Filed 10/25/02

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DANIELLE N. MACOMBER, Plaintiff and Appellant, v. RED ROBIN INTERNATIONAL, INC. et al., Defendants and Respondents.	F036920 (Super. Ct. No. 636137-2) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Lang, Richert & Patch and Charles Trudrung Taylor for Plaintiff and Appellant.

Thomas & Elliott, Stephen L. Thomas, Jay J. Elliott; Benedon & Serlin, Gerald M. Serlin and Douglas Benedon for Defendants and Respondents Red Robin International, Inc., Morite of California, William M. Morrow, Earl Soller, Mary Lou Waite, and Emerson Hess.

Farmer & Joy and Maurice E. Joy for Defendant and Appellant, Bill Vidana.

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Plaintiff and appellant Danielle N. Macomber (plaintiff) filed suit against defendants and respondents Red Robin International, Inc., Morite of California, William M. Morrow, Earl Soller, Mary Lou Waite, Emerson Hess (collectively, Red Robin) and Bill Vidana for sexual harassment, gender discrimination, and retaliation under the California Fair Employment and Housing Act (FEHA), codified at Government Code section 12900 et seq. A jury awarded plaintiff $11,760 in compensatory damages based on the sexual harassment claim. Plaintiff stipulated to accept $0 for punitive damages against her supervisor, Vidana, in a bifurcated trial. On Red Robin's motion for judgment notwithstanding the verdict, the trial court reduced plaintiff's award to $10,000. The court also denied plaintiff's motion for attorney fees and costs.

On appeal, plaintiff's sole contention is that the court committed reversible error in denying her motion for attorney fees and costs on the alternative grounds that she should have filed her action as a limited civil case and/or accepted Red Robin's settlement offers pursuant to Code of Civil Procedure section 998.[1] Red Robin maintains plaintiff's appeal should be dismissed because no appeal was taken from the post-judgment order denying her attorney fees and costs. We agree. Because we lack jurisdiction to review the order, we dismiss the appeal.

PROCEDURAL HISTORY

On July 27, 2000, judgment on the jury verdict was entered awarding plaintiff $11,760 in damages. On August 11, 2000, plaintiff moved for attorney fees and costs in excess of $300,000. On August 16, 2000, Red Robin moved for judgment notwithstanding the verdict.

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[1]All statutory references are to the Code of Civil Procedure unless otherwise indicated.

The hearing on plaintiff's motion for attorney fees and costs and Red Robin's judgment notwithstanding the verdict took place on September 6, 2000. The court granted Red Robin's motion for judgment notwithstanding the verdict as to plaintiff's lost wages of $1,760. The court took plaintiff's motion for attorney fees and costs under submission. On September 13, 2000, the court issued its six-page ruling on plaintiff's motion for attorney fees and costs. The ruling stated:

> "For all of the foregoing reasons, this court finds that it would be unjust, under all the special circumstances present here, to require the defendants to pay the attorneys' fees and costs of the plaintiff in this litigation. Plaintiff's motion is therefore denied, each party is to bear their own attorneys fees and costs, and counsel for the defendant Red Robin International shall prepare and serve an order, consistent with this ruling, as required by law."

On September 14, 2000, the court filed its order granting Red Robin's motion for judgment notwithstanding the verdict and vacating the prior July 27, 2000, judgment. On the same day, the new judgment was also filed. The judgment provided, in relevant part:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff … have and recover from defendants … Vidana … [and Red Robin] the sum of $10,000 with interest thereon at the rate of ten percent (10%) per annum from the date of the entry of this judgment until paid. ~~together with costs in the amount of $__________.~~"

The trial judge initialed the change. On September 22, 2000, the court filed its order on plaintiff's motion for attorney fees and costs.[2] The order provided, in relevant

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[2]The order was originally file-stamped September 26, 2000. This appears to be a clerical error. There is a handwritten correction of September 22 over the file-stamped date, and the order was signed on September 22.

In a declaration in support of the opposition to the motion to dismiss the appeal, counsel for plaintiff maintains he reviewed his files and discovered no record of receipt of this order. However, plaintiff makes no argument as to how this alleged failure to

part: "Plaintiff's motion for attorneys fees and costs is denied. Plaintiff shall not recover any attorneys' fees or costs from defendants. Each party is to bear their own attorneys' fees and costs."

On November 3, 2000, plaintiff filed her "Notice of Appeal and Designation of Clerk's Transcript and Reporter's Transcript on Appeal." The notice of appeal states: "PLEASE TAKE NOTICE that [p]laintiff … appeal[s] to the Court of Appeal, Fifth Appellate District, from the Judgment entered herein on September 14, 2000, in Department 54 of the above-entitled court." Red Robin then moved to dismiss the appeal on the ground we lacked jurisdiction since plaintiff failed to appeal from the order denying her motion for attorney fees and costs.

