

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(El Dorado)

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BRENDA PICKERN,

Plaintiff and Appellant,

v.

BEST WESTERN TIMBER COVE LODGE MARINA  
RESORT et al.,

Defendants and Respondents.

C047356

(Super. Ct. No.  
SC20020104)

FILED

MAY 25 2005

COURT OF APPEAL - THIRD DISTRICT  
DEENA C. FAWCETT

BY \_\_\_\_\_ Deputy

In July 2000, Brenda Pickern sued Best Western Timber Cove Lodge Marina Resort and others (collectively the Lodge Owners) in federal court seeking injunctive relief to remove access barriers that affected disabled persons. She also sought monetary damages and attorney fees. She alleged a federal law claim for relief under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.), state law claims for relief under the Unruh Civil Rights Act (Unruh Act) (Civ. Code, § 51 et seq.), and state statutes providing for access to public facilities (Civ. Code, § 54 et seq.; Health & Saf. Code, § 19955 et seq.).

When the federal ADA claim was mooted by remedial work (which the Lodge Owners began prior to the filing of the federal lawsuit), the district court dismissed the entire federal case.

Pickern subsequently filed this case and realleged her state law cause of action. Pickern and the Lodge Owners then settled this case. In the settlement, the parties agreed that the trial court would decide whether Pickern was entitled to recover any attorney fees incurred in the federal action. Pickern argues the trial court erred in concluding she was not entitled to recover the attorney fees she incurred in the prior dismissed federal action because that case was closely related and necessary to the resolution of this state case. Subsumed in that argument is the contention that the trial court erred in finding she was not the prevailing party because she was not the catalyst in bringing about the removal of access barriers at the lodge. We shall affirm. We further deny the Lodge Owners' motion for sanctions for a frivolous appeal.

#### FACTUAL AND PROCEDURAL BACKGROUND

Pickern has amyotrophic lateral sclerosis (commonly known as Lou Gehrig's disease), is legally blind, and suffers with epilepsy. She uses a wheelchair.

In 1997, Pickern stayed at the Best Western Timber Cove Lodge Marina Resort (Lodge) with her friends Howard Ripley and Barbara Schwartz. During that stay, Pickern's visit was marred by a number of disability access problems. She brought these problems to the attention of an assistant manager.

Two years later in August 1999, Pickern returned to the Lodge. Pickern contends the disability access problems she had previously encountered still existed. These barriers included: (a) a high threshold at the motel lobby entrance; (b) a registration counter without a lowered area accessible to persons in wheelchairs; (c) a cocktail bar that lacked a similar lowered service area; (d) a fireside lounge area accessible only by stairs; (e) a women's restroom without sufficient turning space and without tilted mirrors; (f) a high threshold at the rear lobby entrance; (g) an inaccessible swimming pool and spa; (h) a guest laundry room that was inaccessible to persons in wheelchairs and washing machines that could not be used by those persons; (i) a soda and ice machine room that was blocked by a step; (j) a lack of strike-side clearance for the entry door for guest room 304;<sup>1</sup> (k) a pocket door to the bathroom in room 304 accessible only to persons who can pinch and grab; (l) an inaccessible toilet paper dispenser; (m) a roll-in shower that was inaccessible because the shower seat and water controls were too far apart; (n) a lavatory without levered hardware; (o) an air conditioning system in the guest room that required the ability to pinch, twist, and grasp; (p) no accessible path of travel from the Lodge to the marina; (q) dining tables in the boathouse restaurant that were blocked by several large

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<sup>1</sup> Strike-side clearance is necessary to allow a person in a wheelchair to open a door without it hitting into his or her chair.

planters; and (r) a public restroom on the pier that was inaccessible due to a step at its entrance.<sup>2</sup>

On July 31, 2000, Pickern filed her initial complaint in the United States District Court for the Eastern District of California. In that lawsuit, she alleged four claims for relief based upon her August 2, 1999 stay: (1) for denial of access by a public accommodation under the ADA; (2) for denial of access under Civil Code sections 54, 54.1, and 54.3; (3) for denial of accessible sanitary facilities under Health and Safety Code section 19955 et seq.; and (4) for denial of access to full and equal accommodations under the Unruh Act. Under the ADA claim for relief, Pickern sought only injunctive relief and attorney fees. In the other claims, Pickern sought injunctive relief, compensatory and punitive damages, and attorney fees and costs.

