarily reduced award from the amount sought in the motion – $594,221 – by 85 percent to $89,433 based on the erroneous view that because Code of Civil Procedure section 1038 fees were not available for the second and third causes of action for declaratory and injunctive relief, any fees incurred with respect to those causes of action had to be excluded from the award. Before reaching the merits of this issue, we address several matters raised by the Garaus relating to the jurisdictional and procedural propriety of the cross-appeal.

a. Procedural and Jurisdictional Issues

The Garaus argue that TUSD's cross-appeal should be rejected because: (1) the notice of the cross-appeal was inadequate, not timely filed from an appealable order and not supported by a sufficient record; (2) TUSD lacks standing because the district's governing board did not approve its filing; and (3) TUSD was not aggrieved by the order. None of these complaints has merit.

Appealability, Notice, Timeliness and Appellate Record. The post-judgment order granting fees and sanctions became final on March 30, 2011. The Garaus filed an appeal from that order on April 15, 2011, and the superior court clerk served notice of the appeal on April 18, 2011. TUSD filed its notice of cross-appeal on May 4, 2011. TUSD timely appealed from an appealable order.

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[12] The Garaus filed a motion to dismiss the cross-appeal in this court. The arguments raised in the motion are to a large extent duplicative of those raised in the Garaus' cross-respondents briefs and are therefore addressed in connection with the appeal.

An order awarding attorney's fees, if made after judgment, is separately appealable. (*Soldate v. Fidelity National Financial, Inc.* (1998) 62 Cal.App.4th 1069, 1073; see Code Civ. Proc., § 904.1, subd. (a)(2).) "[W]here several judgments and/or orders occurring close in time are separately appealable (e.g., judgment and order awarding attorney fees), each appealable judgment and order must be expressly specified – in either a single notice of appeal or multiple notices of appeal – in order to be reviewable on appeal." (*DeZerega v. Meggs* (2000) 83Cal.App.4th 28, 43.)

Under the California Rules of Court, rule 8.108(g)(1), a notice of cross-appeal is timely if filed within 20 days of notice of appeal from the underlying judgment or appealable order. (Cal. Rules of Court, rule 8.108(g)(1) [must file notice of cross-appeal within 20 days of clerk's service of notice of appeal from same judgment].) The rules states: "If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk serves notification of the first appeal." (Cal. Rules of Court, rule 8.108(g)(1).) Here, the order granting the motion for attorney's fees and sanctions was separately appealable from the underlying judgment and because TUSD's notice of cross-appeal was filed within 20 days of the clerk's service of the Garaus' notice of appeal from the fees and sanctions order, TUSD's appeal is timely and procedurally proper.

Finally, we also conclude that the notice of the cross-appeal is sufficient. The notice is sufficient in that it apprises both the court and the Garaus that TUSD seeks to appeal from the trial court's fee and sanctions order. Likewise the record on appeal is not insufficient. Although TUSD did not submit a separate appendix or designate the record on appeal, all of the documents and court records relevant to the determination of the matters at issue in the cross-appeal, including TUSD's notice of the cross-appeal, are included in the multi-volume appellant's appendix, and reporter's transcript for the prior appeal in *Garau I,* and the underlying appeal from the fees order, and the other appeals currently before this court in case No. B231114 and case No. B238798. Given that this court is considering all of these matters together, the record before us is adequate to permit our review.

Standing. As discussed elsewhere in this opinion, TUSD presented evidence that its legal counsel had been retained through a contract with the district pursuant to the guidelines adopted by the TUSD school board. Contrary to the Garaus' argument, the Education Code or the Public Contracts law does not require TUSD's governing board to approve every action, motion or litigation decision or strategy of counsel engaged in litigation on behalf of the district. (See Pub. Contract Code, § 20111, subd. (c); Gov. Code, § 53060.)

Finally, TUSD was entitled to appeal the order notwithstanding that the fee motion was granted. Although the fee order awarded TUSD $89,433 in fees against Mr. and Ms. Garau, the amount of the award was significantly less than the total fees sought in the motion. That TUSD only received 15 percent of the fees it had sought demonstrates that it was sufficiently aggrieved for the purposes of standing.

In sum, none of the Garaus' jurisdictional or procedural complaints about the cross-appeal has merit. [13]

b. Merits of TUSD's Cross-appeal

Pursuant to Code of Civil Procedure section 1038, subdivision (a), "If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party."