DISCUSSION

Appellate courts have no discretion to review an appealable judgment or order from which a timely appeal was not taken. (§ 906; *In re Marriage of Lloyd* (1997) 55 Cal.App.4th 216, 219; *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119; see also *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 45 Cal.App.4th 631, 639 [subject matter jurisdiction can never be created by consent, waiver or estoppel].) "A postjudgment order which awards or denies costs or attorney's fees is separately appealable … [citations], and if no appeal is taken from such an order, the appellate court has no jurisdiction to review it." (*Norman I. Krug Real Estate Investments, Inc. v.*

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receive the order pertains to Red Robin's motion to dismiss. Moreover, plaintiff had notice from the court's September 13, 2000, ruling on her motion for attorney fees and costs that an order on the motion was to be prepared. This notwithstanding, because plaintiff has failed to identify any argument related to the alleged lack of service of the order or provided reasoned argument or citations to authority, we treat the point as waived. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [where point is merely asserted by appellant without argument or authority, it is without foundation and requires no discussion by reviewing court].)

Praszker (1990) 220 Cal.App.3d 35, 46; see also § 904.1, subd. (a)(2); *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 650-656; *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43-44; *Robinson v. City of Yucaipa* (1994) 28 Cal.App.4th 1506, 1517-1518.)

However, "when a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award." (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998.) Thus, in such a case, the failure to file a separate appeal from the subsequent order fixing the amount of costs and fees does not preclude review of the order on appeal from the underlying judgment. The appeal from the judgment encompasses the postjudgment order fixing the amount of the costs and fees. (*R. P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 158; *Ziello v. Superior Court* (1999) 75 Cal.App.4th 651, 655; but see *Soldate v. Fidelity National Financial, Inc.* (1998) 62 Cal.App.4th 1069, 1073 [where party files notice of appeal from a favorable judgment, which also awards to that party attorney fees in unspecified amount, subsequent posttrial order setting amount of fees is not reviewable on appeal unless such order is expressly specified in notice of appeal].)

A judgment with a perfunctory and superfluous recital that the prevailing party shall recover his or her costs does not, per se, constitute a *determination* of entitlement to costs and/or attorney fees. (See *DeZerega v. Meggs*, *supra*, 83 Cal.App.4th at p. 44, fn. 10 [even where judgment expressly allowed costs to prevailing party, order resolving contested cost issues after judgment is separately appealable]; *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, *supra*, 220 Cal.App.3d at p. 46, fn. 4 [rejecting argument that recitation in judgment plaintiff be awarded judgment together with "'costs and disbursements'" was sufficient to encompass subsequently awarded litigation costs].) And the holding in *Grant v. List & Lathrop*, *supra*, 2 Cal.App.4th 993, does not apply to a postjudgment discretionary cost award, which must be separately appealed. (*Fish v.*

Guevara (1993) 12 Cal.App.4th 142, 147-148 [because expert witness fees are discretionary, not a matter of right to prevailing party, propriety of postjudgment award of expert witness fees cannot be reviewed on appeal from judgment].)

With respect to the notice of appeal, itself, "[t]he judgment or order, or part thereof, should be 'specified' [citation], i.e., described in such a manner as to make its identification reasonably certain. This part of the notice calls for some care in drafting." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 460, p. 507.) An appellant cannot obtain review of a postjudgment order simply by including the postjudgment proceedings in the record on appeal from the judgment. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2001) ¶ 3:119.2, pp. 3-41 to 3-42.) The appealable judgment and postjudgment 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*, *supra*, 83 Cal.App.4th at p. 43 [appeal from July 29 judgment that allowed costs of suit did not perfect appeal of September 9 order awarding attorney fees]; see also *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, *supra*, 220 Cal.App.3d at pp. 45-47 [notice of appeal filed May 26 specifying only May 5 judgment did not perfect appeal of May 9 order denying motion to tax litigation costs].)

Here, we cannot construe the notice of appeal as applying to the September 22, 2000, order on plaintiff's motion for attorney fees and costs under the rule of liberal construction. (See Cal. Rules of Court, rule 1(a)(2).) The November 3, 2000, notice unambiguously designates only the September 14, 2000, judgment from which plaintiff appeals. "The rule favoring appealability in cases of ambiguity cannot apply where there is a clear intention to appeal from only … one of two separate appealable judgments or orders. [Citation.] 'Despite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the [order] being appealed.' [Citation.]" (*Norman I. Krug Real Estate Investments, Inc. v. Praszker*, *supra*, 220 Cal.App.3d at p. 47; see also *Soldate v. Fidelity National*

Financial, Inc., *supra*, 62 Cal.App.4th at p. 1075 [notice of appeal specifying appeal from "'the judgment … and certain other rulings and orders … entered in the above-referenced action'" inadequate to challenge later decision regarding amount of attorney fees]; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624-625 [court has no authority to liberally construe notice of appeal where portion of judgment appealed from is clear and unmistakable].)

