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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

HECTOR AREVALO, Plaintiff and Appellant, v. CITY OF LONG BEACH, Defendant and Respondent.	B250345 (Los Angeles County Super. Ct. No. BC461248)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark Mooney, Judge. Affirmed.

The Novak Law Firm, Sean M. Novak and Michael S. Reeder for Plaintiff and Appellant.

Charles Parkin, City Attorney, and Haleh R. Jenkins, Deputy City Attorney; Alderman & Hilgers and Allison R. Hilgers for Defendant and Respondent.

Hector Arevalo appeals from the judgment entered in favor of respondent the City of Long Beach on appellant's complaint asserting causes of action for, among other allegations, unlawful employment discrimination and retaliation. Appellant alleged that respondent denied him the opportunity to interview for a management position because of his age. On appeal, appellant raises four arguments: (1) the jury instructions were improper; (2) the verdict on his discrimination claim was not supported by the evidence; (3) that in light of the jury's findings he was entitled to a verdict on his claim that the respondent failed to prevent discrimination; and (4) that the court erred in denying his motion for attorney's fees.[1] For the reasons set forth below, appellant's claims lack merit. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Hector Arevalo was born on January 25, 1959. He has been employed by respondent, City of Long Beach (the City) since 1978. Over the years, he received various promotions and currently maintains the title of Maintenance Superintendent II within the Harbor Department for the City.

In 2007, appellant interviewed for the position of Maintenance Facilities Manager for the Port (Facilities Manager), but was not selected for the job. In 2008, the position became open again. Appellant interviewed but James Deal received the Facilities Manager position. When Deal retired, the position was opened for a third time. Eighty individuals, including appellant, applied and requested an interview. The City only had five interview slots available for the Facilities Manager position. The City did not select appellant for an interview. Appellant was 51 years old at that time.

On April 1, 2010, the City's Director of Maintenance for the Harbor Department, Randy Rich, and the City's Assistant Director of Human Resources, Stacy Lewis, met with appellant to discuss appellant's application for the Facilities Manager position. Appellant claimed that during the meeting, Rich informed him that (1) he would not be

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[1] Appellant also asserted a cause of action for retaliation, which the jury rejected. On appeal appellant does not challenge the judgment with respect to that claim.

allowed to interview for the position because of his age, and (2) Rich wanted the successful candidate to be someone who could continue working for the City for the next 20 years.

The City, however, presented evidence that Rich and Lewis met with appellant to discuss his management style and administrative skills. According to the City, appellant was not given an interview for the position because he lacked the management and administrative skill they were seeking. According to the City, Rich informed appellant that he believed management and administrative skills were more important than technical skills for the Facilities Manager position. Lewis testified that although appellant's technical abilities were sufficient for the position, his management style was "extremely rigid" and "condescending," creating "a difficult environment for his subordinates." Aware of appellant's desire to obtain a position in management, Lewis stated that she intended for the meeting to "engage [appellant] in a dialogue to talk to him about preparing him for the next level of management." Lewis said that appellant was unresponsive to her offer of giving him the resources necessary to improve his management style. Both Rich and Lewis denied that appellant's age had anything to do with appellant not being interviewed for the position.

Ultimately, respondent hired Zorah Echchouaya as the new Facilities Manager. Echchouaya is over 20 years younger than appellant. The City claimed it hired Echchouaya because she interviewed well and her resume included a Master's degree in Construction Management.

Though appellant was not given the promotion, appellant occasionally filled in as the "acting" Facilities Manager when Echchouaya was absent. According to the City, as Maintenance Superintendent II, appellant was in the next highest ranking position and therefore, it was logical to ask him to fill in as manager when she was away.

On April 13, 2010, appellant submitted a discrimination complaint about his failure to receive the Facilities Manager position to Sherriel Murry, a Personal Analyst at the City's Equal Employment Office. Murry investigated the complaint and determined

that the decision not to interview appellant was based on legitimate business considerations.

Appellant contends that after he complained about the discrimination, the City retaliated against him by giving him negative employment evaluations and no longer allowed him to serve as "acting" manager when the manager was absent.

