Filed 2/22/01

CERTIFIED FOR PARTIAL PUBLICATION[*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ARTHUR GILBERT, Plaintiff and Appellant, v. MASTER WASHER & STAMPING CO., INC., Defendant and Respondent.	B133171 (Super. Ct. No. BC 141326)
MASTER WASHER & STAMPING CO., INC., Plaintiff and Respondent, v. ARTHUR GILBERT et al., Defendants and Appellants.	(Super. Ct. No. BC 142051)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Ralph Dau, Judge. Reversed and remanded with instructions.

Gernsbacher & McGarrigle and Paul B. Beach for Appellants.

Law Offices of Jay F. Stocker and Jay F. Stocker for Respondent.

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[*] Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of Part I and certain portions of the sections headed "Facts and Proceedings Below" and "Disposition." [Note to the Reporter of Decisions: The five portions to be omitted from the published opinion are indicated by means of bracketed notes at the appropriate points within the text.]

In the published portion of this case we hold a lawyer represented by other members of his law firm is entitled to recover reasonable attorney fees where the representation involved the lawyer's personal interests and not those of the firm.

FACTS AND PROCEEDINGS BELOW

This case arises out of the landlord-tenant relationship between appellant Arthur Gilbert and respondent Master Washer & Stamping Co., Inc. However this appeal focuses on post-judgment orders regarding attorney fees and costs, and does not concern the merits of the parties' underlying claims against one another.

Gilbert filed a complaint against Master Washer, Los Angeles Superior Court case No. BC 141326, on December 22, 1995, seeking damages for breach of lease, and attorney fees pursuant to the lease between the parties. Master Washer later filed a complaint in a separate action, Los Angeles Superior Court case No. 142051, seeking damages for breach of contract and conversion of its property by Gilbert. Master Washer's complaint also named Gilbert's attorney, appellant David Gernsbacher, as a defendant based on his alleged role in preventing Master Washer from recovering its property from the leased premises. The cases were consolidated and assigned to Judge Ralph W. Dau.

Gernsbacher demurred to Master Washer's first cause of action for breach of lease, and the trial court sustained the demurrer without leave to amend on April 4, 1996.

On February 10, 1998, Gilbert obtained summary adjudication in his favor on Master Washer's breach of lease claim. This ruling also disposed of Master Washer's defenses to Gilbert's claim for breach of lease. The same day, Gernsbacher obtained summary judgment as to all remaining causes of action in Master Washer's complaint.

Trial of the consolidated actions commenced on January 7, 1999. On January 14, 1999, Gilbert and Master Washer entered into a stipulation for judgment (hereinafter the

"Stipulation") whereby Master Washer admitted liability in Gilbert's breach of lease action. [Note to the Reporter of Decisions: Please omit the material beginning at this point and ending as indicated.] The Stipulation provided in pertinent part as follows:

"1. Master Washer admits liability in Gilbert's Action for breach of lease, and, further, admits that Gilbert's damages for breach of lease total Eighty-Five Thousand Dollars ($85,000);

"2. Judgment shall be entered in the Gilbert Action against Master Washer and in favor of Gilbert setting forth said $85,000 in damages (the "Gilbert Judgment"), subject to the following:

"a. The entry of the Gilbert Judgment is conditioned upon the entry of a judgment in favor of Master Washer (the "Master Washer Judgment") in Master Washer's action for conversion against Gilbert as Defendant, Case No. BC 142051 (the "Master Washer Action") or settlement of the Master Washer Action in favor of Master washer <u>and</u> shall not be entered until immediately after the entry by the Court of the Master Washer Judgment or immediately upon a settlement of the Master Washer Action in favor of Master Washer;

"b. The amount of the Gilbert Judgment shall not be treated by the Court or applied as an offset against the amount of the Master Washer Judgment, but said judgments shall be treated separately by the Court;

"c. The Gilbert Judgment shall be a lien upon that portion of the proceeds of the Master Washer Judgment or settlement equal to the amount of the Gilbert Judgment;

[sic] "e. That portion of the proceeds of the Master Washer Judgment or settlement equal to the amount of the Gilbert Judgment shall be held in trust in favor of Gilbert by Master Washer's counsel, currently Joseph Fischbach, who is irrevocably instructed to pay over said amount to Gilbert's counsel in trust for Gilbert;

