Supreme Court Case No. **S180890**

Supreme Court of California

LES JANKEY

Plaintiff-Petitioner

v.

SONG KOO LEE

Defendant-Respondent

Petition after a Decision by the Court of Appeal,
First Appellate District, Division Four

Ruvolo, P. J., Sepulveda and Rivera, JJ

Case No. A123006

REPLY IN SUPPORT OF REVIEW

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INTRODUCTION

How many United States Supreme Court decisions does the court of appeals have to ignore before the respondent considers it an institutional failing? How many poverty-stricken quadriplegics need to pay (mandatory) six-figure attorney fee awards before the respondent considers the issue significant? How many Ninth Circuit opinions must be rejected before the respondent admits that "uniformity" does not exist on an important issue? In his original petition, Jankey pointed out – correctly it would seem, since respondent was unable to identify *any* faults in his legal analysis or factual representations – that the court of appeals in this matter *intentionally* created a split between the California state and federal courts by ignoring: (1) sixty-nine years of United States Supreme Court precedent on conflict preemption; (2) Congressional intent regarding preemption under the ADA; (3) thirty-years of state and federal court precedent on fee awards; (4) the legislative history of Section 55, and the intent of the California legislature; (5) basic rules of statutory construction involving statutes that sit in *pari materia*; and (6) the almost universal rejection of the vexatious litigant order issued against Jankey's trial counsel, Thomas Frankovich. Unable to deny these truths, respondent falls back on questionable factual representations, head-in-the-sand legal arguments, and general platitudes about the standards governing California Supreme Court

petitions, in an effort to dissuade the court from granting review. As petitioner explains below, the respondent's arguments are without merit and should be rejected.

REPLY

I. Although respondent claims that the trial court found petitioner's Section 55 claim "frivolous," neither the trial court order nor the appellate court affirmance included such a finding – *as respondent himself is forced to concede on the second to last page of his Answer.*

First, respondent argues that the petition should be rejected because independent grounds support the award of fees – *i.e.*, the trial court found Jankey's case frivolous. *Answer, p. 3* (citing fee award). In fact, no such finding was ever made by the trial court, as respondent is forced to concede on the second to last page of the Answer. *Id., p. 11* ("the trial court did not expressly use the term frivolous in describing the problematic nature of petitioner's claims and plaintiff DREES's lack of standing from the inception of the action ..."). Accord, *Jankey v. Song Koo Lee,* 181 Cal.App.4th 1173, 1179 (Feb. 5, 2010) ("The court made no finding on whether Jankey's lawsuit could be characterized as frivolous."). Because the trial court never held that Jankey's claims were frivolous, it is inappropriate for respondent to now argue that the petition should be rejected based on non-existent factual findings.

II. Respondent's accusation that petitioner is not resolving an issue of broad public concern, which affects a significant number of people, would be more believable if the appellate court had not ignored *five* United States Supreme Court decisions, an identical analysis from the Ninth Circuit, and the expressed intent of the California Legislature.

Second, respondent argues that the petition should be rejected because "petitioner is seeking correctional review from this Court, an improper and insufficient reason for granting review ... [and] has not demonstrated (much less addressed) how the Court of Appeal's ruling will affect a significant number of people statewide or require resolution of an issue of broad public concern." *Answer, p. 9.* Respondent then accuses petitioner of seeking to vindicate his narrow personal interest in this case by avoiding to pay attorney fees. *Ibid.* At the risk of being accused of giving short-shrift to this argument, and with all due respect to respondent: *Balderdash.* The court of appeals had to ignore no fewer than *five* United States Supreme Court decisions, the *identical* analysis of the Ninth Circuit on the same issue, the *documented* history of Section 55 (a copy of which is attached to this reply), the intent of the California Legislature, the plain language of ADA preemption, and the rules of statutory construction to arrive at what appears to be a result driven analysis – *i.e., ADA litigation is bad, Frankovich is bad, his clients are bad, and they must be punished. Song Koo Lee,* 181 Cal.App.4th at 1184-1187, and n.9. In so doing, the court of appeals introduced

