SUPREME COURT COPY

No. S183523

First District Court of Appeal
Division Two

Case No. A125567

SUPREME COURT
FILED

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IN SUPREME COURT OF THE STATE OF CALIFORNIA

STEVE ROSSA and CONNIE ROSSA

Plaintiffs and Respondents,

vs.

D.L. FALK CONSTRUCTION, INC.,

Defendant and Appellant.

ANSWER TO PETITION FOR REVIEW

On Appeal from the Honorable Marie Weiner
(San Mateo Superior Court Case No.: CIV 442294)

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I. INTRODUCTION

Petitioner D. L. Falk Construction, Inc. (hereinafter "Falk" or "Petitioner") seeks review of the decision by the First Appellate District affirming the trial court's order taxing its cost bill and refusing to award it over $99,000 in interest. The interest it sought was for money Falk borrowed to obtain a letter of credit to collateralize an appeal bond. The Petition for Review should be denied for the following reasons:

1. The First Appellate District's decision is correct in that neither Cal. Rule of Court 8.278 nor any similar rule or statute authorizes interest as a recoverable cost;

2. The decision does not create a conflict between different appellate districts for the Supreme Court to resolve. It merely contains *dicta* that distinguishes and questions the *ratio decidendi* of the Fourth Appellate District's decision in *Cooper v. Westbrook Torrey Hills, LP* (2000) 81 Cal. App.4th 1294. Because *Cooper* involved a different question—the recovery of interest for cash posted in court in lieu of an appeal bond—the First Appellate District held it did not govern the present case regarding money deposited in a bank so the bank would issue a letter of credit.

3. Petitioner raises evidence and arguments not submitted to the lower courts, including legislative history of which it requests judicial notice; and it did not move for rehearing prior to its Petition for Review.

4. A decision by this Court that includes interest as a recoverable cost on appeal, where interest is not specified as a recoverable cost in the applicable rule, would intrude upon the legislative process and permit an expansive reading of the term "costs" so as to trigger substantial litigation over the interpretation of similar cost rules and statutes.

5. Because of the different facts underlying the *Cooper* holding and here, the First Appellate District's decision does not violate equal protection concerns.

II. STATEMENT OF CASE

This case involves a construction dispute regarding the home of Respondents Connie and Steve Rossa (hereinafter the "Rossas") in which a jury awarded them $100,000 for breach of contract. (Petition for Review ("Petition") p. 22; Slip Opinion ("Opinion"), p.1.) The trial court then awarded the Rossas $681,390.15 in attorney's fees, expert fees and costs. (Petition, p. 22; Opinion, p.1.) Falk appealed the fees award as not properly apportioned between successful and unsuccessful causes of action. (Petition, p.22; Opinion, p. 2.) In a first appeal, the First Appellate District Court reversed the

attorney's fees award and sent the case back to the trial court to apportion the fees. (Opinion, p.2.) It also awarded Falk its costs on appeal. (Opinion, p.2.)

After remittitur, Falk filed a Memorandum of Costs that included a request for $99,289.81 in interest that Falk said it paid both its principal, David Falk, and its bank to obtain a letter of credit that secured its bond for the earlier appeal. (Petition, p. 9.) In a hearing considering both the Rossas' post-remittitur motion for attorney's fees and motion to tax the Memorandum of Costs, the trial court awarded the Rossas $238,844 in attorney's fees and struck the requested interest as a recoverable cost. (Petition, p. 22; Opinion, p.3.)

Falk filed an appeal limited to determining whether the trial court properly granted the motion to tax. (Opinion, pp. 1-3.) In a decision certified for publication, the trial court's ruling was affirmed on the following grounds and with the following reasoning:

1. The fact that Falk had to pay interest to obtain a letter of credit to secure its bond did not make such interest a recoverable cost under Rule 8.278(d)(1)(F). (Opinion, p. 3.)
2. Without express authorization for interest in the rule, interest could not be awarded. (Opinion, p. 4.)
3. Rule 8.278(d)(1)(F), as a cost rule, must be strictly construed. (Opinion, pp. 4-5.)
4. The holding of the Fourth Appellate District in *Cooper v. Westbrook Torrey Hills, LP* (2000) 81 Cal. App.4th 1294 is "not

controlling" where the issue involved a letter of credit, not a cash deposit. (Opinion, p. 6.)