"f. Concurrent with the entry of the Gilbert Judgment, Gilbert's counsel shall tender to Master Washer's counsel to hold in trust for the benefit of Gilbert a duly executed stipulation to vacate the Gilbert Judgment and a duly extended Request for Dismissal of the Gilbert Action. Upon payment by the financial institution of the check paid by Master Washer's counsel to Gilbert's counsel in satisfaction of the payment of the Gilbert Judgment in full, Master Washer's counsel is authorized to file said Stipulation to vacate the Gilbert Judgment and Request for Dismissal of the Gilbert Action;

"g. In the event the Master Washer Judgment is not in favor of Master Washer, no Gilbert Judgment shall be entered pursuant to this stipulation;

"h. the [sic] Gilbert Judgment shall be entered in accordance with all applicable Code of Civil Procedure statutes, California Rules of Court and local rules and shall be a lien upon that portion of the proceeds of any judgment or settlement of the Master Washer Action equal to the amount of the Gilbert Judgment." [Note to the Reporter of Decisions: End of omitted material.]

On February 24, 1999, Gilbert filed a proposed judgment pursuant to the Stipulation.[1] [Note to the Reporter of Decisions: Please omit material beginning at this point and ending as indicated.] The February 24, 1999 proposed judgment provided in pertinent part as follows:

"1. Gilbert shall be entitled to recover from Master Washer damages in the amount of $85,000;

"2. Pursuant to Civil Code § 1717 and Code of Civil Proc. § 1033.5(a)(10)(A), Gilbert is further entitled to recover against Master Washer Gilbert's costs in the within action, in the amount of $_____________ and Gilbert's attorneys' fees, in the amount of $_______________." [Note to the Reporter of Decisions: End of omitted material.]

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[1] This judgment was never signed or entered by the trial court.

On or about March 1, 1999, Gilbert and Gernsbacher filed a second proposed judgment providing in pertinent part as follows.

"On April 4, 1996, in Case No. BC 142051 (hereinafter the 'Master Washer Action') the Court sustained without leave to amend the demurrer of Defendant David Gernsbacher . . . to the First Cause of Action for Breach of Lease of Plaintiff Master Washer & Stamping Co., Inc. . . . and, on February 10, 1998, the Court granted Defendant Gernsbacher's Motion for Summary Judgment/Adjudication as to the remainder of Plaintiff Master Washer's Complaint.

"On January 7, 1999, these consolidated causes came on regularly for trial before Judge Ralph W. Dau. . . .

"On January 14, 1999, in the Gilbert Action, Plaintiff Gilbert and Defendant Master Washer entered into a Stipulation under which Defendant Master Washer admitted liability on Plaintiff Gilbert's complaint for breach of lease and, further, admitted that Plaintiff Gilbert's damages for breach of lease total Eighty-Five Thousand Dollars ($85,000), stipulating that judgment be entered against Defendant Master Washer and in favor of Plaintiff Gilbert setting forth said $85,000 in damages.

"The Court has filed its Statement of Decision in the Master Washer Action.

"Accordingly,

"IT IS ORDERED, ADJUDGED AND DECREED as follows:

"1. That, in the Master Washer Action, Plaintiff Master Washer shall take nothing as against Defendant Gernsbacher, that the Master Washer Action against Defendant Gernsbacher be and hereby is dismissed, and that Defendant Gernsbacher shall recover from Plaintiff Master Washer his costs of suit in the amount of $_________and attorneys' fees in the amount of $_________; [Note to the Reporter of Decisions: Please omit the material beginning at this point and ending as indicated.]

"2. That in the Master Washer Action, Plaintiff Master Washer recover against Defendant Gilbert damages in the amount of $504,000.00 together with interest on that

sum at the legal rate from January 5, 1996 and costs in the amount of $________ (hereinafter, the 'Master Washer Judgment');

"3. That in the Gilbert Action, Plaintiff Gilbert recover against Defendant Master Washer damages in the amount of $85,000.00, together with costs in the amount of $___________ and attorneys' fees in the amount of $__________ (hereinafter, the 'Gilbert Judgment'), subject to the following:

"a. The amount of the Gilbert Judgment shall not be treated or applied as an offset against the amount of the Master Washer Judgment, but said judgments shall be treated separately;

"b. The Gilbert Judgment shall be a lien upon that portion of the proceeds of the Master Washer Judgment or settlement equal to the amount of the Gilbert Judgment; and,

"c. That portion of the proceeds of the Master Washer Judgment or settlement equal to the amount of the Gilbert Judgment shall be held in trust in favor of Plaintiff Gilbert by Defendant Master Washer's counsel, currently Joseph Fischbach, who is irrevocably instructed to pay over such amount to Plaintiff Gilbert's counsel, Gernsbacher & McGarrigle, in trust for Plaintiff Gilbert."