In May 2011, appellant filed a lawsuit against the City. Appellant alleged causes of action for age discrimination, retaliation and the failure to prevent discrimination/retaliation in violation of the Fair Employment and Housing Act, and Government Code section 12940, et seq.

At trial, the parties discussed the Supreme Court's decision in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, as it pertained to the content of the jury instructions, and in particular the *Harris* decision's impact on the law relating to the "motive" of the employer in making employment decisions. Appellant objected to the trial court's decision to read portions of the *Harris* decision directly to the jury.

The jury returned a special verdict, finding that (1) the City "use[d]" appellant's age as a reason for its refusal to promote appellant; (2) but age was not a "substantial motivating reason" for its refusal to promote appellant; (3) the City did not engage in conduct that materially and adversely affect the terms and conditions of appellant's employment; and (4) did not fail to take reasonable steps to prevent harassment/discrimination/retaliation from occurring. Appellant filed a motion for judgment notwithstanding the verdict, a motion for new trial and a motion for attorneys' fees and costs. All three motions were heard and denied. This appeal followed.

DISCUSSION

Before this court, appellant contends the trial court erred by: (1) informing the jury that appellant was required to prove his age was a substantial motivating reason for the City not to promote him, (2) providing an inaccurate instruction on substantial factor, and (3) reading from the *Harris* decision. In the alternative, appellant argues that the jury's verdict on the discrimination and the failure to prevent discrimination claims must be set aside. He further asserts that the court erred in denying his motion for attorney fees.

I. The Jury Instructions

Appellant argues that he should not have been required to prove that his age was a "substantial motivating reason" for the City not to promote him, and that the court erred when it instructed the jury regarding his discrimination claim.

The court instructed the jury on appellant's discrimination claim as follows:

> "[Appellant] claims that the City of Long Beach wrongfully discriminated against him because of his age. To establish this claim [appellant] must prove all of the following:
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> "1. That the City of Long Beach was an employer;
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> "2. That [appellant] was an employee of the City of Long Beach;
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> "3. The City of Long Beach failed to promote [appellant];
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> "4. That [appellant's] age was 40 or older at the time of the adverse employment action;
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> "5. That [appellant's] age was a substantial motivating reason for the City of Long Beach's decision not to promote [appellant];
>
> "6. That [appellant] was harmed; and
>
> "7. That the City of Long Beach's conduct was a substantial factor in causing [appellant's] harm.
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> "A 'motivating reason' is a reason that . . . contributed to the decision to take certain action, even though other reasons also may have contributed to the decision.
>
> "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only factor – the only cause of the harm.

"Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

The jury returned verdicts finding that although appellant's age was a "reason" for its refusal to promote appellant, his age was not a "substantial motivating reason" for its refusal to promote appellant. The jury further found the City did not engage in conduct that materially and adversely affected the terms and conditions of appellant's employment and did not fail to take reasonable steps to prevent harassment/discrimination/retaliation from occurring.

A. Standard of review

Appellant contends that the trial court erred in instructing the jury by failing to correctly define "substantial factor." "A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) However, "'Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.]' [Citation.] Finally, '[e]rror cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given. [Citations.]' [Citations.]" (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 359-360.)

We review the propriety of the jury instructions *de novo.* (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 475.) The record is reviewed in a light most favorable to the requesting party to determine whether the instruction was warranted by substantial evidence. (*Id.* at pp. 475-476.) However, even if there was instructional error, "there is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission

or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule v. General Motors Corp., supra,* 8 Cal.4th at p. 580.) Even if the trial court erred, "[a] judgment may not be reversed on appeal . . . unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.'" (*Ibid.* [citing Cal. Const., art. VI, § 13].) "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.'" (*Ibid*.) "That assessment, in turn, requires evaluation of several factors, including the evidence, counsel's arguments, the effect of other instructions, and any indication by the jury itself that it was misled. (*Ibid*. [citing *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069-1070].)