5. In *dicta*, the Opinion indicated, the premise of *Cooper* "does not withstand scrutiny." (Opinion, p. 7.) While *Cooper* correctly notes a deposit in lieu of a bond is treated the same as a bond (Cal. Code Civ. Proc. § 995.730.), it ignores Cal. Code Civ. Proc. § 995.250 which "limits recovery of costs for a bond to the premium paid for it—with no mention of any collateral or ancillary expenses. . . ." (Opinion, p. 8.) Thus, *Cooper* suffers from "its unstated assumption that interest paid on an appellate bond is recoverable" which the applicable statutory scheme does not support. (Opinion, p. 8.)

6. Further, in *dicta*, the Opinion states *Cooper* is "dubious" in ignoring Cal. Code Civ. Proc. § 1033.5 which permits the recovery of only premiums on surety bonds. (Opinion, p.10-11.)

7. Including interest as a recoverable cost, where it is not specifically provided for in Rule 8.278 and Cal. Code Civ. Proc. § 1033.5, would permit an expansive definition of recoverable costs that would be "hard to contain." (Opinion, p. 11-12.)

8. Awarding $100,000 in interest would conflict with the "presumption of proportionality" of the cost statutes. (Opinion, p. 12.)

9. Lastly, the First Appellate District declined to consider Falk's equal protection argument since it had not been raised in the trial court. (Opinion, p. 13.)

The opinion of the First Appellate District is well reasoned and well supported by the law. The court does not err or "disregard . . . the plain meaning" of Rule 8.278 as Falk argues. (Petition, p. 4.)[1] It is anything but "plain" that the rule was intended to include interest as a recoverable appellate cost. Interest is not mentioned in the rule nor permitted in cases (other than *Cooper*) interpreting it and its predecessors. Nor is interest even mentioned in the legislative history of which Falk now seeks judicial notice.

As the First Appellate District recognized, in light of the strict construction of cost rules and statutes, there are no grounds to insert in the rule interest as a recoverable cost, and *Cooper* does not provide a basis to do so. In fact, Cal. Code Civ. Proc. § 1858 prohibits this, saying, "[i]n the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what

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[1] Petitioner also criticizes the court for disregarding the rulemaking history and purpose of the rule. (Petition, p. 4.) This is disingenuous, at least. In a declaration in support of its Request for Judicial Notice, Petitioner's attorney stated that he commissioned a legislative history "when this case was pending in the Court of Appeal" but did not submit it to the court at that time, and is only doing so now. (Declaration of Tony J. Tanke ("Tanke Decl."), ¶ 2.) Thus any failure of the court to consider this legislative history would be, in effect, Petitioner's invited error since Petitioner did not ask the court to consider it.

has been omitted, . . ." Such an addition must be done by the legislative process (here, the Judicial Council), not judicial interpretation.

III. LEGAL ANALYSIS

A. Cal. Rule of Court 8.278 Does Not Authorize A Court to Award Interest On Funds Borrowed To Obtain A Letter of Credit Used As Collateral For An Appeal Bond

1. Rule 8.278(d)(1)(F) Does Not Mention Interest As An Awardable Cost

Cal. Rule of Court 8.278(d)(1)(F) includes as recoverable costs on appeal:

> The cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary.

Interest is not mentioned. Nothing in the language of the rule supports it as including as a recoverable cost the interest that Falk paid to borrow money and then deposit in a bank account to secure a letter of credit.

2. Cost Rules and Statutes Are Strictly Construed

Statutes and rules like Rule 8.278(d)(1)(F) regarding the recovery of litigation costs are strictly construed so that only those costs specifically enumerated in them are permitted. (*Moss v. Underwriters Report, Inc.* (1938) 12 Cal.2d 266, 274; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 407; *Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281, 289.) Only "ordinary costs" are recoverable. (*Ferrell v.*

County of San Diego (2001) 90 Cal.App.4th 537, 543-544.) Such costs must be "actually incurred." (*Acree, supra,* 92 Cal.App.4th at 410-411.)