The trial court signed and filed the judgment on March 11, 1999. Gilbert and Gernsbacher filed Memoranda of Costs, each seeking, inter alia, attorney fees pursuant to the lease. Master Washer moved to tax costs, arguing the Stipulation precluded an award of costs to Gilbert, and also challenging Gernsbacher's entitlement to attorney fees.

On May 4, the trial court issued a minute order striking a portion of Gilbert's memorandum of costs, including Item 9 thereof (attorney fees), but later vacated the order and ruled "Ruling on Item Number 9 is reserved and subject to a motion to be filed under Section 870.2 of the Code of Civil Procedure."[2]

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[2] Code of Civil Procedure does not contain a section 870.2. Doubtless the trial court intended to cite Rule 870.2 of the California Rules of Court, which sets forth the procedure for claiming contractual attorney fees as costs.

Also on May 4, 1999, Master Washer made ex parte application "For an OSC Re: Contempt for Willful Refusal to Comply with Court Order; and to Compel Compliance with Court Order of January 14, 1999 or Vacate the March 11, 1999 Judgment and Dismiss This Action." The application was based on Gilbert's counsel's refusal to dismiss the Gilbert Action pursuant to the Stipulation despite the fact the $85,000 damages specified in the Stipulation had been paid. At a hearing on the ex parte application on May 4, 1999, the trial court ruled the application would be treated as a motion to amend the judgment, and would be heard on June 11, 1999.

Gilbert filed his motion to fix the amount of attorney fees, which was also set for hearing on June 11, 1999. At the hearing on June 11, the trial court modified the previously entered judgment by striking out the portion providing for Gilbert to recover his attorney fees and costs. Gilbert's motion to fix attorney fees was "ordered off calendar as moot in view of the Court's ruling on [Master Washer's motion to modify the judgment]." [Note to the Reporter of Decisions: End of omitted material.]

On June 15, 1999, the trial court issued an order denying Gernsbacher's motion to fix his attorney fees as costs, ruling because Gernsbacher was represented by his own law firm, he was not entitled to an award of fees pursuant to *Trope v. Katz*,[3] in which the California Supreme Court held an attorney who litigates in propria persona may not recover attorney fees pursuant to Civil Code section 1717.

Gilbert and Gernsbacher both appeal from the trial court's denial of their separate motions to fix attorney fees as costs.[4]

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[3] (1993) 11 Cal.4th 274, 292.

[4] The lease underlying the litigation includes a provision for attorney fees to the successful party "by reason of any action to which Lessor shall be made party because of this lease."

DISCUSSION

I. MASTER WASHER'S MOTION TO AMEND THE JUDGMENT DID NOT CONFORM WITH THE REQUIREMENTS OF CODE OF CIVIL PROCEDURE SECTION 663a, THEREFORE THE TRIAL COURT ERRED IN AMENDING THE JUDGMENT.

[Note to the Reporter of Decisions: Please omit the material beginning at this point and ending as indicated.] Gilbert argues Master Washer's motion for contempt/sanctions was improperly treated as a motion to amend the judgment and improperly granted, because it failed to comply with the time limit, notice requirements, and procedural requirements of Code of Civil Procedure section 663a.[5] We must agree. "Trial courts can modify or amend judgments only as prescribed by statute."[6] Here, the trial court modified the judgment to strike Gilbert's fees and costs, despite the fact Master Washer completely failed to comply with Code of Civil Procedure section 663a. Indeed, the mere fact the motion was made far beyond 15 days from the date of mailing of entry of judgment should have compelled its denial.