When he served Pickern's complaint in August 2000, Pickern's attorney advised the Lodge Owners they had no defense to this action. Setting the tone for this lawsuit, Pickern's counsel also admonished the Lodge Owners: "Keep in mind, the more work your attorneys force on us, the more work we must do. The more work we do is just that much more money you may be responsible for paying."

In September 2000, the Lodge Owners' counsel wrote back to Pickern's attorney requesting that Pickern agree to arbitrate

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<sup>2</sup> Pickern had an access consultant prepare a report that raised many of these same issues after her 1997 visit. That report was provided to Pickern's counsel in 1997, but not to anyone at the Lodge until September 2001.

her claims. Further, counsel represented, "Regardless of whether the case is arbitrated and/or litigation [sic], [the Lodge Owners] intend to make legally required access changes pursuant to applicable federal and state access law." The Lodge Owners agreed to proffer a written stipulation to that effect. Counsel invited Pickern's attorney to set up a site visit and discuss Pickern's demands regarding access problems.

In the parties' joint status report filed in the federal action, the Lodge Owners said they had already been sued for violation of federal and state disability access laws in 1997. The parties to that prior lawsuit settled the case in 1997 with an agreement that required the Lodge Owners to make upgrades to their property to remove architectural barriers and bring the Lodge into compliance with the ADA Accessibility Guidelines (28 C.F.R. § 36 et seq. (2005)) (ADAAG). Specifically, the Lodge Owners agreed to add seven accessible rooms, upgrade the lobby, upgrade the parking lot, and upgrade all areas where the public and disabled persons would travel. Those improvements were commenced prior to the filing of Pickern's federal lawsuit.

While Pickern requested a copy of that prior settlement agreement by letter in October 2000, November 2000, and January 2001, the Lodge Owners did not provide Pickern's counsel with a copy of the agreement until March 2001. The agreement specifically recited that the Lodge Owners had already upgraded access to room 304 of the premises and that they would upgrade the lobby and public restrooms of the premises by July 1, 1998,

and upgrade access to and from and within six more guest rooms and the ramps and associated parking at the rate of one per year. The specifications for these upgrades were listed on an attached exhibit; however, Pickern asserts the Lodge Owners have never produced a copy of that exhibit.

On November 15, 2000, the Lodge Owners' counsel repeated their pledge to make the legally required disabled access changes to the Lodge. The Lodge Owners provided an update of the progress they had already made in rendering the property accessible. Again, counsel invited Pickern to discuss what relief she wanted through the federal lawsuit.

Pickern's attorney responded to that letter concluding that the Lodge Owners' promise was "somewhat hollow" because the letter provided no definition of what "legally required" meant. Pickern explained her demands for this lawsuit as follows: "injunctive relief which results in [the Lodge] being made fully compliant with ADAAG, she wants proper compensation for the discrimination she experienced, and she wants her statutorily provided attorneys' fees, litigation expenses and costs." Only after the injunctive relief was accomplished would Pickern specify the amount of her demand for damages and fees.

On November 29, 2000, the Lodge Owners filed a "Unilateral Unconditional Enforceable Stipulation" in the federal action. That stipulation recited that the Lodge Owners "have and will continue to make [the Lodge] disabled-accessible as legally required under applicable Federal and State access laws and codes." Under penalty of perjury, the stipulation recited that

the Lodge Owners had implemented changes over the years and had allocated funds each year to make improvements. It further stated that "[Pickern's] lawsuit has not caused [the Lodge Owners] to make access improvements as such was pre-planned. Pursuant to [the Lodge Owners'] prior Plan and prior Settlement, [the Lodge Owners] will continue to make legally required access improvements. Further litigation by [Pickern] is therefore not necessary." The Lodge Owners alleged they had and will comply with "applicable federal and state access codes, i.e., ADAAG and/or Title 24 of the California Building Code (Title 24), whichever is more restrictive."

Pickern's attorney concluded this stipulation was neither unconditional nor enforceable. As a result, litigation proceeded.

During the federal action, Pickern's attorney contended that equitable relief was the primary relief sought in the action and that "the monetary value attached to [her] damages [was] relatively small." Further, her attorney repeatedly stated that the recovery of attorney fees at the conclusion of the case was one of the goals of the litigation.

During the federal litigation, Pickern noticed a formal demand for inspection of the property. Upon receipt of several photographs and architectural renderings showing improvements contemplated for the property, Pickern postponed the inspection and made overtures to settle the equitable claims in the matter. Those settlement overtures were rebuffed.