B. Governing Law

Government Code section 12940, subdivision (a) prohibits employers from taking adverse employment actions against an employee on the basis of, among other characteristics, age. (Gov. Code, § 12940, subd. (a).) As explained in *Guz v. Bechtel National Inc*. (2000) 24 Cal.4th 317, under *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, a plaintiff has the initial burden to make a *prima facie* case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A *prima facie* case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff. (See *Guz v. Bechtel National Inc*., *supra*, 24 Cal.4th at pp. 354-356.)

While appellant's case was pending in the trial court, the California Supreme Court held a FEHA plaintiff seeking damages for discrimination is required to show that an illegitimate criterion was a "substantial motivating factor" for the employment decision. (*Harris v. City of Santa Monica, supra,* 56 Cal.4th at p. 232.) *Harris* concluded that former CACI No. 2500 incorrectly allowed the jury "to determine whether discrimination was a motivating factor/reason for Harris's termination." Instead, the jury was required to determine whether the discrimination was a substantial motivating factor. (*Ibid.*) "Requiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, for reasons explained above, proof that discrimination was a substantial factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Ibid.*)

Although the *Harris* Court did not opine "on what evidence might be sufficient to show that discrimination was a substantial factor motivating a particular employment decision," the Court held that the jury in *Harris* should not have been instructed with the "a motivating factor/reason" language of CACI No. 2500, and in the event of a retrial, "the jury should instead determine whether discrimination was 'a substantial motivating factor/reason'" for the discharge decision.[2] (*Ibid*.)

After *Harris* was decided, this court in *Alamo v. Practice Management Information Corp.*, *supra*, 219 Cal.App.4th 466, determined that the trial court prejudicially erred in instructing the jury with former versions of CACI Nos. 2430, 2500,

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[2] Following the *Harris* decision, CACI Nos. 2430, 2500, 2505, and 2507 were each revised by the Judicial Council of California in June 2013 to replace the phrase "a motivating reason" with the phrase "a substantial motivating reason." CACI No. 2507 was further revised to state that "[a]'substantial motivating reason' is a reason that actually contributed to the [adverse employment action]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [adverse employment action]."

2505, and 2507 under *Harris*. *Alamo* concluded that the proper standard for a FEHA discrimination claim is not a motivating reason as used in the former CACI instructions but is a substantial motivating reason as articulated in *Harris.* (*Id.* at pp. 469-470.)

C. Analysis

In view of *Harris,* we conclude that the trial court here did not err when it instructed the jury that appellant was required to prove that his age was a substantial motivating reason in respondent's decision to deny him the promotion.

Turning to the instructions and specifically whether those instructions accurately conveyed the required proof under *Harris,* the trial court defined "motivating reason" as "a reason that contributed to the decision to take certain action, even though other reasons may have contributed to the decision." Then, using CACI No. 430 the court explained "[a] substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only . . . cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." The trial court did not, however, specifically define "*substantial* motivating reason" for the jury.

Appellant argues that the instructions given by the court were erroneous, and asserts that the trial court should have instructed the jury that a "substantial factor" is a cause that is more than "negligible or theoretical" as opposed to more than "remote and trivial." (*Bockrath v. Aldrick Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79.) We do not agree with appellant's argument. As noted elsewhere here, the "remote and trivial" language is a correct statement of law. In the current version of CACI No. 2507 defining "substantial motivating reason," the instruction reads: "[a] 'substantial motivating reason' is a reason that actually contributed to the [*specify adverse employment action*]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [*adverse employment action*]." (CACI No. 2507, "'Substantial Motivating Reason' Explained," revised June 2013.)

In our view, however, the trial court's instructions did not completely convey the law as articulated in *Harris* because the instructions given did not contain a definition of

"substantial" in the context of motivating reason. We are not convinced that defining "substantial" in the context of causation, as was done in this case, is an adequate substitute for defining that term in connection with motivating reason.