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[5] Section 663a provides as follows: "The party intending to make the motion mentioned in the last section must file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and specifying the particulars in which the legal basis for the decision is not consistent with or supported by the facts, or in which the judgment or decree is not consistent with the special verdict, either 1. Before the entry of judgment; or 2. Within 15 days of the date of mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest. The provisions of Section 1013 of this code extending the time for exercising a right or doing an act where service is by mail shall not apply to extend the time above specified. An order of the court granting such motion may be reviewed on appeal in the same manner as a special order made after final judgment."

[6] *Bowman v. Bowman* (1947) 29 Cal.2d 808, 814. See also *Stevens v. Superior Court* (1936) 7 Cal.2d 110, 112 (trial court "has no power, having once made its decision after regular submission, to set aside or amend for judicial error").

Master Washer argues the judgment was properly amended because the inclusion of the fees and costs was a "clerical error," and therefore the judgment did not reflect the intent of the parties to the Stipulation.[7] We are not persuaded. The judgment is not, as Master Washer contends, facially inconsistent with the Stipulation, which is silent as to Gilbert's entitlement to fees and costs. If Master Washer believed the inclusion of fees and costs in the judgment was improper, it was incumbent upon Master Washer to timely challenge the Judgment pursuant to Code of Civil Procedure section 663a.[8]

Master Washer also argues the order amending the judgment to strike Gilbert's fees and costs was proper because Gilbert was not the "prevailing party," and thus was not entitled to fees and costs pursuant to Code of Civil Procedure section 1717, which provides "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of a case, there shall be no party prevailing on the contract for purposes of this section." It also argues Gilbert cannot possibly be the prevailing party because Master Washer's judgment of $504,000 on its conversion claim far exceeded the $85,000 damages it stipulated to pay Gilbert. "When the defendant in an action had filed a cross-complaint such that plaintiff and defendant had competing monetary claims, the party in whose favor the net amount is due qualifies as the prevailing party, the party with a net monetary recovery."[9] Master Washer raised its "prevailing party" argument in its opposition to Gilbert's motion to fix attorney fees as costs. However, because the trial court's order of June 11, 1999 ordered the motion off calendar as moot, the "prevailing

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[7] See Code of Civil Procedure section 473 ("The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered. . .")

[8] See *Tokio Marine & Fire Insurance Corp. v. Western Pacific Roofing Corporation* (1999) 75 Cal.App.4th 110, 199 ("A court's power to correct clerical error does not allow the court to leapfrog inconvenient questions of contract interpretation and proceed summarily to judgment under the guise of correcting 'clerical error'.").

[9] *Public Employees' Retirement System v. Winston* (1989) 209 Cal.App.3d 205, 212.

party" issue has not been determined by the trial court.[10] We therefore remand the matter to the trial court for a ruling on Gilbert's motion to fix attorney fees as costs, which ruling shall include a determination of whether Gilbert is the "prevailing party" for purpose of an award of contractual attorney fees. [Note to the Reporter of Decisions: End of omitted material.]

II. AN ATTORNEY WHO IS REPRESENTED BY OTHER MEMBERS OF HIS OR HER LAW FIRM MAY BE ENTITLED TO RECOVER ATTORNEY FEES UNDER CIVIL CODE SECTION 1717; THEREFORE THE TRIAL COURT ERRED IN DENYING GERNSBACHER'S MOTION TO FIX ATTORNEY FEES AS COSTS.

California follows the so-called American rule, whereby each party to a lawsuit must ordinarily pay his or her own attorney fees.[11] However, this rule does not apply where, as in this case, the parties have agreed to allocate attorney fees by contract.[12] Such agreements are governed by Civil Code section 1717, which provides in pertinent part "(a) In any action on a contract, where the contract specifically provides that attorneys' fees and costs, which are incurred to enforce that contract, shall be awarded either to one

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[10] Code of Civil Procedure section 1032, subdivision (a)(4) defines "prevailing party" for purposes of an award of costs. It states: "(4) 'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034."

[11] *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 504.

[12] *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1182 ("parties may agree by contract for the payment of attorney fees in actions relating to the contract"). See also Code of Civil Procedure section 1021 ("Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . .").

of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. . . . Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit."

