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Calif. Ruling Shows That Prevailing Party Wins Can Be Pyrrhic

By **Warren Jackson** (August 13, 2021, 5:40 PM EDT)

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In the 1992 buddy movie, "White Men Can't Jump," Rosie Perez's character, Gloria Clemente, said, "Sometimes when you win, you really lose, and sometimes when you lose, you really win."

It provides a rambling life lesson: Victories can be pyrrhic, and even taking an "L" may not make you a loser.

In an interesting and novel recent opinion that would make Gloria proud, a California state appeals court, in affirming an order denying attorney fees to a self-described prevailing party, reaffirmed in a commercial litigation context that determining who's prevailed and is entitled to fees is not always clear.

The case, Harris v. Rojas, was decided on July 20 in the Court of Appeal of the State of California, Second Appellate District.

Justice John Shepard Wiley Jr., who authored the opinion, also gave a special, well-deserved shout-out to the alternative dispute resolution profession.

It's not unusual, particularly in individual discrimination, harassment, and wage and hour cases, for the potential attorney fees award to be substantially greater than the economic damages, e.g., in cases with a plaintiff who is a low-wage earner or who has successfully mitigated damages.

As a result, the settlement value is not simply economic damages, but attorney fees as well.

The policy goals behind statutory awards of attorney fees or fee-shifting provisions are clear.

A virtual guarantee of attorney fees to the prevailing plaintiff, even if the damages are nominal, is a powerful incentive for the plaintiffs bar to represent employees who have fewer means and less power, but were allegedly treated unfairly.

To put a finer point on it, that incentive is also not diminished by what's generally the case — no downside of having to pay a prevailing employer's fees.

More on this dynamic and its impact on mediating cases later, but first, the opinion.

George Harris leased commercial space from Abel Rojas, and the lease had a clause for attorney fees to the prevailing party in the event of litigation.

Harris sued Rojas for breach of contract, among other claims, and Rojas cross-complained for ejectment, breach of contract and nuisance. There was also a separate unlawful detainer case by Rojas against Harris.

After nearly three years of litigation and a seven-day jury trial, the jury awarded $6,450 to Harris on his breach of contract claim (rather than his requested $200,000). Rojas also was awarded $6,450 against Harris on his negligence claim, and Harris was awarded $500 on his negligence claim against Rojas.

The harm was apportioned at 15% for Harris and 85% for Rojas, so when all the math was done, a net judgment was entered in Harris' favor for $5,907.50 or $5,882.50 — a discrepancy between the actual math result and the judgment, which only the court noticed.

Thereafter, Harris moved for an award of attorney fees under the lease, seeking $296,744.68.

The trial court — California Superior Court in Los Angeles County — denied Harris' motion, ruling there was no prevailing party, citing the California Supreme Court's 1995 decision in Hsu v. Abbara — if a party obtains a "simple, unqualified victory" in an action with an attorney fee clause, the court is obliged to make an award, but where there is "good news and bad news" for each party in the outcome, there's discretion.

Harris appealed this order.

Justice Wiley, also relying upon Hsu v. Abbara, seized on the obvious: "When the demand is $200,000 and the verdict is $6,450 or less ... the 'victory' is pyrrhic and nobody won."

He went on to clarify, "Reaping merely five or six thousand dollars after spending three years pursuing $200,000 drastically falls short of the goal." Thus, the trial court properly exercised its discretion.

Justice Wiley had an alternative and novel theory for affirming the denial of attorney fees. Looking to the result in Rojas' unlawful detainer action, where he was awarded some $13,000 or $17,000, "depending on the moment at which one calculates the rent and interest," Justice Wiley aggregated the two results, opining, "This war had two battles. Harris decisively lost the war."

As Gloria Clemente remarked, "Sometimes when you tie, you actually win or lose."

Writing what could be characterized as a nod to mediators everywhere, Justice Wiley dogmatically declared:

> Determining a party's true litigation objective is no mean feat. When the case is strictly about money, the litigation objective is a dollar figure. The true value of a case is a matter of opinion, and parties normally conceal their true opinion on this vital topic. That is why we call that look a poker face. What economists call a reservation price usually is a carefully guarded secret; if the other side perceives this closeted sum, it will offer that amount in settlement negotiations and nothing more. So each side typically bluffs while searching the other side for clues. Successful mediators use sustained efforts in a confidential setting to extract this private information from both sides. By

> discovering previously hidden common ground, a mediator can settle the case. But this exploration is often difficult, which is why successful mediators can command premium rates.

As mentioned above, courts have waded into the waters of who's a prevailing party in employment cases over the years.

In the seminal Chavez v. City of Los Angeles decision in 2010, the California Supreme Court upheld a trial court's rejection of a fee application under California Fair Employment and Housing Act, where the plaintiff recovered damages of $11,500 — less than the $25,000 that could have been recovered in a limited civil case — and sought an attorney fee award of $870,935.50.

Noting that under FEHA, the prevailing employee should ordinarily be awarded fees unless special circumstances would render such an award unjust, the court held that where a plaintiff brings an unlimited civil case but fails to recover $25,000, the trial court has discretion under Code of Civil Procedure Section 1033 (a) to deny an attorney fees application.

While Chavez is often cited where a verdict is substantially dwarfed by the attorney fee application, in my opinion it has not shifted the landscape dramatically.[1]

Fee applications can be denied in their entirety.[2] However, more often the result is a reduction in the fee request.[3]

Turning back to the challenge of mediating cases where attorney fee awards are available to a plaintiff, we mediators routinely hear from defense counsel that some plaintiffs lawyers have been incentivized to increase the settlement value of cases by aggressively working them up.

Of course, what may seem like overworking a case to counsel can simply be opposing counsel's diligence and due care.

Justice Wiley seems to suggest successful mediators have a secret sauce for settling cases. While past success can portend future success, unfortunately, there's no guaranteed formula.

One key to success is a tactic that parties often employ — early mediation.

By mediating a case early before significant attorney fees have been incurred, the fee-shifting issue is less problematic.

Of course, early mediations have their drawback in terms of equality of pertinent information or discovery and analysis, so parties should evaluate the relative merits of proceeding early versus later-stage scheduling.

In addition, defense counsel often employ the strategy of threatening or filing a California Code of Civil Procedure Section 998 offer to potentially place the attorney fee award at risk if the recovery at trial is less than the offer and the offer was properly drafted.

My experience, however, is that employers prefer a settlement to a 998 offer, and plaintiffs prefer a reasonable settlement over protracted or scorched-earth litigation.

Finally, the only secret sauce in getting difficult cases resolved might be the four Ps: patience,

perseverance, persuasion and proposals from mediators.

But all parties should recognize that the logic and holding of Harris v. Rojas have implications in the employment law context. And the case should be a reminder that verdict size and prevailing party determinations are necessarily intertwined, and that Gloria Clemente was more lucid that we thought.

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[1] Muniz v. UPS, Inc., (panel 2-1 approved $697,971.80 in fees where plaintiff recovered only $27,280).

[2] Guillory v. Hill, as modified (June 26, 2019), review filed (Aug. 5, 2019) (fees denied because the request was unreasonable in comparison to the actual damages award-$2.4 million vs. $5,335.00 for each of nine plaintiffs).

[3] Sommerfield v. City of Chicago ; McKelvey v. Sec'y of U.S. Army.