Petitioner argues to include interest as a cost from definitions in *Black's Law Dictionary* and *Merriam-Webster's Collegiate Dictionary* that costs include "expenditures."(Petition, pp. 11-12.)[2] However, even those definitions do not say "interest" is included as an "expenditure." Interest is not mentioned. Moreover, the dictionary definitions are inapplicable because awardable litigation costs are defined as only those specified in the relevant statutes or rules. (*Moss, supra,* 12 Cal.2d at 274; *Rabinowitch v. Cal. Western Gas Co.* (1967) 257 Cal.App.2d 150, 161; *Agnew v. Cronin* (1959) 167 Cal.App.2d 154, 156-157.) The court in *Ferrell v. County of San Diego* (2001) 90 Cal.App.4th 537, 543-544 rejected the use of such dictionary definitions to expand the definition of costs from that set forth in the applicable rules and statutes. Without interest being specified in Rule 8.278(d)(1)(F) as a cost, the dictionary definitions are irrelevant because there is no authority to award interest in the first place.

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[2] Such a broad interpretation of "costs" or "expenses" is problematic in that it could include intangibles such as overhead and labor costs, which may be subject to vagaries and manipulation. Moreover, such additional costs, if they were awardable for money borrowed for letters of credit would also be awardable for money borrowed to permit a litigant to pay for other litigation costs, such as experts, exhibit preparation and transcripts.

No statute or rule regarding recoverable trial or appellate costs permits the awarding of interest or similar indirect expenses. In the past, when the legislature wanted to discuss interest, it specified interest, such as in the former version of Cal. Code Civ. Proc. § 1033, where it indicated

> where the court determines that interest should not be recovered from a date prior to the entry of judgment under subdivision (b) of Section 3287 of the Civil Code, the clerk of judge shall include in the judgment entered by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained.[3]

If the legislature (or, in this case, the Judicial Council) wanted to include interest as a cost that a successful appellant could recover, it could have done so by specifying this. However, it has not done so. As shown above, without such authorization, such interest cannot be awarded. Petitioner's argument that the Judicial Council could have stated interest was excluded (Petition, p. 14) turns statutory interpretation on its head. (Cal. Code Civ. Proc. § 1858.) It is what the rule says—not what it could have said—that a court considers in interpreting it. (*See, Geldermann, Inc. v. Bruner* (1992) 10

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[3] This statute was repealed and replaced in 1986 by another costs statute.

Cal.App.4th 640, 644 (Courts' "authority is limited to applying [rules] as written.")

No case that has analyzed this or similar questions, with the possible exception of *Cooper*, has held interest recoverable as a litigation cost. Instead, such cases have followed the law that the language of the governing rule must be strictly construed, only permitting costs that the statute has specified. (*Geldermann, Inc., supra,* 10 Cal.App.4th at 642; *Golf West of Kentucky, Inc., supra,* 178 Cal.App.3d at 316.) In fact, in *Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at 289, the appellate court reversed a trial court's awarding interest incurred on borrowed funds used for an undertaking. It rejected as a cost item "interest paid . . . on cash . . . borrowed and deposited as an undertaking on the issuance of the preliminary injunction." (*Id.*)

3. Rule 8.278(d)(1)(F) Should Not Be Expanded to Include Interest As Costs for Policy Reasons

Policy reasons also militate against the expansion of recoverable appeal costs incurred to include interest. For instance in *Golf West of Kentucky, Inc., supra,* 178 Cal.App.3d 313, the court found it inappropriate for an appellant to obtain such costs where, as here, they were exponentially larger than the actual fee required to obtain a bond. In addition, as indicated in *Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at 289, there is an inequity in awarding interest to an appellant that borrows money to make a deposit, but not to one who uses his own money. Similarly, there is the unfairness that an appellant

who borrowed such money might recover interest on it, while a litigant after trial would not be permitted the same interest because Cal. Code Civ. Proc. § 1033.5(a)(D)(6) permits a post-trial cost award for only "premiums on necessary surety bonds."

The expansion of the rule to include as appellate costs interest for borrowed money raises the question where should such expansion end. Would "costs" include the time of an employee to obtain a letter of credit? Would it include overhead and other intangible and indirect expenses that would be difficult to calculate? Would a party's borrowing funds to pay for a cost item entitle the party to recover the interest incurred for this? Would, as the *Sequoia Vacuum Systems* court noted, the expansive reading of "costs" and "expenses" support the awarding of interest in the form of lost opportunity costs when a litigant used his or her own money for such costs? (*Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at 289.) These questions are best left to the legislative process to resolve. Costs are defined by statute, and the interpretation of them to include costs not specified, as the First Appellate District's decision indicates, "opens a can of worms." (Decision p.12.)