The trial court found Gernsbacher was not entitled to attorney fees because he was represented by his own law firm, Gernsbacher & McGarrigle, APC, and did not present evidence he was "obligated to pay" the legal fees incurred on his behalf by the attorneys representing him in this matter. Gernsbacher argues he is entitled to his attorney fees because he was sued personally and was represented by other counsel within the law firm of which he is a member. Thus he did not represent himself in *propria persona*. We agree with Gernsbacher and therefore we reverse the trial court's order denying his motion to fix attorney fees as costs and remand for further proceedings.

A. An Attorney Representing Himself or Herself In Propria Persona May Not Recover Contractual Attorney Fees Pursuant to Code of Civil Procedure Section 1717, However a Corporation May Recover Fees Incurred by its In-House Counsel.

In *Trope v. Katz,*[13] the law firm Trope & Trope, representing itself in propria persona, sued a former client for fees.[14] The former client filed a cross-complaint for

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[13] (1995) 11 Cal.4th 274.

[14] The party litigants in *Trope* were actually the individual lawyers, Sorrell Trope and Eugene L. Trope, who were, according to the Court of Appeal opinion in *Trope v. Katz*, No. B073244, "engaged in the practice of law as the firm of Trope and Trope." The law firm Trope and Trope was not a party to the action and there is no indication it had any independent legal existence. Indeed, the Supreme Court treated the firm and the attorneys as interchangeable, framing the issue in the case as "whether an attorney who successfully represents himself in litigation may recover attorney fees when such fees are provided for by contract or statute." (*Trope, supra*, 11 Cal.4th 274, 278.) Therefore the Supreme Court's references to "Trope & Trope" or "the firm" are best understood as shorthand references to party litigants Sorrell Trope and Eugene L. Trope, the two attorneys who represented themselves in propria persona. (Although the Court of Appeal

malpractice, and a trial of the entire matter resulted in a net verdict in favor of Trope and Trope.[15] Trope and Trope moved for an award of attorney fees under the attorney fee provision in the parties' retainer agreement.[16] The trial court found "although Trope & Trope would have been entitled to attorney fees under the 1985 agreement if it had retained an attorney, it was barred from recovering such fees because it had represented itself."[17]

The California Supreme Court affirmed the trial court's action, holding "an attorney who chooses to litigate in propria persona rather than retain another attorney to represent him in an action to enforce a contract . . . cannot recover [attorney] fees under [Civil Code] section 1717."[18] The high court explained Civil Code section 1717 authorizes an award of "attorney's fees," and the plain meaning of the term "both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation."[19]

Trope rejected Trope and Trope's argument they were entitled to an award of attorney fees "simply because the time [an attorney] devotes to litigating a matter on his own behalf has value."[20] Noting the time of any litigant is valuable, the Supreme Court concluded "the issue is whether in enacting section 1717 the Legislature intended to allow attorneys who represent themselves to recover 'reasonable attorney's fees' for the time and effort they have expended and the professional opportunities they have lost as a

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opinion in *Trope v. Katz* is not published, we may take judicial notice thereof as a court record pursuant to Evidence Code section 452, subdivision (d)(1).)

[15] *Id.* at p. 283.

[16] *Ibid.*

[17] *Ibid.*

[18] *Trope, supra*, 11 Cal.4th 274, 277.

[19] *Id.* at p. 280.

[20] *Trope, supra*, 11 Cal.4th 274, 285.

result of their decision to litigate a contract dispute in propria persona, even though they have not actually paid or become liable to pay any consideration in exchange for legal representation. . . . We believe the Legislature did not so intend."[21]

The Supreme Court in *Trope* also rejected Trope and Trope's suggestion the Legislature may have wished to encourage attorneys to represent themselves in litigation. Citing to the United States Supreme Court's decision in *Kay v. Ehrler,*[22] the court observed "a lawmaking body may instead prefer to discourage attorneys from electing to appear in propria persona because such self-representation may often conflict with the general public and legislative policy favoring the effective and successful prosecution of meritorious claims"[23] Thus *Trope* stands for the proposition an attorney who represents him or herself in propria persona may not recover the value of his or her time as attorney fees pursuant to Civil Code section 1717.

