SUPREME COURT COPY

No. S183523

First District Court of Appeal
Division Two

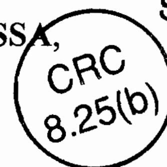
Case No. A125567

IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA

STEVE ROSSA and CONNIE ROSSA,
Plaintiffs and Respondents,

vs.

D.L. FALK CONSTRUCTION, INC.,
Defendant and Appellant.



SUPREME COURT
FILED
JUL 13 2010
Frederick K. Ohlrich Clerk
Deputy

REPLY TO ANSWER TO PETITION FOR REVIEW

On Appeal from the Superior Court of San Mateo County
Superior Court Case No. CIV442294
Honorable Marie Weiner

Tony J. Tanke, SBN 74054
LAW OFFICES OF TONY J. TANKE
2050 Lyndell Terrace, Suite 240
Davis, CA 95616
Telephone: (530) 758-4530
Facsimile: (530) 758-4540
appeals@tankelaw.com

Attorneys for Appellant D.L. FALK CONSTRUCTION, INC.

No. S183523

First District Court of Appeal
Division Two

Case No. A125567

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVE ROSSA and CONNIE ROSSA,
Plaintiffs and Respondents,

vs.

D.L. FALK CONSTRUCTION, INC.,
Defendant and Appellant.

REPLY TO ANSWER TO PETITION FOR REVIEW

On Appeal from the Superior Court of San Mateo County
Superior Court Case No. CIV442294
Honorable Marie Weiner

Tony J. Tanke, SBN 74054
LAW OFFICES OF TONY J. TANKE
2050 Lyndell Terrace, Suite 240
Davis, CA 95616
Telephone: (530) 758-4530
Facsimile: (530) 758-4540
appeals@tankelaw.com

Attorneys for Appellant D.L. FALK CONSTRUCTION, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

DISCUSSION 3

I. THE RULE'S PLAIN MEANING AND DRAFTING HISTORY REVEAL THAT ALL COSTS OF LETTER-OF-CREDIT COLLATERAL – INCLUDING FINANCE CHARGES FOR INTEREST AND LOAN COMMITMENT FEES – ARE RECOVERABLE. 3

II. FAIRNESS TO PREVAILING APELLANTS AND POLICY CONSIDERATIONS ALSO FAVOR REVIEW 6

III. THE CONFLICT BETWEEN THE PRESENT CASE AND *COOPER v. WESTBROOK TORREY HILLS* (2001) 81 Cal.App.4th 1294 GIVES RISE TO UNCERTAINTY THAT CAN BE REMOVED ONLY BY THIS COURT. 9

IV. AWARDING THE FINANCIAL COSTS OF LETTERS OF CREDIT – INCLUDING INTEREST – IS NOT A LEGISLATIVE MATTER BECAUSE CODE OF CIVIL PROCEDURE SECTION 1034, SUBDIVISION (b) HAS LEFT THAT MATTER ENTIRELY IN THE HANDS OF THE JUDICIAL COUNCIL 11

CONCLUSION 12

CERTIFICATE OF WORD COUNT 14

TABLE OF AUTHORITIES

STATE CASES

Cooper v. Westbrook Torrey Hills (2001) 81 Cal.App.4th 1294 ....passim

Ferrell v. County of San Diego (2000) 90 Cal.App.4th 537 ....3, 4

Golf West of Kentucky, Inc. v. Life Investors Inc. (1986) 178 Cal.App.3d 313 7

Goodman v. Lozano (2010) 47 Cal.4th 1327 3

Miller v. Reagh (1959) 170 Cal.App.2d 151 8

So. Cal. Chapter of Associated Builders and Contractors, Inc. v. California Apprenticeship Council (1992) 4 Cal.4th 422 9

State Farm Mutual Automobile Ins. Co. v. Garamendi (2004) 32 Cal.4th 1029 4

STATE STATUTES

Cal. Rules of Court, rule 8.278(d)(1)(F) ....passim

Cal. Rules of Court, rule 8.500(c) 12

Cal. Rules of Court, rule 26(c) ....passim

Code Civ. Proc., section 975.730 10

Code Civ. Proc., section 995.250 2

Code Civ. Proc., section 1033.5 4

Code Civ. Proc., section 1034(b) 2, 4, 11, 12

Code Civ. Proc., section 1036 3

MISCELLANEOUS

9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 512 9

Eisenberg, et al., *California Practice Guide – Civil Appeals and Writs* (Rutter Group 2009), § 14:93 8