The trial court denied TUSD's motion for Code of Civil Procedure section 1038 fees for the second cause of action for declaratory relief and the third cause of action for an injunction because Code of Civil Procedure section 1038 fees may only be sought for claims brought under the Government Claims Act and "there is no requirement for compliance with the Tort Claims Act when a party is seeking injunctive or declaratory

[13] In view of our conclusion, we hereby deny the Garaus' motion to dismiss the cross-appeal.

relief." Thereafter because TUSD did not apportion its attorney fees among the three causes of action, and because Code of Civil Procedure section 1038 fees were available for only the first cause of action, the court determined that it would be appropriate to award TUSD only 15 percent of the total fees it sought in the motion

On appeal TUSD argues that the court erred in limiting its recovery of defense fees to the first cause of action without considering whether all of the claims shared common issues or were so intertwined that an award of attorney fees in defending all of the claims would be appropriate. We agree.

In general, when a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation of a legal or factual issue common to both a cause of action for which fees are permitted and one for which they are not. All expenses incurred on the common issues qualify for an award. (*Akins v. Enterprise Rent-A-Car Company San Francisco* (2000) 79 Cal.App.4th 1127, 1133; see *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130 [contractual right to fee case].) When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required. (See *Liton Gen. Engineering Contractor, Inc. v. United Pacific Insurance* (1993) 16 Cal.App.4th 577, 588 [no allocation of two parties' liability required].)

Here, Code of Civil Procedure section 1038 fees were warranted for the first cause of action. Having made that determination the trial court should have turned its consideration to the issue of whether the fees sought were incurred for representation of legal or factual issues common to both the first cause of action for which fees were permitted and the other causes of action for which they were not otherwise allowed. Nothing in the record before us suggests that the court ever considered this matter; the court never determined whether there were common issues among the three causes of

action. Accordingly, the Code of Civil Procedure section 1038 fees must be reversed and remanded for the trial court to conduct further proceedings to consider whether there are common issues among the three causes of action which qualify for an award of attorney fees.

III. Appeal from the December 11, 2011 Minute Order (Case No. B238798)

In the Garaus' final appeal considered here in case No. 238798, they assert a number of arguments. First, they claim that the trial court's December 11, 2011 post-judgment minute order directing the superior court clerk to enter the amount of costs and fees awarded to TUSD into the final judgment, is void and unlawful because judgment had already been entered in the case. Second, they have asked for leave to amend on appeal to assert an inverse condemnation claim against the TUSD arguing that the TUSD's actions amount to an unconstitutional "taking" of their private property. Third, they argue that TUSD's fundraising and solicitation violates equal protection and that the court erred in denying their equal protection claims. Finally, the Garaus contend that they brought the lawsuit for a proper purpose and that the award of fees and sanctions was unconscionable and unenforceable.[14] We address these contentions in turn.

A. Challenge to the December 11, 2011 Minute Order

The December 23, 2010 judgment contains several blanks for the amount of fees and sanctions. When the court entered judgment it reserved jurisdiction to conduct further proceedings regarding fees, sanctions and costs and thereafter "to direct the clerk to enter the amounts awarded, thereunder, if any, below." After the post-judgment proceedings for sanctions, costs and fees were completed, on December 1, 2011, the trial court issued a minute order directing the clerk to "interlineate the judgment signed and filed on December 23, 2010" to add costs (pursuant to the memorandum of costs) in the amount of $7,665.44 and the sanctions awarded under Code of Civil Procedure section

[14] In section II of this opinion we concluded that the sanctions order must be reversed, the Code of Civil Procedure section 1038 fees order is reversed and remanded for further proceedings, and therefore we do not reach the merits of these arguments.

128.7 ($25,000) and defense fees awarded under Code of Civil Procedure section 1038 ($89,433).

Before this court, the Garaus argue that the court's order amounted to an improper judicial modification of the judgment after the trial court lost jurisdiction in the case. We disagree.