In December 2000, the Lodge Owners' counsel again wrote to Pickern's lawyer advising her of the prior access changes made to the property and the plans for future changes. Again, counsel requested that Pickern advise how the case could be resolved. Pickern responded the Lodge could satisfy her demands for equitable relief by stipulating to have the property in full compliance with the ADAAG by January 2002. Pickern further stated that after that issue was resolved, the parties could then turn to the monetary claims and attorney fees.

The Lodge Owners set Pickern's deposition. In response, Pickern noticed and took the depositions of two individuals and a representative of the Lodge's corporate entity. All told, Pickern propounded five sets of requests for production of documents totaling 102 requests, two requests for inspection of the property, two sets of interrogatories totaling 50 questions and one set of request for admissions totaling 49 admissions. She noticed seven depositions.

The Lodge Owners brought a motion for summary judgment contending that the equitable relief subsumed in Pickern's ADA claim was mooted by the work the Lodge Owners had already performed. The federal court denied that motion concluding a triable issue of fact existed as to whether the turning space in two of the Lodge's guest rooms complied with the ADAAG and whether accessibility changes were readily achievable.

The Lodge Owners then removed two bathtubs in the two rooms and replaced them with roll-in showers. After they completed this work, the Lodge Owners brought a second motion for summary

judgment arguing the ADA claim had been mooted by their remedial work.

On April 1, 2002, the federal court agreed and dismissed the ADA claim. The federal court also declined to exercise its supplemental jurisdiction on the remaining state law claims and thus dismissed the entire action.

The federal court denied Pickern's subsequent motion to recover attorney fees on her federal claim because she was not a prevailing party. She lacked prevailing party status because she did not obtain an enforceable judgment, settlement agreement, or consent decree judgment in the federal action. The federal district court concluded that because it had dismissed the state law claims, it lacked jurisdiction to rule on the attorney fee request made in conjunction with those state causes of action.

Pickern filed the instant action following that dismissal. Her complaint consisted of a single cause of action based on the August 2, 1999 visit, and alleged four separate legal theories to recover damages and attorney fees and costs: (1) for denial of full and equal access in violation of Civil Code section 54 et seq.; (2) for denial of accessible sanitary facilities in violation of Health and Safety Code section 19955, et seq.; (3) for denial of access to full and equal accommodations, advantages, facilities, privileges or services under the Unruh Act; and (4) for unfair business practices under Business and Professions Code section 17200. In the complaint, Pickern alleged that this case was a continuation of the prior federal

lawsuit. Pickern sought to recover general and compensatory damages, statutory damages, attorney fees, punitive damages, and prejudgment interest and costs.

Pickern and the Lodge Owners settled this action with an agreement under which the Lodge Owners paid Pickern \$50,000. The agreement further provided that this sum included any and all attorney fees and costs incurred from the commencement of the state lawsuit to the date of settlement. The parties agreed to leave the issue of Pickern's entitlement to attorney fees prior to that date for a decision by the trial court. Specifically, the agreement provides, "PICKERN'S claim for attorneys' fees, costs and litigation expenses, as against [the Lodge Owners] allegedly incurred while litigating her state cause of action for violations of Civil Code sections 51, 51.5, and 54 in the federal action before the U.S. District Court remains in dispute, and her entitlement to said fees, and any amount, if she is entitled to such, will be determined by motion filed by PICKERN" in the state court action.

Pursuant to the settlement agreement, Pickern brought a motion to recover \$87,712 in attorney fees and \$8,308 in costs incurred in the federal action. Pickern based her claim of entitlement to attorney fees on Civil Code section 55<sup>3</sup> and the

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<sup>3</sup> Civil Code section 55 provides, "Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code, Chapter 7 (commencing with Section 4450) of Division 5 of Title 1 of the Government Code, or Part 5.5 (commencing with Section 19955) of Division 13 of the Health and Safety Code may bring an action to enjoin the violation. The

private attorney general doctrine codified in Code of Civil Procedure section 1021.5.<sup>4</sup> Pickern argued her federal action "resulted in very real equitable success." She claims her federal action was responsible for providing: (a) seven fully equipped ADAAG compliant guest rooms; (b) ADAAG accessible parking spaces; (c) access to the Lodge lobby and cafe; (d) an alternate accessible registration table; (e) fully ADAAG compliant public restrooms; (f) accessible tables in the lounge and bar area; (g) a lowered accessible cocktail bar area; (h) access to a fireside lounge; (i) access to the laundry facilities; (j) access to the vending machines; (k) access to the pool and Jacuzzi area and an assistive lifting device for the pool and Jacuzzi; (l) access to a boathouse restaurant; and (m) an ADAAG compliant restroom at the marina. Pickern presented a paper trail of her lawyer's letters demanding settlement of the action as we have discussed above.