More recently, *PLCM Group, Inc. v. Drexler*,[24] the California Supreme Court revisited the attorney fees issue and held a corporate litigant was entitled to recover attorney fees for work performed by in-house counsel, even though such counsel were employees of the corporate litigant.[25] In *PLCM,* the Supreme Court explained its holding in *Trope*[26] was based largely on the lack of any attorney-client relationship in the case of an attorney litigating his or her own contract dispute: "[in *Trope*, w]e explained that, by definition, the term 'attorney fees' implies the existence of an attorney-client relationship, i.e., a party receiving professional services from a lawyer. [Citations.]"[27] But the

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[21] *Ibid.*

[22] (1991) 499 U.S. 432, 111 S.Ct. 1435.

[23] *Trope, supra*, 11 Cal.4th 274, 292, quoting *Kay, supra*, 499 U.S. 432, 437-438.

[24] (2000) 22 Cal.4th 1084.

[25] *Id.* at p. 1092.

[26] *Supra*, 11 Cal.4th 274.

[27] *PLCM, supra*, 22 Cal.4th 1084, 1092.

Supreme Court in *PLCM Group* found such a relationship *does* exist where a corporation is represented by its in-house counsel.[28]

PLCM Group emphasized none of the problems relating to the pro se attorney litigants in *Trope* applied in the case of in-house counsel: "There is no problem of disparate treatment; in-house attorneys, like private counsel but unlike pro se litigants, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer. A corporation represented by in-house counsel is in an agency relationship, i.e., it has hired an attorney to provide professional legal services on its behalf. Nor is there any impediment to the effective and successful prosecution of meritorious claims because of possible ethical conflict or emotional investment in the outcome. The fact that the corporation employs in-house counsel does not alter the fact of representation by an independent third party. Instead, the payment of a salary to in-house attorneys is analogous to hiring a private firm on a retainer."[29] Therefore, it held "We discern no basis for discriminating between counsel working for a corporation in-house and private counsel engaged with respect to a specific matter or on retainer. Both are bound by the same fiduciary and ethical duties to their clients. [Citations.] Both are qualified to provide, and do provide, equivalent legal services. And both incur attorney fees and costs within the meaning of Civil Code section 1717 in enforcing the contract on behalf of their client."[30]

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[28] *Ibid.*

[29] *PLCM Group, supra,* 22 Cal.4th 1084,1092-1093.

[30] *Id.* at p. 1094.

B. The Policy Considerations in *Trope v. Katz* Do Not Preclude Gernsbacher's Recovery of Attorney Fees Because He is Not a Litigant In Propria Persona.

Having examined the policy considerations leading to the *Trope* and *PLCM Group* decisions, we apply those considerations to the case before us. We hold Gernsbacher, as an attorney litigant represented by other attorneys in his firm, is not a litigant in propria persona and thus *Trope* does not bar his recovery of reasonable attorney fees under Civil Code section 1717.

1. An Attorney Represented by Members of His or Her Own Law Firm "Incurs" Attorney Fees.

While *Trope* defines "incurring" an attorney fee as "becoming obligated to pay for it,"[31] such an "obligation" is broadly defined as necessary to fulfill the purpose of Civil Code section 1717. In *International Billing Services, Inc. v. Emigh*,[32] for example, the Court of Appeal held prevailing litigants were entitled to an award of attorney fees, even though the fees had been paid by their employer.[33] Noting the litigants had agreed to reimburse the employer in the event they obtained a fee award pursuant to Civil Code section 1717, the court held they "became liable to pay the fee even if they were not the source of payment the attorney agreed to look to first." Similarly, in *Staples v. Hoefke*,[34] the court concluded a defendant was entitled to recover attorney fees despite the fact his fees had been paid by his insurer.[35]

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[31] *Trope, supra*, 11 Cal.4th 274, 280.

[32] (2000) 84 Cal.App.4th 1175.

[33] *Id.* at p. 1192 ("it is difficult to see how [plaintiff] is aggrieved by the serendipity of the [defendants], who discovered how to defend the lawsuit without having to pay out of their pockets").

[34] (1987) 189 Cal.App.3d 1397.

[35] *Id.* at p. 1410 ("we can perceive of no reason why plaintiffs should profit from defendant Hoefke's foresight in obtaining insurance coverage").