Nonetheless, appellant fails to demonstrate how the instructions given resulted in prejudice. Indeed, the motivating reason instruction given was more favorable to appellant that the current version of CACI No. 2507. As given, the instruction informed the jury that appellant had only to prove that his age was a "motivating" reason, rather than the higher standard of "substantial" motivating reason. The fact that the jury rejected appellant's theory of liability based on the lesser standard of proof demonstrates that even if properly instructed, it is not reasonably probable that the jury would have reached a verdict favorable to appellant on this claim.

Finally, on appeal appellant also complains that the trial court read directly from the *Harris* decision and in so doing appellant cites to the reporter's transcript where he argued in the trial court that "the combination of the existing CACI's modified to reflect what *Harris* holds should be sufficient or is sufficient for a jury to understand what's being asked of them on those issues . . . that's plaintiff's position." On appeal, appellant has failed to identify the language from *Harris* that the court read to the jury. The respondent posits, however, that appellant is referring to instruction in which the court stated "If the employer proves by a preponderance of the evidence that legitimate nondiscriminatory reasons would have led [it] to make the same decision at that time, then plaintiff cannot be awarded damages or backpay." We do not find that this is an error because this is a correct statement of the law. (See *Harris v. City of Santa Monica*, *supra*, 56 Cal.4th at p. 241; see also, CACI No. 2515 "Limitation on Remedies – Same Decision," new December 2013.)

II. The Discrimination Claim

Appellant argues that because the jury found that age was a "motivating reason" for respondent's refusal to promote him, the jury should have also found that age was a "substantial motivating reason." However, there is sufficient evidence in the record to

sustain the jury's finding that although age was a motivating reason, it was not a substantial motivating reason for respondent's refusal to promote appellant.

We review appellant's claims to determine whether there is substantial evidence to support the verdict. (*McCoy v. Pacific Maritime Assn*. (2013) 216 Cal.App.4th 283, 299.) "In reviewing the evidence, we must resolve all conflicts in favor of the verdict, and indulge in all reasonable and legitimate inferences in order to uphold the verdict. . . . '. . . when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.'" (*Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal.App.4th 189, 207 [quoting *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429].)

Appellant contended that he had more technical skills and experience than the individual who received the Facilities Manager position. Therefore, appellant believed he was not offered the promotion because of his age. However, when Rich and Lewis met with appellant to discuss his 2010 application, they explained to appellant that management and administrative skills were more important than technical skills.

Lewis testified that appellant's management style was "extremely rigid" and "condescending." She said that this created "a difficult environment for his subordinates to work under." She testified that appellant was not given an interview because he was not prepared for the position from a management and administrative perspective. Both Rich and Lewis testified that age had nothing to do with appellant not being interviewed for the position.

Though Jim Deal was not involved in selecting which of the 80 applicants would get an interview, he did serve on the interview committee for finding his replacement. Deal corroborated Rich's claim that the City was looking for someone with "managerial experience, facility maintenance experience, administrative experience, that type of individual." Deal said that age was never "part of the consideration" and never discussed during the selection process.

While Deal acknowledged that appellant had served as a superintendent and oversaw one of the shops, Deal testified that there were concerns about whether appellant would be able to manage all of the shops. Deal said that about "90 percent" of the position is administrative versus technical. Deal describes the position's responsibilities as reviewing the work "that the subordinate supervisors are doing, making sure that everything is accounted for, review time sheets, review work schedules."

When asked what he thought of appellant's management, Deal testified that "[appellant] could be extremely challenging at times. Technically, he was very good in what he did. As far as his managerial skills and interpersonal skills[, they] were lacking severely." Deal did not believe that appellant would have qualified for the position of facilities manager "mainly because of his managerial skills. There was a lot of conflict between subordinates of his and him. Administrative skills that he had, he couldn't get his paperwork done on time. He wouldn't complete tasks paperwork-wise, those sort of things."

Robert Treon, the City's Manager of Fleet and Green Operations for the Port and appellant's direct supervisor since 2011, testified that appellant was "weak" on administrative skills and completing paperwork on time. He stated that appellant was "hardheaded" and "adamant on getting his way." Treon did not believe that appellant had the management or administrative skills to be an effective Facilities Manager.