B. The *Cooper* Case Does Not Apply To Make Awardable Interest On Money Borrowed To Obtain A Letter of Credit To Secure A Surety Bond

As the First Appellate District decision recognizes, *Cooper v. Westbrook Torrey Hills, LP* (2000) 81 Cal. App.4th 1294, does not make interest awardable in the situation involved in this case. *Cooper* involved a

developer's appealing a trial court's decision that it was obligated to pay for certain work done by an unlicensed contractor. (*Cooper, supra,* 81 Cal. App.4th at 1296-1297.) To avoid foreclosure of the subject property, the developer, Cooper, obtained an undertaking order which he funded with the proceeds of a loan deposited in the court in lieu of obtaining a bond. (*Id.* at 1297.)

After the appellate court reversed the trial court's determination, Cooper sought as costs the interest payments he had paid. (*Id.*) The trial court refused to award this to Cooper, reasoning that the then applicable Cal. Rule of Court 26, the predecessor to Rule 8.278, did "not permit a party to recover the expenses associated with making a cash deposit in lieu of a surety bond." (*Id.* at 1298.)

The Fourth Appellate District reversed on the grounds that Cal. Code Civ. Proc. § 995.730 "explicitly requires that a deposit given in place of a bond must be treated in the same manner as a bond." (*Id.*) It distinguished earlier cases disallowing costs associated with obtaining similar letters of credit as overruled by a 1994 amendment to Rule 26 that added as recoverable costs expenses to obtain a letter of credit. (*Id.* at 1299.)

The *Cooper* court reasoned that Cal. Code Civ. Proc. § 995.730 required a bond and deposit in lieu of a bond to be treated as "equivalents" and that under Rule 26(c)(6) "the cost of obtaining a bond is recoverable, the cost of making a cash deposit is also recoverable." (*Id.* at 1300.) From these premises, the court made the jump that interest payments a party made to borrow money

that was then deposited in court in lieu of a bond were also recoverable. The court pointed to no case or authority for its conclusion that interest was included as such a recoverable cost. Moreover, it ignored Cal. Code Civ. Proc. § 995.250 that limits recoverable costs and does not provide for interest.

Cooper differs from the present case. As both the trial court and First Appellate District noted, *Cooper* only applies to a situation in which money was borrowed so as to make a direct deposit in court, when such deposit substitutes for a surety bond. (Opinion, p.7; 2 AA 528.) It does not apply to money deposited in a party's own bank account.

In addition, the 1982 amendments to the Bond and Undertaking Law on which the *Cooper* court relied merely codified and consolidated in one chapter then-existing law. (*Milo Equipment Corp. v. Elsinore Valley Mun. Water Dist.* (1988) 205 Cal.App.3d 1282, 1285-1286; *Royster Construction Co. v. Urban West Communities* (1995) 40 Cal. App. 4th 1158, 1167.) It did not change previous law that did not provide for the recovery of interest on surety bonds (or money securing letters of credit) as a cost. (*Moss, supra,* 12 Cal.2d at 274; *Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at 289; *Golf West of Kentucky, Inc. v. Life Investors, Inc.* (1986) 178 Cal.App.3d 313, 315.) Accordingly, the *Cooper* court's use of section 995.730, while ignoring Cal. Code Civ. Proc. § 995.250 and the fact that the law was a mere codification of previous law, did not support its decision that interest was a recoverable cost.

C. The Opinion's Criticism of *Cooper* Does Not Create a Conflict in the Districts Because Such Criticism Was *Dicta*

Without dispute the First Appellate District's decision contains significant criticism of *Cooper's* reasoning. It notes that the premise of *Cooper* "does not withstand scrutiny" because it only cites one section of the Bond and Undertaking Law that a deposit in lieu of a bond is treated the same as a bond (Cal. Code Civ. Proc. § 995.730.), while ignoring Cal. Code Civ. Proc. § 995.250 which "limits recovery of costs for a bond to the premium paid for it—with no mention of any collateral or ancillary expenses. . . ." (Opinion, p. 8.) For these reasons, the Opinion states that *Cooper* suffers from "its unstated assumption that interest paid on an appellate bond is recoverable," which the statutory scheme does not support. (Opinion, p. 8.) Moreover, the Opinion states *Cooper* is "dubious" in ignoring Cal. Code Civ. Proc. § 1033.5 which permits the recovery of only premiums on surety bonds. (Opinion, p.10-11.)