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prevailing party in the action shall be entitled to recover reasonable attorney's fees."

<sup>4</sup> Code of Civil Procedure section 1021.5 reads in relevant part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." This provision is commonly known as the private attorney general doctrine. (*Leiserson v. City of San Diego* (1988) 202 Cal.App.3d 725, 733-734.)

In opposition to the motion, the Lodge Owners presented evidence in the form of declarations and invoices demonstrating that they had commenced improvements to the Lodge property prior to Pickern's July 2000 lawsuit. This evidence included invoices for the purchase and installation of roll-in showers, plumbing and shower trim, water closets, lavatories, wash basins, and faucets. The declaration further recited that other invoices had been lost due to routine purging of the Lodge's records after four years. In addition, the Lodge Owners declared they had upgraded the parking lot and two rooms prior to the federal lawsuit. The Lodge Owners also presented their own paper trail of their own settlement overtures and updates on their progress on their preexisting plan to make the Lodge accessible.

The trial court denied Pickern's request for attorney fees. The court examined the key cases on the subject of the recovery of fees in prior related litigation and administrative proceedings and found the federal court proceedings here did not constitute ancillary proceedings for which fees could be awarded. The court found there was no "inextricable intertwining" between the federal lawsuit and the subsequent state lawsuit.

The court further found it could not award Pickern attorney fees under the theory that her action was a "catalyst" motivating the Lodge Owners to provide the primary relief sought or that it activated them to modify their behavior. The trial court found the Lodge Owners had been involved in litigation based on the ADA in the past, were aware of their obligations

under federal and state law prior to the filing of the federal action to make the property accessible, and had developed a plan to bring the Lodge into compliance before this litigation was initiated. The court found the Lodge Owners had "done a fair amount of work to bring the property into compliance before plaintiff's stay and continued to do so during the course of the federal litigation" ultimately mooting the injunctive relief sought in those proceedings. Thus, this litigation was not the catalyst in bringing about any action by the Lodge Owners. The court concluded this litigation was designed only to achieve one thing: an award of attorney fees. Pickern appeals.

#### DISCUSSION

##### I

*The Trial Court Did Not Abuse Its Discretion In  
Concluding Pickern Was Not The Catalyst For The Lodge  
Owners' Actions And Hence Not The Prevailing Party*

Pickern argues she was a prevailing party in the state action based on the theory that her "legal action was a catalyst causing [the Lodge Owners] to modify their behavior." We disagree.

##### A

*Standard Of Review*

"The decision as to whether an award of attorney fees is warranted rests initially with the trial court." (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142.) "Where, as here, a trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of

discretion. "To be entitled to relief on appeal . . . it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice . . . ." [Citation.] However, 'discretion may not be exercised whimsically and, accordingly, reversal is appropriate "where no reasonable basis for the action is shown."

[Citation.]' [Citations.]" (Id. at pp. 142-143.)

"Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power."

(*Silver v. Boatwright Home Inspection, Inc.* (2002) 97

Cal.App.4th 443, 449.)

B

*Pickern Was Not A Prevailing Party*

Only a successful or prevailing party is entitled to an award of attorney fees under Code of Civil Procedure section 1021.5 or Civil Code section 55. It is, however, not always easy to identify that party. "[A]n attorney fee award may be justified [under section 1021.5] even where a plaintiff's legal action does not lead to a favorable final judgment."

(*Westside Community for Independent Living, Inc. v. Obledo*

(1983) 33 Cal.3d 348, 352 (*Westside Community*).) Thus, a Code

of Civil Procedure section 1021.5 award is not necessarily

barred because the case was won on a preliminary issue or settled before trial. (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 685 (*Folsom*).)