Moreover, under *PLCM Group,* the trial court has wide discretion to fix a reasonable amount of attorney fees, and is not limited to the amount actually paid by the prevailing party.[36] In *PLCM Group,* the Supreme Court held a fee award for in-house counsel was properly based "on the number of hours expended by counsel multiplied by the prevailing market rate for comparable legal services . . . where counsel is located." The Supreme Court held the trial court was not, as the losing party argued, limited to the "cost-plus approach, based on a precise calculation of the actual salary, costs, and overhead of in-house counsel."[37]

Thus, a member of a law firm who is represented by other attorneys in the firm "incurs" fees within the meaning of Civil Code section 1717. Either the represented attorney will experience a reduced draw from the partnership (or a reduced salary from the professional corporation) to account for the amount of time his or her partners or colleagues have specifically devoted to his or her representation, or absorb a share of the reduction in other income the firm experiences because of the time spent on the case. This is different from the "opportunity costs" the attorney loses while he or she is personally involved in the same case, because the economic detriment is caused not by

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[36] *PLCM Group, supra*, 22 Cal.4th 1084, 1096 ("the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court"). See also *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7 (party who receives free legal services from pro bono attorney, and thus incurs no attorney fees at all, is nonetheless entitled to recover attorney fees under section 1717); *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 520 (while terms of the contract between attorney and client may be considered by trial court, such terms "do not compel any particular award"); *All-West Design, Inc. v. Boozer* (183 Cal.App.3d 1212, 1227 (trial court not bound by terms of contingency fee agreement in determining amount of reasonable fees under Civil Code section 1717)..

[37] *Id.* at p. 1096. See also *Balkind v. Telluride Mountain Title Company* (2000) 8 P.3d 581, 588 ("The market-rate approach also has the virtue of being predictable for the parties and easy to administer, whereas the cost-plus approach is cumbersome, intrusive, costly to apply, and may distort the incentives for settlement and reward inefficiency.).

the expenditure of his or her own time, but by other attorneys working on his or her behalf.

Nevertheless, in this case the trial court denied Gernsbacher's motion to fix attorney fees as costs in part because it believed the declaration of McGarrigle, Gernsbacher's attorney, did not adequately establish Gernsbacher had "incurred" attorney fees. Although the trial court stated "nowhere does the declaration state that attorney Gernsbacher is obligated to pay this or any other amount to his firm for his representation in this matter," this conclusion is factually inaccurate. Mr. McGarrigle's declaration does indeed state "the total amount of costs and attorneys' fees *incurred* by Defendant [Gernsbacher]." Master Washer did not present any evidence to rebut this statement, and in the absence of any reason to think otherwise, the word "incurred" in Mr. McGarrigle's declaration should be interpreted as it is used in Civil Code section 1717.[38]

2. <u>An Attorney Represented by Members of His or Her Own Law Firm is Party to an Attorney-Client Relationship</u>.

Trope[39] denied fees to an attorney litigant acting in propria persona based in large part on the absence of an attorney-client relationship, because a pro se attorney litigant does not become liable to pay fees "in exchange for legal representation."[40] By contrast, *PLCM Group* approved a fee award for the representation of in-house counsel because

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[38] See *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1192 (for purposes of section 1717, "To 'incur' means 'To run or fall into (some consequence, usually undesirable or injurious); to become through one's own action liable or subject to; to bring upon oneself.' (5 Oxford English Dict. (2d ed. 1933) p. 188, col. b.; see Black's Law Dict. (7th ed. 1999) p. 771, col. b. ['To suffer or bring on oneself (a liability or expense)']; 1 Abbott's Law Dict. (1879) p. 595, col. b [liability 'cast upon them by act or operation of law'].) The California Supreme Court has construed the term as used in section 1717 to mean generally 'become liable for' a fee, 'i.e., to become obligated to pay for it.' [Citation.].")

[39] *Supra*, 11 Cal.4th 274.

[40] *Id.* at p. 280.

unlike an individual attorney acting in propria persona, "an organization is always represented by counsel. . . . and thus, there is always an attorney-client relationship."[41]

There can be no question an attorney-client relationship is also present where an attorney litigant is represented by other attorneys in his or her own firm. In this case, Messrs. Beach and McGarrigle of Gernsbacher & McGarrigle, like the in-house counsel in *PLCM Group* but unlike Messrs. Trope and Trope in *Trope,* represented not their personal interests or even those of their law firm, but the separate and distinct interests of Gernsbacher himself.[42] Beach and McGarrigle were Gernsbacher's agents, and he was the recipient of legal services performed by them on his behalf.[43]

As our Supreme Court recognized in *PLCM Group*, the introduction of an objective third party as counsel for an attorney litigant promotes "the general public and legislative policy favoring the effective and successful prosecution of meritorious claims [or defense of non-meritorious claims]."[44] It recognized "Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that 'a lawyer who represents himself has a fool for a client' is the product of years of experience by

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[41] *PLCM Group, supra,* 22 Cal.4th 1084, 1094.