In contrast, however, the Opinion makes clear that the court's holding is based on the fact that *Cooper* involved a situation different than considered in the appeal before it. It states *Cooper* is "not controlling" because the "issue here is a letter of credit, not a cash deposit." (Opinion, p. 7.) It is for this reason that the First Appellate District decided "not to extend *Cooper* to letters of credit. . . ." (Opinion, p. 7.) (Emphasis added.)

Discussion in an opinion not necessary to its determination is *dicta* and is not binding precedent. (*Western Landscape Construction v. Bank of America*

(1997) 58 Cal.App.4th 57, 62.) The *Western Landscape Construction* court held that language in a case was *dicta*, and "not binding precedent" when it involved facts not involved in the case being considered. (*Id.* at 61.) It explained:

> To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised. Only statements necessary to the decision are binding precedents; explanatory observations are not binding precedent. (*Id.*)

Similar is *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1301, where the court held that language in a Supreme Court case regarding equitable subrogation was not applicable when the case in which this language appeared did not involve equitable subrogation. The *Fireman's Fund Ins* court indicated that:

> In every case, it is necessary to read the language of an opinion in the light of its facts and the issues raised, in order to determine which statements of law were necessary to the decision, and therefore binding precedent, and which were general observations unnecessary to the decision. The latter are *dicta*, with no force as precedent. (*Id.*)

Since the *Cooper* case and the one before the First Appellate District involved different fact situations—letters of credit verses cash deposits in lieu of bonds—the criticisms of the *Cooper* court's reasoning are non-binding *dicta.*

That the Opinion's criticisms of the *Cooper's* court's reasoning are *dicta* and not binding is strongly shown by *Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 66-67. There a footnote in a Supreme Court case criticizing the reasoning of another case was found to be *dicta* and not dispositive for an issue in a case involving a different factual situation. This was in part because the footnote occurred in a discussion of rules the case did not decide. (*Id.* at 67.) Moreover, the *dicta* were for a case that involved "facts materially different from those of the present case." (*Id.*at 68.) It was thus not binding authority controlling the resolution of the case. (*Id.* at 66.)

Similarly, here, the criticism of the *Cooper* case by the First Appellate District is not binding authority: it is *dicta.* It does not create a conflict of holdings in the appellate districts that it is necessary for this Court to resolve. (Cal. Rule of Court 8.500(b)(1).) The Supreme Court does not review issues that are "not necessary for [a] decision." (*Carpenter v. Pacific States Savings & Loan, Co.* (1937) 19 Cal. App.2d 263, 269.) Moreover, because the facts of *Cooper* so differ from those involved here, and such facts would not be before this Court, any discussion of *Cooper* would be *dicta.* For these reasons, the Court does not need to grant review to resolve a conflict in the districts: no such conflict exists.

D. The First Appellate District's Decision Does Not Violate The Equal Protection Clause

There is no dispute that Petitioner did not raise the equal protection argument in the trial court. A constitutional issue should be raised first in the trial court, which, since Falk did not do, it waived. (*Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal. App.4th 563, 585.) The First Appellate District thus properly declined to consider the argument. (*People v. Burgener* (2001) 29 Cal.4th 833, 860, n.1.) Similarly, this court normally does not decide arguments not brought up in the lower courts. (Cal. Rule of Court 8.500(c)(1); *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481.) Because the issue was not raised in the trial court, it was not developed there and it should not be considered here.

Moreover, Petitioner's equal protection argument is based on faulty premises. The state equal protection clause, Cal. Const. Art 1, section 7, requires only that similarly situated people be treated similarly. (*Griffiths v. Superior Court* (2002) 96 Cal. App.4th 757, 775; *Thompson v. Superior Court* (2001) 91 Cal. App.4th 144, 158.) Under it, absolute or identical equality is not required. (*People v. Jennings* (2000) 81 Cal. App.4th 1301, 1311; *In re Jose Z.* (2004) 116 Cal. App.4th 953, 960.) If there is a rational relationship for putative disparate treatment to occur, it will be permitted. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 841.) Where, as here, fundamental rights are not involved, legislation is presumed constitutional. (*Paretto v. Dept. of Motor

Vehicles (1991) 235 Cal. App.3d 449, 455.) Statutes imposing differing procedures on litigants are generally deemed valid where some rational basis exists for them. (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal. App.4th 442, 449.)