chaos in an otherwise orderly area of law, and rejected over sixty years of United States Supreme Court precedent. Instead of determining whether a specific state law conflicts with a specific federal law under the circumstances of that particular case (the test established by the United States Supreme Court), California courts – under the *Song Koo Lee* analysis – are now permitted to take a more holistic view and determine whether federal law conflicts that state law "as a whole." *Compare*, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (the primary function of a court is to determine "whether, under the circumstances of *this particular case*, [California] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (italics added), *with Song Koo Lee*, 181 Cal. App. 4th at 1186, citing *Hubbard v. SoBreck, LLC*, 554 F.3d 742 (9th Cir. 2009) (Ninth Circuit "went astray when it failed to look at the CDPA as a whole in measuring it against the ADA's protection, and instead improperly parsed the law."). No longer will California courts be bound by the circumstances of a particular case; instead, they can consider the infinite number of *hypothetical* circumstances in which a party would be entitled to greater protections under state law, and thereby side-step conflict preemption. Contrary to respondent's claim otherwise, the institutional harm caused by the *Song Koo Lee* opinion is both significant and important, and the confusion that opinion created needs to be resolved immediately.

III. Respondent's statement that review is not required to secure uniformity of decision is not only untrue but misrepresents the scope of issues and cases affected by the underlying decision.

Finally, respondent argues that the petition should be rejected because "review is not required to secure uniformity of decision among courts in California because there is no conflict among the appellate courts on the issue presented in [Jankey's] petition for review." *Answer, pp. 6-8.* This statement is not only patently untrue, but misrepresents the scope of issues and cases affected by the underlying decision. Simply put, this case does not involve a conflict between the *Song Koo Lee* and *Arciero Wine* decisions, as respondent suggests. Rather, this case involves a conflict between *Song Koo Lee* and every other published decision *in existence* (except for *Arciero Wine*). As evinced in his original petition, the court of appeals departed from well known principles of conflict preemption, (*Petition, pp. 6-10*), ADA preemption, (*Petition, pp. 11-13*), fee shifting awards, (*Petition, pp. 13-16*), and statutory construction, (*Petition, pp. 20-22*); and, in the process, ignored a host of *published* California opinions establishing those same principles, the string citation for which shall not be repeat here. Unable to deny that departure (or excuse the wholesale abandonment of these principles), respondent instead focuses on the *one case* that ostensibly supports its position: *Arciero Wine*. But the *Arciero Wine* analysis is itself not without flaws and a poor

source of authority for opposing review.[1] Furthermore, brushing aside these other California court decisions (without so much as a footnote) is not only inappropriate but a disservice to this court, since ignoring the problem will neither eliminate the conflict nor correct the institutional harm it caused. Nor is respondent serving the court well by intentionally overlooking *federal* opinions (*e.g., Hubbard v. SoBreck*) in order to represent that there is "uniformity of decision." *Answer, pp. 6-9.* Respondent fails to cite – and petitioner could not find – any authority discounting federal courts opinions when determining whether there is uniformity of decision. In fact, the opposite appears true, as this court routinely grants review to ensure uniformity between California state and federal courts. *See, e.g., Munson v. Del Taco, Inc.*, 46 Cal.4th 661 (June 11, 2009) (California Supreme Court resolves dispute of law between state and federal courts.). Boiled to its essence, while petitioner can understand why respondent omitted these conflicting state and federal opinions, ignoring them will not make review of this matter any less compelling or necessary.

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[1] As Jankey's counsel explained in his original petition for review. *See, e.g., Molski v. Arciero Wine Group.*, Petition for Review, Case No. S165946, 2008 WL 6137582 (Aug. 15, 2008). Accord, *SoBreck, LLC*, 554 F.3d 742.

CONCLUSION

The best evidence supporting review is the Answering brief. Unable to rebut the factual representations and legal analysis contained in his original petition, Lee's response consisted of little more than general platitudes, unsubstantiated factual representations, and non-existent legal arguments. In other words ... *a thundering silence.* Given respondents' inability to present a viable basis for rejecting his petition, Jankey hopes the court will take this opportunity to (1) resolve what is now a full-blown split between California state and federal courts, and (2) overturn the *Song Koo Lee* opinion with an authoritative and definitive interpretation that brings Section 55 in line with (a) the other fee-shifting statutes and (b) the intent of the California legislature.

Respectfully submitted this seventeenth day of April 2010.

Scottlynn J Hubbard IV
Law Offices of Lynn Hubbard
12 Williamsburg Lane
Chico, California 95926
Attorney for Petitioner

By: /s/ _____/
Scottlynn J Hubbard IV
Attorney for Petitioner

CERTIFICATE OF WORD COUNT

This Petition contains 1,513 words from the cover page to signature block.

Respectfully submitted this seventeenth day of April 2010.