INTRODUCTION

The Rossas'[1] Answer highlights the importance of review in several key respects:

First, like the Court of Appeal, the Rossas nowhere bother to explain why one kind of financial outlay to obtain letter-of-credit collateral (i.e., a $950 bank fee) is a "cost to obtain a letter of credit as collateral" under the rule, while two others (i.e., bank interest charges and loan commitment fees) are not.[2] All three are "costs" Falk had to pay. All three were required to secure the letter of credit and the bond. The Rossas do not explain how the plain meaning of the rule or its history discriminates among them these costs.

Second, also imitating the Court of Appeal, the Rossas maintain that a Pandora's Box would be opened if the rule were construed to mean what it says – that all "costs" of obtaining a letter of credit are recoverable. But they neglect the rule's express requirement and the caselaw's command that any interest, fee, or charge be a reasonable and necessary expenditure. Falk did not pay $100,000 voluntarily or out of benevolent feelings. It did so only because it vitally needed letter-of-credit collateral for an appeal bond to stop the Rossas from executing on a legally-flawed judgment. There is manifest equity – and no mischief – in allowing Falk and other similarly-situated appellants to recover this very real and substantial "cost" of an appeal. The

[1] Respondents Steve and Connie Rossa will be referred to as "the Rossas." Appellant D.L. Falk Construction, Inc. will be referred to as "Falk."
[2] All references to "the rule" are to rule 8.278(d)(1)(F) of the California Rules of Court.

Rossas cannot and do not deny the unfairness of leaving Falk and other appellants far less than whole in the wake of unjust money judgments.

Third, the Rossas also ignore the essential premises of *Cooper v. Westbrook Torrey Hills* (2001) 81 Cal.App.4th 1294, in maintaining that the Court of Appeal's devastating criticism and utter rejection of *Cooper* is somehow meaningless dictum. *Cooper* rests on two propositions: (1) that interest to procure letter-of-credit collateral for bonds is recoverable; and (2) that bonds and deposits in lieu of bonds are legally equivalent for cost award purposes. If either is undermined, *Cooper* falls. The Court of Appeal here has rejected both propositions, leaving little or nothing left of *Cooper*. Its rejection is expressed in multiple independent grounds which constitute holdings necessary to its decision, not *obiter dicta*.

Fourth, the Rossas' assert that the California Legislature must enact a new statute specifying that "interest" is among the costs of appeal is groundless. (Answer 20-22.) The Legislature has already spoken in section 1034, subdivision (b)[3] by empowering the Judicial Council to define costs on appeal. No other statute limits or undermines that clear grant of authority.[4] The Judicial Council's decision to award by rule all letter-of-credit costs is legislatively authorized and unassailable.

[3] All statutory cites are to the Code of Civil Procedure unless otherwise stated.

[4] Although the Rossas and the Court of Appeal appear to think otherwise, nothing in section 995.250 preempts the rule. That section: (1) addresses statutory costs not those imposed by statutorily-authorized court rules; and (2) mandates that certain described bond premiums be included in allowable costs, but nowhere restricts appellate costs defined by court rule or forbids the recovery of financial costs or interest to obtain letter-of-credit collateral.

DISCUSSION

I. THE RULE'S PLAIN MEANING AND DRAFTING HISTORY REVEAL THAT ALL COSTS OF LETTER-OF-CREDIT COLLATERAL – INCLUDING FINANCE CHARGES FOR INTEREST AND LOAN COMMITMENT FEES – ARE RECOVERABLE.

The Rossas contend that the Judicial Council's failure to use the word "interest" in the text of the rule, coupled with the rule of "strict construction" of cost statutes, signifies that bank charges for financing letter-of-credit collateral are unrecoverable. (Answer 6-8.) Their contention is deficient on multiple levels.