Petitioner's equal protection argument appears to depend on the contrast between *Cooper's* ruling that a person who posts money in lieu of a bond may receive interest, while a person who borrows money to deposit in a bank account to obtain a letter of credit does not. It is not apparent that such persons are similarly situated. Each makes a different choice as to how to avoid an execution on a judgment. Further, the premise for the argument depends on the propriety of the *Cooper* decision, which, as the Fist Appellate District decision shows, is questionable.

Moreover, even if the litigants in *Cooper* and here were similarly situated, there are reasonable rationales to support different treatment. It may be fair and proper (as the trial court thought) that an appellant get only one cost, either that of the letter of credit and/or surety bond or interest on the deposit made to avoid having a surety bond. The reason for this putative disparate treatment might also stem from the difference in the ability to calculate interest where it is posted in lieu of a surety bond verses a deposit in a bank. For instance, where, as here, the deposit is made in a bank, the interest paid may be offset, in part or whole, by the interest provided by the bank. Other reasons the bank depositor may be treated differently than the appellant

who posts cash in lieu of a surety bond include the depositor's ability to withdraw the money, get interest on it or choose a different way of securing the surety bond. Assuming there is a difference in treatment created by the *Cooper* decision, a number of reasonable rationales would permit this.

Lastly, Petitioner's equal protection argument is ironic in light of the disparate treatment, as indicated in the language of applicable statutes and rules, between an appellant and a litigant seeking costs after a trial. For such litigants Cal. Code Civ. Proc. § 1033.5(a)(D)(6) permits a cost award only for "premiums on necessary surety bonds." This would preclude interest on money borrowed to obtain a letter of credit. Accordingly, the equal protection argument proves too much. There may be a disparity, assuming *Cooper* is correctly decided, but it is rational and not constitutionally impermissible.

E. The Court Should Deny the Petition Because Falk Did Not Raise Issues Below and Requests Judicial Notice of Evidence Not Presented Below

Another reason to deny the Petition is that it raises arguments and depends on evidence that Petitioner did not present previously. Nor did Petitioner attempt to bring such issues and evidence to the attention of the First Appellate District through a motion for rehearing. In fact, in violation of Cal. Rule of Court 8.504(b)(3), Falk did not disclose in its Petition that it failed to file a motion for rehearing.

The Supreme Court generally does not consider matters not raised below. (*Jimenez, supra,* 29 Cal.4th at 481; *Flannery v. Prentice* (2001) 26

Cal.4th 572, 591.) "As a policy matter . . . the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (Cal. Rule of Court 8.500(c)(1).) Moreover, if a petitioner seeks review of such issues, it should have first filed a motion for rehearing before raising such issues with this Court. (Cal. Rule of Court 8.500(c)(2); *In re Marriage of Goddard* (2004) 33 Cal.4th 49, 53, n. 2; *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1000, n. 2.)

The very fact that Petitioner has filed a Request for Judicial Notice shows it is depending upon new facts not argued below. Such facts should have been presented below. Petitioner's attorney stated that he arranged to gather the legislative history for which Falk is now seeking judicial notice for the lower court's consideration but, for some reason, did not present it in connection with its appeal. (Tanke Decl., ¶ 2.) Nor did Petitioner present it in a Motion for Rehearing. This is likely because <u>nothing in the legislative history helps Petitioner's argument</u> that Rule 8.278(d)(1)(F) includes interests as recoverable costs. Falk's belated Request for Judicial Notice of the legislative history without having first submitted it to the lower courts is questionable and further undermines its argument to grant its Petition.

Petitioner also includes at least one a new argument in its Petition. This argument concerns the differences between rulemaking authority for the recovery of costs after appeal and for those regarding the recovery of costs after trial. While it is not quite clear what Petitioner is trying to suggest with

the distinction, the argument was not raised previously and should not be considered by this Court in its determination as to whether to grant the Petition.