The court expressly reserved jurisdiction to conduct post-judgment proceedings to determine the amount of fees, costs and sanctions, and thereafter had those amounts inserted into the judgment. There is nothing improper about the method or means the trial court used to conduct the post-judgment proceedings or to enter the awards for fees, sanctions and costs; it is standard procedure in the trial courts. When a judgment includes an award of costs and fees, often the amount of the award is left blank for future determination. (See, e.g., *UAP-Columbus JV 326132 v. Nesbitt* (1991) 234 Cal.App.3d 1028, 1039.) After the parties file their memoranda of costs and any motions to tax, a post-judgment hearing is held and the trial court makes its determination of the merits of the competing contentions. When the order setting the final amount is filed, the clerk enters the amounts on the judgment nunc pro tunc. (*Ibid*.) The act of inserting costs, fees and sanctions into the judgment is a "ministerial act" that is done after a determination has been made as to whether it is appropriate to award such fees, costs or sanctions.

Accordingly, we conclude that the court's December 1, 2011 minute order is neither void nor unlawful as a matter of law Nonetheless, the post-judgment order cannot stand because elsewhere here we have determined that the post-judgment fees and sanctions order must be reversed.[15]

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[15] We also observe that the Garaus challenge the "abstracts" relating to the award of fees. However we do not reach the merits of this contention in view of the conclusion that the sanctions order must be reversed and the Code of Civil Procedure section 1038 fees order must reversed and remanded for further proceedings.

B. Other Arguments Raised in this Appeal

1. "Takings" and Equal Protection

The inverse condemnation argument and the equal protection assertions are not appropriately raised in connection with this appeal. Both are properly addressed and resolved in connection with the appeal from the underlying judgment (case No. B231114) and are addressed in section II of this opinion.

2. Application of AB 1575 to this Case

The Garaus argue that new law – Education Code sections 49010-49013, Assembly Bill No. 1575 (AB 1575) – allows them to proceed on their Government Code claims. AB 1575 does not assist them.

In September 2012 the California Legislature passed and the governor signed into law AB 1575, enacting Education Code sections 49010-49013. These provisions became effective on January 1, 2013. Education Code section 49011, subdivision (e) specifically states that the new sections are "declarative of existing law and shall not be interpreted to prohibit the imposition of a fee, deposit, or other charge otherwise allowed by law." As a result, even were AB 1575 to be retroactively applied, it would not revive any of the Garaus' substantive claims about the charges, fees or programs at issue in this case.

AB 1575 did, however, create a new administrative process in Education Code section 49013 for seeking a refund of an "unlawfully" charged fee, and added an exception for claim filing under the Government Claims Act in Government Code section 905 for those refunds sought under Education Code section 49013.

The Garaus argue that this new exception to the Government Claims Act should be retroactively applied here, and such an application would have obviated the requirement that the Garaus file a government claim on its damage claim. Under this theory, according to the Garaus, absent this claim filing requirement, TUSD could not assert any Government Code claim defense. As a result, they maintain, the trial court could not have granted TUSD's motion in limine to limit the Garaus' claim for damages to only six months prior to the filing of the government claim, and thus they are entitled to a reversal of the judgment.

The Garaus' argument fails because they have not demonstrated that the Legislature intended Education Code section 49013 and Government Code section 905, subdivision (o) to apply retroactively.

"Generally, statutes operate prospectively only." (*Myers v. Philip Morris Company, Inc.* (2002) 28 Cal.4th 828, 840.) "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. . . . For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265, fns. omitted; see also *Myers, supra,* 28 Cal.4th at pp. 840–841.) "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." (*Landgraf, supra*, 511 U.S. at p. 270.)

In general legislation is not given retroactive application unless such an intent is expressed by the Legislature. (*Western Security Bank v. Superior Court* (1978) 15 Cal.4th 232, 243.) The Legislature is familiar with this rule and "when it intends a statute to operate retroactively, it uses clear language to accomplish that purpose." (*Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828.) "[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Myers, supra,* 28 Cal.4th at p. 844.)

Nothing in the language of AB 1575 or the available legislative history suggests an intent to apply Education Code section 49013 or Government Code section 905, subdivision (o) retroactively. The Garaus have no authority or convincing argument to support their argument that Evidence Code section 49013 and Government Code section 905, subdivision (o) should be applied retroactively in this case.

DISPOSITION

The judgment (case No. B231114) is affirmed. The post-judgment fees and sanctions order (case No. B232442) and the post-judgment order (case No. B238798) are reversed and remanded for further proceedings in accord with the views expressed in this opinion. Each party is to pay its own costs in connection with these appeals.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.