Initially, the Rossas reject the use of "dictionary definitions" as an aid to ascertaining the plain meaning of the rule. (Answer 7.) To the contrary, dictionary definitions are often used as a means of interpreting the plain meaning of statutes and court rules. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1333-1334, citing *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122 ["When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word."].)[5]

[5] The Rossas' citation to *Ferrell v. County of San Diego* (2000) 90 Cal.App.4th 537, 543-544 (Answer 7), does not alter the plain meaning rule. *Ferrell* construed section 1036 – a special statute governing condemnation fees and costs – to be limited to those costs listed in section 1033.5, which governs prejudgment costs in

As Falk noted in its Petition for Review, this Court has held that court rules are construed in the manner of statutes to ascertain the drafter's intent by looking "first to the words of the [rules] themselves, giving to the language its usual ordinary input and according significance, if possible, to every word, phrase and sentence . . . ." (Petition, p. 11, quoting *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043.) But the Rossas decline to do what this Court says must be done to interpret a rule of court. Instead they prefer to assert, without benefit of authority, that the Judicial Council cannot use the general word "cost" to encompass *all* expenses to obtain a letter of credit, but instead must list one-by-one the expenses it seeks to authorize. (See Answer 7 ["Without interest being specified in [the rule] as a cost . . . there is no authority to award interest in the first place."].)

No case cited by the Rossas or the Court of Appeal addresses the use of broad "cost" language to describe recoverable appellate expenses. Rather, the so-called strict construction cases dealt with situations in which appellants sought to expand the coverage of rules that did not encompass all

---

civil cases. As Falk has noted – and the Rossas do not dispute – *appellate costs are governed not by section 1033.5, but by section 1034, subdivision (b)*, which vests authority in the Judicial Council to "establish by rule allowable costs on appeal." The interpretation of the rule – not the applicability of a condemnation cost statute that does not govern appellate costs – is at issue here. Moreover, *Ferrell* itself uses a dictionary definition of "costs" as an expenditure or outlay of money, thereby supporting Falk's plain meaning construction of the rule. (90 Cal.App.4th at 543.)

"costs," but merely listed very specific kinds of recoverable expenses. (Petition 13.) The Rossas offer nothing to foreclose application of plain meaning principles to the all-encompassing "costs" language used by the Judicial Council in the rule at issue here.

The unreasonableness of the Rossas' argument that interest cannot be included in "costs" becomes manifest when the same contention is extended to other kinds of expenses needed to secure letter-of-credit collateral. Just as the rule does not say "interest," neither does it say "bank fees" or "letter-of-credit fees" or "annual bank charges for a letter of credit." Neither the Court of Appeal nor the Rossas offer any reasoned basis to distinguish – based on the rule's language – one kind of unspecified "cost" from another. The Rossas' argument thus leads to an absurdity. Under their reasoning, none of the possible costs Falk might incur to obtain letter of credit collateral would be recoverable because none are specified in the rule. Under the Rossas' approach, the rule becomes a nullity. As the Petition observes, this was not the Judicial Council's purpose in drafting the rule. (*Id.* 14-21.)

Except to repeat that the word "interest" is absent from the rulemaking history, the Rossas do not deny that the Judicial Council sought to cover all expenses of letter-of-credit collateral. Nor do they explain why, if the Council intended a strict or limited construction excluding interest or other unlisted "costs," it chose to draft Form MC-013 to include "*other*

expenses reasonably necessary to secure surety bond."[6] Interest, of course, is one such expense. (Petition 21.) Again, the Rossas have nothing to say.

The Rossas' further suggestion that no case (except, notably, *Cooper*) has held interest recoverable as an appellate cost likewise begs the question. No previous case has addressed general cost-of-collateral language in a rule or statute. Other cases merely held that "interest" cannot be included when "premium" or other specific expenses are listed without such language. (Petition 13.)

In short, the Rossas simply refuse to consider the plain meaning of the language used by the Judicial Council or its drafting history. Their non-existent analysis heightens the need for Supreme Court review to establish consistency and certainty in the application of the rule.

II. FAIRNESS TO PREVAILING APELLANTS AND POLICY CONSIDERATIONS ALSO FAVOR REVIEW.

The Rossas' parade of horribles that allegedly will arise from a plain-meaning construction of the rule likewise disregards the safeguards present in the rule's language and in caselaw. It also neglects the inequity of denying appellant-victims of erroneous money judgments the prospect of make-whole relief. (Answer 9-10.)