Appellant contends that these are "all pre-textual excuses [because other] … managers have received frequent complaints concerning their handling of job duties and employees." However, the jury had this argument and the evidence presented by the City and appellant before it, and found in favor of the City. In our view, there is substantial evidence to sustain the jury's finding that age was not a substantial motivating factor in respondent's decision to not promote appellant.

III. *Failure to Prevent Discrimination Claim*

Appellant maintains that he was entitled to a verdict on the failure to prevent discrimination claim as a matter of law because (1) the jury found that he had complained

about discrimination; and (2) the jury found that his age was a motivating reason he did not receive the promotion. We do not agree.

Appellant is correct that the jury found that he complained about the fact he was passed over for promotion to Facilities Manager and also found that age was a motivating reason for that decision. However, because the jury also found that age was not a substantial motivating reason appellant was denied the promotion, the jury entered a verdict on the discrimination cause of action in favor of respondent. As we discussed elsewhere here, the jury's rejection of appellant's discrimination claim was supported by sufficient evidence. The jury's implicit conclusion that appellant was not subject to unlawful discrimination is fatal to his claim that the respondent failed to prevent discrimination—a claim which presupposes that the conduct at issue is discriminatory. (See Gov. Code, § 12940, subd. (k) [an employer must "take all reasonable steps necessary to prevent *discrimination* and harassment from occurring" in the workplace]; italics added; *see, e.g., Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 283–84 [requiring a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section 12940, subdivision (k)].)

IV. Trial Court Properly Denied Appellant Attorney's Fees and Costs

A. Standard of review

Finally, appellant insists that the trial court abused its discretion by refusing to award appellant attorney's fees and costs. Though appellant did not prevail on his claims at trial, appellant contends he is still entitled to fees and costs because of the statutory construction of Government Code section 12965, subdivision (b). "On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, *de novo* review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law." (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175 [citing *Carver v. Chevron USA, Inc.* (2002) 97 Cal.App.4th 132, 142].) We review this matter *de novo* because the determination of

whether appellant is a prevailing party within the meaning of Government Code section 12965, subdivision (b) is a question of law.

B. Appellant was not the prevailing party

Appellant bases his contention on the fact that the jury determined age was a motivating reason in denying appellant the promotion. Therefore, under Government Code section 12965, subdivision (b),[3] appellant believes he should have been granted attorney fees and costs because he suffered employment discrimination. In making this argument, appellant misapprehends the law post-*Harris*. As explained elsewhere here, to prevail on his discrimination claim for damages, appellant was required to prove that not only was his age a motivating reason in the decision in denying him the promotion, but that it was a *substantial* motivating reason in the decision. The jury concluded that it was not a substantial reason, and as we have concluded the jury's finding was supported by sufficient evidence.

Moreover, while appellant cites to general authority that a court must award a prevailing FEHA plaintiff attorney fees and costs, he fails to cite to any authority on why he is considered a prevailing party despite losing all of his claims at trial. Nor is there authority that supports appellant's theory. Appellant did not prevail under Government Code section 12965, subdivision (b) because the jury found that age was not a substantial motivating factor. (See, e.g., *Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 589 [holding that the plaintiffs were not considered prevailing parties because the "plaintiffs did not obtain any judicial ruling in their favor"].) Therefore, appellant is not entitled to attorney fees and costs.

Furthermore, "[a]n award of attorney's fees is *discretionary* [not mandatory] under section 12965, subdivision (b). An award may take into account the scale of the plaintiff's success. . . ." (*Harris*, *supra*, at p. 294; italics added.) Appellant relies on

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[3] "[T]he court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs." (Gov. Code, § 12965.)

Harris for why he should be awarded attorney fees. However, in *Harris*, the California Supreme Court stated, "[i]n sum, we hold that a plaintiff subject to an adverse employment decision in which discrimination was a substantial motivating factor *may* be eligible for reasonable attorney's fees and costs expended for the purpose of redressing, preventing, or deterring that discrimination." (*Ibid.*, italics added.)

In view of the foregoing, we conclude that the trial court did not err in denying appellant's motion for fees.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **SEGAL, J.**[*]

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