Scottlynn J Hubbard IV
Law Offices of Lynn Hubbard
12 Williamsburg Lane
Chico, California 95926
Attorney for Petitioner

By: /s/ Scottlynn J Hubbard IV
Attorney for Petitioner

Attachment No. 3

Excerpts of Legislative History for Section 55 of the California Civil Code

CALIFORNIA LEGISLATURE—1972 REGULAR SESSION

ASSEMBLY BILL No. 1547

Introduced by Assemblyman Sieroty

March 15, 1972

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 55 to the Civil Code, relating to disabled persons.

LEGISLATIVE COUNSEL'S DIGEST

AB 1547, as introduced, Sieroty (Jud.). Disabled persons.

Provides procedure for obtaining injunction against further construction or operation of a public or private facility not conforming to building requirements with respect to blind or disabled persons.

Vote—Majority; Appropriation—No; Fiscal Committee—No.

The people of the State of California do enact as follows:

SECTION 1. Section 55 is added to the Civil Code, to read:

55. (a) Notwithstanding any other provision of law, a blind or other physically disabled person may give notice to the owner of any private facility, or, in the case of a public facility, to the person designated in Section 4453 of the Government Code or in Section 19958 of the Health and Safety Code, that such facility contains unauthorized deviations from the requirements of Sections 54 and 54.1, Section 4451 of the Government Code, or Section 19955 or 19955.5 of the Health and Safety Code.

(b) If such deviation is not rectified within 90 days of

such notice, a blind or other physically disabled person may bring an action for an injunction against further construction or operation of the nonconforming facility until the deviation is corrected. Such blind or physically disabled person shall not be required to post a bond pursuant to Section 529 of the Code of Civil Procedure, and, if successful in obtaining an injunction, shall be awarded reasonable attorney's fees and court costs, irregardless of whether the facility in question is public or private in character.

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BILL ANALYSIS

DEPARTMENT	AUTHOR	BILL NUMBER
GENERAL SERVICES	ASSEMBLYMAN SIEROTY	AB 1547
SPONSORED BY	RELATED BILLS	DATE LAST AMENDED
UNKNOWN	UNKNOWN	ORIGINAL

BILL SUMMARY

Specific Findings:

Assembly Bill No. 1547 provides procedures for obtaining an injunction against further construction or operation of a private or public facility not conforming to building requirements in respect to the Physically Handicapped Law.

Assembly Bill No. 1547 would allow a blind or physically disabled person to obtain an injunction against construction or operation of a facility without being required to post a bond for the purposes of reimbursing the owner for monies lost as a result of such action. The bill would also award reasonable attorney fees and court costs to the person initiating the action.

We are concerned that the bill could result in unreasonable actions being taken against the owner of a building or facility. A handicapped person could initiate action against the owner of a building or facility without posting a bond to protect the owner against excessive losses of revenue. If enacted Assembly Bill No. 1547 could result in unreasonable actions being initiated.

Financial Analysis:

The bill would have no fiscal impact upon the Department of General Services is indeterminate; however, if a number of legal actions were filed against the state it could be substantial.

(Durpo: 5/4/71.)

INFORMAL POSITION:

3-B

Legislative Analyst
July 12, 1972

AB 1547 (Am. 6/19).

ANALYSIS OF ASSEMBLY BILL NO. 1547 (Sieroty)
As Amended in Assembly, June 19, 1972
1972 Session

Fiscal Effect:

Cost: None.

Revenue: None.

Analysis:

This bill would allow blind or physically disabled persons to obtain an injunction against further construction or operation of a public or private facility if the facility contains unauthorized deviations from statutes regulating building accessibility for the physically handicapped and if 90 days have elapsed from the time said person gave written notice to the owner informing him of the deviations. A bond will not be required for filing of the injunction if the court finds evidence of nonconformity to be clear and convincing. If the injunction is obtained, the plaintiff is to be awarded all reasonable attorney's fees and court costs.

This procedure is to apply only to future construction or alterations of facilities.

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ASSEMBLY COMMITTEE ON JUDICIARY
CHARLES WARREN, CHAIRMAN

BILL DIGEST

Bill: AB 2471 Hearing Date: 8/14/73

AUTHOR: Sieroty

SUBJECT: Physically Handicapped; Access to Buildings

BACKGROUND:

Under existing law, all buildings and facilities built since 1968 using state or local funds, and all gas stations, office buildings, shopping centers, hospitals, convalescent homes, hotels, motels, restaurants and other places of amusement built since 1970, must insure reasonable access to the physically handicapped. All such buildings and facilities built before the applicable dates must comply with the necessary standards whenever they alter, repair or add to the building or facility.