Pickern alleges she was a prevailing party under the "catalyst" theory of causation. This theory requires a causal connection between the plaintiff's lawsuit and the relief obtained. (*Wallace v. Consumers Cooperative of Berkeley, Inc.* (1985) 170 Cal.App.3d 836, 844 (*Wallace*).) Under this theory, "an award of attorney fees may be appropriate where 'plaintiffs' lawsuit was a catalyst motivating defendants to provide the primary relief sought . . . .' [Citation.] A plaintiff will be considered a 'successful party' where an important right is vindicated 'by activating defendants to modify their behavior.' [Citation.]" (*Westside Community, supra*, 33 Cal.3d at p. 353.)

If a plaintiff's lawsuit was a catalyst to the extent it "'induced' defendant's response or was a 'material factor' or 'contributed in a significant way' to the result achieved then plaintiff has shown the necessary causal connection." (*Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 967.) Under this analysis, the appropriate inquiry is to examine the situation immediately prior to the commencement of the lawsuit, compare it to the situation after the lawsuit has been resolved and determine what role, if any, the plaintiff's litigation played in bringing about that result. (*Leiserson v. City of San Diego, supra*, 202 Cal.App.3d at p. 735.) Whether there is a causal connection between the lawsuit and the result is a question of fact for the trial

judge. (*Californians for Responsible Toxics Management v. Kizer, supra*, 211 Cal.App.3d at p. 967.)<sup>5</sup>

In *Folsom*, the plaintiffs were taxpaying residents of Butte County who alleged they were transit-dependent. (*Folsom, supra*, 32 Cal.3d at p. 671.) The plaintiffs sought declaratory and injunctive relief against the Butte County Association of Governments (BCAG) and others to stop the allocation and expenditure of public transportation funds on local street and road projects. (*Id.* at pp. 671-672.) The plaintiffs alleged the allocations were illegal and invalid due to the defendants' failure to identify unmet transit needs as required by applicable regulations. (*Id.* at p. 673.) The parties settled; the defendants agreed to establish four new transit systems, and the plaintiffs agreed to dismiss the defendants "'within one week of the date that the last new transit system ha[d] initiated service . . . .'" (*Id.* at p. 675.) The court granted the plaintiffs' request for attorney fees as successful parties under Code of Civil Procedure section 1021.5. (*Folsom, supra*, 32 Cal.3d at p. 675.)

The Supreme Court affirmed. (*Folsom, supra*, 32 Cal.3d at p. 687.) The court stated, "the trial court must 'realistically assess the litigation and determine, from a practical

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<sup>5</sup> Although federal courts have eschewed this theory under federal statutes (*Buckhannon Home v. West VA. Dept.* (2001) 532 U.S. 598, 605 [149 L.Ed.2d 855, 863]), the catalyst theory remains alive and well in California. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 571-572.)

perspective, whether or not the action served to vindicate an important right. . . ." (*Id.* at p. 685.) Borrowing from prior federal cases, the court stated, "the inquiry as to a party's success must be a pragmatic one that may range outside the merits of the underlying dispute. '[Its] initial focus might well be on establishing the precise factual/legal condition that the fee claimant has sought to change or affect . . . . With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.'

(Citations.]" (*Id.* at p. 685.) Applying this analysis, the Supreme Court concluded the plaintiffs achieved precisely what they sought in the underlying litigation. "Their litigation aim was to assure an adequate public transit system in Butte County. Just prior to commencement of the action, BCAG had found that no unmet transit needs existed in the county and had rejected the request of the Chico City Council to allocate Chico's share of [Transportation Development Act of 1971] monies to a transit system there. No public transit system existed in Chico or Oroville or between the major urban areas of the county, and service for the handicapped was both limited and violative of applicable regulations. . . . After the court issued its contingent order . . . Local Defendants agreed to implement a plan including intracity systems for Chico and Oroville, an

intercity system for the county, and a program whereby the elderly and handicapped might utilize systems throughout the county." (*Id.* at p. 686.) The Supreme Court then turned to the question whether the plaintiffs' action "contributed to that result or, as the trial court phrased it, 'whether or not the local politicians would have done what they have done absent the lawsuit.'" (*Ibid.*) The Supreme Court found that the record was "replete with evidence that BCAG dramatically changed its position after the filing of plaintiffs' action." (*Ibid.*)

By way of contrast, in *Westside Community*, the Supreme Court reached a different result. There, the plaintiffs filed a petition for writ of mandate asking the court to order defendant Secretary of Health and Welfare to issue final regulations implementing a statute that prohibited discriminatory practices. (*Westside Community, supra*, 33 Cal.3d at p. 350.) Evidence showed the defendant had approved the draft regulations two weeks before plaintiffs filed their lawsuit, and was following the procedures for approval that were mandated by the Administrative Procedure Act. (*Id.* at pp. 350-351.) The trial court nonetheless ordered the defendant to pay attorney fees. (*Id.* at p. 351.)