[42] Unlike the law firm Trope and Trope, Gernsbacher & McGarrigle has an independent existence as a professional corporation. Furthermore, Gernsbacher was being sued personally; the professional corporation was not a party to the lawsuit.

[43] Indeed, while Gernsbacher's situation is somewhat similar to that of the corporation in *PLCM,* it is even more analogous to that of any litigant who retains private counsel to represent him or her in a lawsuit.

[44] *PLCM Group, supra,* 22 Cal.4th 1084, 1092.

seasoned litigators."[45] An attorney who asks his partners or associates to represent him, by contrast, is no fool.

3. Permitting an Attorney Represented by Members of His or Her Own Law Firm to Recover Fees Under Civil Code Section 1717 Does Not Lead to Inequitable Application of the Statute.

In *Trope*,[46] the Supreme Court held it would be inequitable to permit attorneys, but not other litigants, to recover fees when they litigate in propria persona.[47] It held such an outcome "would conflict with the legislative purpose of section 1717 . . . to establish mutuality of remedy when a contractual provision makes recovery of attorney fees available to only one party, and to prevent the oppressive use of one-sided attorney fee provisions. [Citations.] If an attorney who is the prevailing party in an action to enforce a contract with an attorney fee provision can recover compensation for the time he expends litigating his case in propria persona, but a nonattorney pro se litigant cannot do so regardless of the personal and economic value of such time simply because he has chosen to pursue a different occupation, every such contract would be oppressive and one-sided."[48]

As we have seen, this consideration is absent where an attorney litigant is represented by members of his or her firm, because like a corporation represented by in-house counsel, the represented attorney seeks to recover fees for work done by others on his behalf. Indeed, it would be inequitable in the extreme to permit Gernsbacher to recover fees incurred by outside counsel, but deny him such recovery merely because his counsel are members of the same law firm as he.

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[45] *Id.* at pp. 1092-1093.

[46] *Supra,* 11 Cal.4th 274.

[47] *Id.* at p. 285.

[48] *Id.* at pp. 285-286.

C. The Matter Must Be Remanded for Ruling on the Remaining Issues Presented in Gernsbacher's Motion to Fix Attorneys Fees.

Because the trial court erroneously ruled *Trope v. Katz*[49] precluded Gernsbacher from recovering his attorney fees, it did not reach the other issues raised in his motion to fix attorney fees as costs, namely whether Gernsbacher is the prevailing party against Master Washer, and the amount of attorney fees, if any, he is entitled to recover. Accordingly, the trial court's June 15, 1999 order denying Gernsbacher's motion to fix his attorney fees as costs is reversed, and the matter is remanded to the trial court for a determination of these issues.

DISPOSITION

[Note to the Reporter of Decisions: Please omit the material beginning at this point and ending as indicated.] The trial court's June 11, 1999 order is reversed in part, as follows:

1. The portion of the order amending the judgment is reversed,

2. The portion of the order removing Gilbert's motion to fix attorney fees as costs from its calendar as moot is reversed.

The matter is remanded to the trial court with directions to set a new date for hearing on Gilbert's motion to fix attorney fees as costs, and to make a ruling thereon including whether Gilbert is a prevailing party entitled to contractual attorney fees, and the amount, if any, of reasonable attorney fees to which he is entitled. [Note to the Reporter of Decisions: End of omitted material.]

The trial court's June 15, 1999 order denying Gernsbacher's motion to fix attorney fees as costs is reversed and the matter is remanded to the trial court with directions to make a new ruling on Gernsbacher's motion to fix attorney fees as costs, including

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[49] *Supra,* 11 Cal.4th 274.

whether Gernsbacher is a prevailing party entitled to contractual attorney fees, and the amount, if any, of reasonable attorney fees to which he is entitled. The parties shall bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS, J.