Moreover, the judgment in this case cannot be found to subsume the later order denying plaintiff attorney fees and costs. There is simply no finding regarding entitlement to fees and costs in the judgment. The court's deletion of the reference to costs does not in any way indicate whether costs or attorney fees were awarded. It only makes the judgment silent on the issue. As recognized by Red Robin, the attorney fees and costs sought by plaintiff were discretionary under Government Code section 12965, subdivision (b), which provides: "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs …." As a result, any postjudgment discretionary attorney fee and/or cost award must be separately appealed. (See *Fish v. Guevara*, *supra*, 12 Cal.App.4th at pp. 147-148; see also *Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 979, fn. 6.)

Plaintiff maintains that, even if the judgment did not subsume the September 22, 2000, order on her motion for attorney fees and costs, it did subsume the September 13, 2000, "ruling" on the motion. Plaintiff's argument is flawed. The ruling specifically provided for Red Robin International to prepare and serve an order on the motion as required by law. Thus, the court clearly did not intend for the ruling to be the final determination of the issue. Under these circumstances, we cannot find the ruling to be an appealable order. (See *In re Marriage of Hafferkamp* (1998) 61 Cal.App.4th 789, 794 [order withdrawing earlier tentative decision and announcing new one not an appealable order]; *In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 398, fn. 1 [memorandum of

decision not an appealable order]; cf. Cal. Rules of Court, rule 2(c)(2) ["The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed …."].)

Finally, relying on *Department of Industrial Relations v. Nielsen Construction Co.* (1996) 51 Cal.App.4th 1016, and *Wilbur v. Cull* (1954) 127 Cal.App.2d 655, plaintiff maintains the transcript requests relating to the hearing on her motion for attorney fees and costs are sufficient to invoke this court's jurisdiction. Neither case supports plaintiff's position. In *Wilbur v. Cull*, the court found:

> "By a long line of decisions it has been repeatedly held that a notice and demand for transcript, addressed to the clerk of the court, which contains language substantially stating that notice is given that the party filing the document 'desires and intends to appeal' or 'desires or intends to appeal' or like language is a sufficient notice of appeal to transfer jurisdiction to the appellate court even though no separate or other notice of appeal is filed." (*Wilbur, supra,* 127 Cal.App.2d 655, 657.)

The court in *Department of Industrial Relations v. Nielsen Construction Co.*, *supra*, relied on *Wilbur v. Cull* in holding that the appellant's request for transcripts, with its references to a previously filed notice of appeal and a specific judgment being appealed, manifested appellant's intent to appeal. As a result, the court found the notice of appeal was timely filed. (*Department of Industrial Relations, supra,* 51 Cal.App.4th at p. 1024.) Neither case stands for the expansive proposition articulated by plaintiff that transcript requests can cure an otherwise defective notice of appeal and confer subject matter jurisdiction. In fact, plaintiff's argument is directly contrary to well-established case law holding that the appealable judgment or postjudgment order must be expressly specified in either a single notice of appeal or multiple notices of appeal in order to be reviewable on appeal. (See, e.g., *DeZerega v. Meggs*, *supra*, 83 Cal.App.4th at p. 43; *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, *supra*, 220 Cal.App.3d at pp. 45-47.)

In short, we do not read *Department of Industrial Relations v. Nielsen Construction Co.*, *supra*, or *Wilbur v. Cull*, *supra*, as creating an exception to this body of case law in order to save inattentive appellate practice. We reiterate our reasoning in *Jordan v. Malone* (1992) 5 Cal.App.4th 18, 22:

> "The trend of recent cases of the Courts of Appeal is to hold appellate counsel to strict account for ensuring that their appeal rights are perfected according to the applicable statutes and rules of court. [¶] … [¶] 'We have long since determined that the proper role of an appellate court is to adhere to and apply … section 904.1, not to devise and employ strategies for its wholesale avoidance. As a practical matter, experience teaches that far from solving the problem, the latter approach only exacerbates it.' [Citation.]" (Fn. omitted, see also *Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1177, 1180 ["In keeping with a general trend among intermediate appellate courts of this state to reaffirm that the responsibility to perfect appeals is firmly on the shoulders of appellants, it is no longer this court's policy to 'save' erroneous appeals"].)

We find no reason here to depart from this trend. In sum, because plaintiff's notice of appeal entirely omits any reference to the September 22, 2000, order denying her motion for attorney fees and costs, we have no jurisdiction to review the propriety of that award.[3]

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[3]We note that even if we were to construe the notice of appeal as including the September 22, 2000, order denying plaintiff's motion for attorney fees and costs, we fail to find any abuse of discretion by the trial court. (See *Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326, 330-331.)

DISPOSITION

The appeal is dismissed. Costs are awarded to respondents.

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Wiseman, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Harris, J.