The Supreme Court reversed, ruling that the trial court abused its discretion in awarding attorney fees. (*Westside Community, supra*, 33 Cal.3d at p. 355.) Focusing on the causal connection between the plaintiffs' action and the relief obtained, the Supreme Court noted that no award is required "if the court determines that plaintiff's suit was completely

superfluous in achieving the improvements undertaken by defendants on plaintiff's behalf.'" (*Id.* at p. 353.) It found "no evidence in the record to indicate that the issuance of final regulations occurred even a day earlier than it otherwise would have as a result of plaintiffs' lawsuit." (*Ibid.*) The Supreme Court explained that "at the time the lawsuit was filed, defendant had already approved a final draft of the proposed regulations. Statutory requirements mandated a lengthy process of consultation with other state agencies, notice to the public, and public hearings before the proposals could be finalized. Defendant stated in December, in his answer to the petition, that he intended to proceed with the statutorily mandated procedures in an expeditious manner, and he did so." (*Ibid.*)

Here, the trial court's finding that Pickern did not cause the Lodge Owners to engage in any of the remedial work, but rather that work was spurred on by the prior lawsuit and settlement agreement, is supported by ample evidence. Prior to being sued by Pickern, the Lodge Owners had already been sued for access issues by another party and settled that suit by agreeing to make access improvements. The Lodge Owners declared that they agreed to make all areas of the property where the public and disabled would go ADA accessible. Their plan (which predated the Pickern lawsuit) included upgrading access to seven rooms, upgrading access to the lobby and public restrooms, and upgrading access to the ramps and parking lot. Shortly after being served with the instant complaint, the Lodge Owners informed Pickern's counsel that they were already in the process

of making the Lodge ADAAG compliant. Further, the Lodge Owners filed a stipulation in the federal court early in the action, signed under penalty of perjury, stating they were committed to this course of action. The Lodge Owners' plans met most of the specific complaints Pickern raised, and went beyond those complaints to address other access issues that she had not raised. Despite these assurances, Pickern moved forward in this case with discovery, taking depositions, serving interrogatories, document requests, requests for admissions, and a request to inspect the property. In opposition to the attorney fee motion, the Lodge Owners further presented the trial court with receipts showing their work and a declaration from the Lodge Owners that the Lodge was in the process of complying with the ADA prior to the filing of this lawsuit. These facts objectively support the trial court's finding that Pickern was not the catalyst for the Lodge Owners' access improvements.

Pickern retorts she was a catalyst in changing the Lodge Owners' behavior to meet the goals of her lawsuit because the changes that she sought were significantly greater than the plan the Lodge Owners had in place at the time Pickern sued them. She points specifically to the changes to the path between the Lodge and the marina, the laundry and soda machine access, the planters blocking the way to a boathouse restaurant, and the restrooms at the marina. Further, she argues she was the catalyst because all of the ADA alterations were not completed prior to the deadlines contained in the earlier agreement.

The trial court is in the unique position to assess the value of the legal services in the cases presented before it. (*Ciani v. San Diego Trust & Savings Bank* (1994) 25 Cal.App.4th 563, 571.) Our role as the appellate court is not to reweigh the conflicting evidence on what the Lodge Owners agreed to do or when they agreed to do it. Our role is to determine whether substantial evidence supports the trial court's factual findings, and whether its determination not to award attorney fees in light of those facts exceeded the bounds of reason. As we have already seen, substantial evidence supported the court's determination that the Lodge had preexisting motivation to resolve the access problems and had engaged in affirmative conduct to remedy these issues. Thus, Pickern has failed to meet her burden of establishing that the trial court abused its discretion. Because she was not a prevailing party as it relates to the equitable relief she sought, the trial court did not abuse its discretion in denying her motion for attorney fees.

C

*The Trial Court Did Not Abuse Its Discretion In Finding  
The Federal Lawsuit Was Neither Inextricably Intertwined  
Nor Useful To The Resolution Of The State Court Action*

Pickern argues the trial court abused its discretion in refusing to award her attorney fees for the federal action based on the cases that conclude that fees expended in prior ancillary litigation may be recovered where the prior proceedings were "inextricably intertwined," (see *Wallace, supra*, 170 Cal.App.3d

at p. 848) or "closely related to the action in which fees are sought and useful to its resolution" (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 779-780). We reject this argument as well.