Enforcement of this law presently rests with the Director of General Services if state funds were used. It rests with the building department of the applicable local government if local funds were used. Unauthorized deviations must be rectified within 90 days after discovery.

BILL DESCRIPTION:

This bill provides that a physically disabled person can give written notice of a deviation to the owner of a private facility, or to the person responsible for enforcing the law if the deviation is in a public facility. If the deviation is not corrected within 90 days, the physically disabled person can then seek an injunction against further construction or operation of the nonconforming facility until the deviation is corrected.

The bill also provides that if the person is successful in obtaining an injunction the court can award him reasonable attorney's fees and court costs.

CONTINUED

SUPPORT:

National Rehabilitation Association.

OPPOSITION:

North Coast Builders Exchange.

ENROLLED BILL REPORT

AGENCY	BILL NUMBER
Health and Welfare Agency	AB 2471 (8/8/74)
DEPARTMENT, BOARD OR COMMISSION	AUTHOR
Department of Rehabilitation	Sieroty

SUBJECT: Inforcement of Architectural Barrier Laws

SPONSORSHIP: Assemblyman Sieroty

RELATED BILLS: AB 1547 (Sieroty), 1972

HISTORY: Assemblyman Sieroty carried AB 1547 (1972) which would have permitted a blind physically handicapped person to bring action for an injunction to stop construction or operation of a building or facility which did not meet the architectural barrier laws without being required to post a bond.

ANALYSIS: This bill is much more moderate specifying that an injunction may be brought and specifies that the prevailing party will be entitled to reasonable attorney fees. Under AB 2471, the plaintiff would have to post bond in order to bring the action.

Starting in 1968, several laws requiring buildings and other facilities be accessible to the physically handicapped have been passed. Enforcement of these architectural barrier laws have been very weak. Physically handicapped persons do not generally have income or resources necessary to pay for attorney fees when it is necessary to take flagrant violators to court. This bill will make clear that the prevailing party will be entitled to attorney's fees.

FISCAL IMPACT: No impact on state general funds. Other fiscal impact will depend upon awards made by the court.

FINANCE'S POSITION: Neutral

RECOMMENDATION:

Sign the bill

DEPARTMENT DIRECTOR	DATE	AGENCY SECRETARY	DATE
Alan C. Nelson	9/4/74	PE-7	9/12/74

NATIONAL ASSOCIATION

CALIFORNIA COORDINATING COUNCIL

May 30, 1973

Assemblyman Charles Warren
State Capitol Building
Sacramento, California

Assemblyman Warren:

The California Coordinating Council of the National Rehabilitation Association on behalf of its statewide membership wishes to urge your YES vote for AB2471 when it is heard in the Assembly Judiciary Committee.

While California has some of the most progressive laws in terms of removing mobility barriers, there has been a constant problem of enforcement of those laws. Public education of the architects and builders has helped, but it is not enough. The disabled in the State need the courts to back them up in their efforts to move freely in their community. However, attorneys and courts cost money and according to Federal and State statistics, the disabled are among the most financially disadvantaged. For this reason, AB2471 is needed to allow the disabled to bring action against those builders in violation of the law without the prohibitive burden of attorney's fees and court costs. This would put the disabled in the State on a more equal footing with their able-bodied peers.

Respectfully,

Saralea Altman
Legislative Chairwoman
California Coordinating Council
2385 Roscomare Rd. #21
Los Angeles, California 90024

SA:bn

cc: Assemblyman Alan Sieroty

3-E

CERTIFICATE OF SERVICE

I, the undersigned, certify that I am a citizen of the United States and a resident of Marin County, California. I am over the age of eighteen years and not a party to the within action; I am employed in the office of a member of the bar of this court at whose direction service was made; my business address is 4328 Redwood Hwy., Ste. 300, San Rafael, California 94903. The document identified below and this affidavit has been printed on recycled paper meeting EPA guidelines. On the date this affidavit is signed below, a true copy of the REPLY IN SUPPORT OF REVIEW, was placed by me in an envelope addressed to the person(s) at the address(es) set forth below, then sealed and, following ordinary business practices, placed for delivery with the Federal Express Service in Chico, California.

Supreme Court of California
(Original plus 13 copies)
Office of the Clerk
350 McAllister Street
San Francisco, CA 94102-4783

Court of Appeal
First Appellate District (1 copy)
350 McAllister Street
San Francisco, CA 94102

San Francisco County Superior Court
– Main (1 copy)
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I declare under penalty of perjury that the foregoing is true and correct. Executed in San Rafael, California on April 21, 2010.

By: Armetrice Cooper