For similar reasons the *amicus curiae* letter of International Sureties, Ltd. is not persuasive. International Sureties, Ltd, of course, has a significant financial stake in this matter, not as a potential litigant, but as a company that makes money on issuing surety bonds. It argues that review of this case should be granted because the practical result of the validity of both the First Appellate District's Opinion and *Cooper* is that appellants will be encouraged to borrow money to post cash in courts in lieu of bonds instead of buying surety bonds from companies such as International Sureties, Ltd. It then suggests that the administrative staff of trial courts, despite the statutory provisions providing for it, are reluctant and ill-equipped to deal with deposits of cash used in lieu of bonds. Accordingly, International Sureties, Inc. argues, the appellate bonds it sells are the preferable way to secure a judgment on appeal.

International Sureties, Ltd.'s description of the potential effect of the lower court's decision is mere speculation. There is no evidence to support it. Nor is there evidence in the record for the other "facts" in the letter, including none regarding trial courts' procedures and supposed reluctance to receive cash in lieu of a bond. No such evidence was presented to the trial court or the Court of Appeal. The "facts" promoted by International Sureties, Ltd. have not been evaluated and tested and have not been determined to be true by any court.

Before this Court grants review on the basis of the purported facts submitted by International Sureties, Ltd., such facts should be developed properly in the lower courts, with the admission of evidence that might support the surety company's assertions, and evidence that might dispute it. Granting review due to such untested "facts" supplied by the financially interested International Sureties, Ltd. is premature and would deprive Respondents of the ability to develop and present evidence to challenge these unsupported assertions.

Because the inclusion of interest as a recoverable cost is a legislative, not judicial question, the Court should not review this issue. The legislature and relevant rules-making bodies like the Judicial Council know how include interest as costs. It is up to them to determine what costs are permitted. Thus, just as the *Geldermann* court decided with respect to the earlier version of this rule, this is not an issue for review by this Court; it is one for the legislative process to decide. (*Geldermann, supra,* 10 Cal.App.4th at 644.)

CONCLUSION

For the reasons set forth above, Steve and Connie Rossa respectfully submit that the Court should not grant the Petition for Review of D. L. Falk Construction, Inc. The Decision of the First Appellate District was correct. It does not create a legal conflict with the *Cooper* decision. The determination as to whether interest is a recoverable appellate cost is one that should be made by the legislature, not this Court. A decision broadly interpreting California Rule

of Court 8.278 to authorize the awarding of interest incurred on money borrowed to obtain a letter of credit securing a surety bond would create significant questions and problems in this context as well as other cost determinations.

DATED: 7/2/2010 McLENNON LAW CORPORATION

By: Marc Sherman
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CERTIFICATION OF TYPE AND WORD COUNT

This Respondent's Opening Brief contains 5093 words and is a 13 point font in Times New Roman Type.

DATED: 7/2/2010 McLENNON LAW CORPORATION

By: Marc Sherman

DANIEL F. McLENNON,
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CONNIE ROSSA

PROOF OF SERVICE

I, the undersigned, declare that:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am associated with the law firm of McLennon Law Corporation, and my business address is 550 California Street, Suite 700, Sacramento Street Tower, San Francisco, California 94104. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Post Office. On this date, I caused to be served the following:

ANSWER TO PETITION FOR REVIEW

______ (BY ELECTRONIC SERVICE) by transmitting via internet the document(s) listed above to the recipient set forth below, or as stated on the service list, on this date before 4:00 p.m.

______ (BY PERSONAL SERVICE) by personally delivering, or causing to be delivered, a true copy thereof to the person and at the address set forth below.

_XX__ (BY MAIL) by placing a true copy thereof, enclosed in a sealed envelope with first class postage thereon fully prepaid, at my place of business at 550 California Street, Sacramento Tower, Suite 700, San Francisco, California 94104, addressed as set forth below.

______ (BY OVERNIGHT COURIER) by placing a true copy thereof enclosed in a sealed envelope placed with an overnight courier, at my place of business at 550 California Street, Sacramento Tower, Suite 700, San Francisco, CA 94109, addressed as set forth below.

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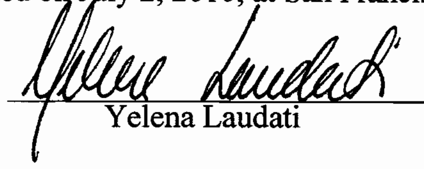
1 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 2, 2010, at San Francisco,
2 California.



3 Yelena Laudati

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