We reach this argument in light of the cases which state that a prevailing party is one who succeeds in ""any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."" (See *Wallace, supra*, 170 Cal.App.3d at p. 849.) We assume, for the sake of argument, that Pickern's "success" in obtaining a settlement payment in this case of \$50,000 from the Lodge Owners could qualify under this standard.<sup>6</sup> This purely personal benefit, however, does not render Pickern a prevailing party under the attorney general doctrine embodied in Code of Civil Procedure section 1021.5. (*Leiserson v. City of San Diego, supra*, 202 Cal.App.3d at p. 738.) Thus, we examine this question only as it relates to Pickern's claim for attorney fees under Civil Code

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<sup>6</sup> The trial court's ruling, however, suggests that the monetary benefit obtained in this case was not a significant issue in the case. The court stated, "The Settlement Agreement . . . requires defendants to pay some monetary damages, but no affirmative action to remedy anything under either the state or federal disability laws is required. That was all done before the present lawsuit was even filed. Reviewing the entire court file, the Court is left with the firm feeling that what this lawsuit is about is plaintiff's attorneys fees." Indeed, the attorney fees and costs she incurred in the federal action alone are more than three times the damages she obtained in this settlement.

section 55 and solely upon her recovery of money, not the equitable relief. We turn to the relevant standards.

In *Wallace*, a retail food cooperative decided to challenge the legality of minimum milk prices by selling milk below those minimums. (*Wallace, supra*, 170 Cal.App.3d at pp. 840-841.) The director of the Department of Food and Agriculture (director) sued to enjoin this practice. (*Ibid.*) In this lawsuit, the cooperative filed a cross-complaint challenging the minimum milk prices. (*Id.* at p. 841.) In a separate action, the director sued the cooperative for \$19,000 in civil penalties. (*Ibid.*) The parties agreed to settle the first case with a memorandum of understanding that provided that if the director held administrative hearings and decided to eliminate the minimum milk prices, the cooperative would drop their challenge. (*Id.* at pp. 841-842.) In the alternative, the matter would proceed to trial. (*Ibid.*) The cooperative also settled the civil penalty action by paying \$500 in exchange for a dismissal of that suit. (*Id.* at p. 842.) The director held administrative proceedings and ultimately suspended the minimum retail milk prices. (*Ibid.*) The appellate court affirmed the trial court's decision to award the cooperative its attorney fees incurred in the underlying litigation and in the ancillary administrative proceedings. (*Id.* at pp. 842, 849, 850.) The appellate court explained that the parties' resolution of the lawsuit explicitly contemplated the commencement of the administrative proceedings, and the abandonment of the litigation if the administrative proceedings were successful in eliminating the minimum prices.

(*Id.* at pp. 848-849) Thus, the trial court did not abuse its discretion in concluding these administrative and litigation proceedings were *inextricably intertwined* and the attorney fees incurred in the separate administrative and litigation proceedings were "useful and necessary to the ultimate resolution of the state court action, and directly contributed to that resolution." (*Id.* at pp. 848-849.)

As explained by *Ciani v. San Diego Trust & Savings Bank*, *supra*, 25 Cal.App.4th at page 575, the import of *Wallace* is "only that administrative activities are not automatically ignored, and may be considered part of the litigation where such activities *directly contribute to the resolution of the case.*" The test is not whether the two proceedings are temporarily linked or arose from a common factual core. (*Id.* at p. 576.) "Instead, . . . the issue is whether [the administrative] activities were 'useful and necessary and directly contributed to the resolution of [the lawsuit.]'" (*Ibid.*)

Here, the trial court's analysis of the relevant cases demonstrates it had this rule firmly in mind. Applying this rule, the trial court found the prior federal action was neither *inextricably intertwined*, nor was it useful and necessary to the resolution of this lawsuit. The trial court did not abuse its discretion in this conclusion.

Pickern claims the removal of architectural barriers was the "primary relief sought" in the entire action. The record, however, reflects that primary litigation aims of the federal and state court lawsuits were different and as a result, the

lawsuits were not inextricably intertwined. The federal suit was focused on the equitable relief, while the state action was focused on the recovery of money.

Only the federal complaint sought equitable relief. Furthermore, to the extent that the Lodge Owners made the property accessible, those acts were completed prior to the dismissal of the federal lawsuit. The distinctiveness of the two actions is further demonstrated by the fact that during the federal action, Pickern refused to discuss her monetary damage demands that she now asserts were part and parcel of that first suit.

In the state action, by contrast, because the equitable relief was entirely addressed in the federal action, the state action could only focus on obtaining monetary relief. Moreover, this monetary relief was personal to Pickern. This is distinct from the claims for equitable relief that had already been mooted.

Pickern also failed to demonstrate that the trial court erred in concluding the federal action was not "closely related to the action in which fees are sought and useful to its resolution." (*Children's Hospital & Medical Center v. Bontá*, *supra*, 97 Cal.App.4th at p. 780.) During the federal litigation, even Pickern conceded the federal action served no useful purpose in resolving the state court action. In a letter to the Lodge Owners' attorney dated July 24, 2001, Pickern's attorney stated, "As I see it, this case is at a crossroads, and there are two paths you and your clients can choose to have us

travel. We can either move toward a quick and efficient settlement of the remaining monetary aspects of this case here and now, or you can once again attempt to have plaintiff's federal complaint dismissed for mootness. This, of course, will force plaintiff to refile her claims in State Court and start *yet another action from square one.*" (Italics added.)

While Pickern's counsel argues that discovery obtained in the federal action was helpful in the state action, she presented nothing to the trial court (nor to us) to explain what information was obtained through interrogatories, depositions, requests for admissions, and document requests. More importantly, she fails to explain how that information was helpful in resolving the damages claim of the state court action. To the extent that the parties litigated state law legal issues during the federal court action, the district court's rulings on questions of law in the federal action were not binding on the state court. (*Allen v. Superior Court* (2003) 111 Cal.App.4th 217, 229.) This is not a case where res judicata or collateral estoppel would render a prior federal ruling binding on the state court and narrow the issues to be resolved in that later lawsuit. (See *Children's Hospital & Medical Center v. Bontá*, *supra*, 97 Cal.App.4th at pp. 755, 778, 781.) The trial court did not act unreasonably in concluding

that the federal lawsuit was not useful in resolving this lawsuit.<sup>7</sup>

## II

### *This Appeal Is Not Frivolous*

The Lodge Owners have moved for sanctions against Pickern claiming that this appeal is frivolous. We disagree.

"[A]n appeal may be found frivolous and sanctions imposed when (1) the appeal was prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse

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<sup>7</sup> Finally, we pause to note that contrary to Pickern's initial argument, the district court does not have exclusive jurisdiction over the federal claims under the ADA. Both the state and federal courts have concurrent jurisdiction over those claims. (*Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 744, fn. 4; 42 U.S.C. § 12101 et seq.) Thus, as she concedes in her reply brief, "procedural avenues were available which would have allowed [Pickern] to bring her action in either federal or State court." Importantly, there is a presumption in federal law that where all of the federal claims have been adjudicated prior to trial and all that remains are pendant state law claims, the entire case *should* be dismissed. (*Acri v. Varian Associates, Inc.* (9th Cir. 1997) 114 F.3d 999, 1001.) Given this preference for resolving state claims in state courts, it is not at all surprising the federal court declined to exercise its supplemental jurisdiction in this case once all of the federal law claims had been adjudicated prior to trial.

Pickern's original choice of the federal forum represented a gamble by Pickern that the case would be fully litigated in that court without the need for additional separate proceedings. She lost that gamble when the federal claims were mooted and the case was dismissed. In that sense, the original federal action was not inextricably intertwined with this action, nor was it useful to the resolution of this case. The trial court's conclusion on this point did not constitute an abuse of discretion.

judgment; or (2) the appeal indisputably has no merit, i.e., when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 310, citing *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

"*Flaherty* cautions that 'any definition [of a frivolous appeal] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions.' (31 Cal.3d at p. 650.)" (*Bach v. County of Butte, supra*, 215 Cal.App.3d at p. 310.) Measured by these standards, the instant appeal was not frivolous.

DISPOSITION

The judgment is affirmed. The Lodge Owners shall recover their costs on appeal. (Cal. Rules of Court, rule 27(a).)

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ROBIE, J.

We concur:

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RAYE, Acting P.J.

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BUTZ, J.