In their so-called policy analysis, the Rossas conveniently ignore the rank unfairness to prevailing appellants who must post bonds to protect

[6] All emphasis added unless otherwise stated.

themselves against legally-flawed money judgments. The Rossas' massive $680,000 monetary award threatened Falk's assets and forced it to incur the expense of an appeal bond. Falk was required to pay the full cost of the bond – more than $100,000 for a $950,000 bond.

In practical effect, Falk was compelled to buy the Rossas the legal protection of a bond on a judgment Falk did not owe. As a matter of equity, the Rossas should restore the reasonable cost of the bond to Falk. This, of course, is exactly what the rule contemplates.

The Rossas predict dire consequences if the full financial costs of appellate bonding are awarded to appellants. (Answer 7, fn. 2; 9-10.) They initially point out that financial charges may be larger than bank fees for letters of credit. (Answer 9, citing *Golf West of Kentucky, Inc. v. Life Investors, Inc.* (1986) 178 Cal.App.3d 313.) But *Golf West* held only that the premium on an appeal bond could not be recovered as a cost because it was not listed or described in the then-existing rule. And it has been superseded by the current rule. There is no "proportionality limit" for a cost recovery that, as here, is authorized by rule and based on the reasonable out-of-pocket expenses emanating from an opponent's conduct in litigation.

Nor is there any merit in Rossas' farfetched suggestions that employee time, overhead, opportunity costs, or other sums might be

recovered. As Falk noted in its Petition (30-31), the language of the rule and established California law require that appellate costs be:

- Reasonable. (Rule 8.278(d)(1).)
- Necessary. (Eisenberg, et al., *California Practice Guide – Civil Writs and Appeals* (Rutter Group 2009), § 14:93 [courts can withhold recovery of "costs . . . incurred solely for the incurring party's convenience (i.e., not "necessary" to the appeal)."].)
- Out-of-pocket outlays. (*Miller v. Reagh* (1959) 170 Cal.App.2d 151, 153.)

The outlandish items listed by the Rossas do not meet these criteria.[7]

Falk claims no such untoward items here. There is no question that Falk had to spend $100,000 in reasonable out-of-pocket costs to obtain the letter of credit. The Rossas nowhere demonstrate otherwise. Indeed, they admit that "actually incurred" costs defined by rule are recoverable. (Answer 7.) That is what Falk asked for – $100,000 in actually incurred costs to obtain letter-of-credit security. In contravention of the rule, it got only $950.

[7] For example, an appellant who did not reasonably and necessarily borrow money to obtain a bond would have no financial cost at all.

III. <u>THE CONFLICT BETWEEN THE PRESENT CASE AND *COOPER v. WESTBROOK TORREY HILLS* (2001) 81 Cal.App.4th 1294 GIVES RISE TO UNCERTAINTY THAT CAN BE REMOVED ONLY BY THIS COURT.</u>

The Rossas repeat the Court of Appeal's criticisms of the *Cooper* case, which they obviously relish. (Answer 3-5, 13-18.) But they then turn about-face, seeking to dismiss all of the Court of Appeal's assaults on *Cooper*, labeling them mere "dicta" that were not necessary to the court's decision. (*Id.*) Again, the Rossas are wrong.

As this Court observed in *So. Cal. Chapter of Associated Builders and Contractors, Inc. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 431, fn. 3: "It is well settled that where two independent reasons are given for a decision, neither one is to be considered mere *dictum*, because there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and each is of equal validity." (Emphasis in original, quoting *Bank of Italy Nat. Trust & Savings Assn. v. Bentley* (1933) 217 Cal. 644, 650; see also 9 Witkin, Cal. Procedure (5th ed. 2008), § 512.)

The Court of Appeal here gave several independent reasons for its decision to reject *Cooper* and to deny interest. Those reasons involved what the Court of Appeal believed to be statutory and

caselaw prohibitions – not recognized in *Cooper* – that required denial of interest as part of the "cost" of letter-of-credit collateral. (Opn. 7-13.) Each of those reasons constitutes an independent rationale for the court's ultimate conclusion that interest and other financing costs could not be awarded to Falk. Each is at odds with *Cooper* on matters necessary to the decision.

While *Cooper* addressed a situation involving a deposit in lieu of bond, it nonetheless construed former rule 26(c)(6), which is the predecessor of the current rule. Rule 26(c)(6) itself did not on its face address deposits. But the *Cooper* court felt constrained to examine the rule because of the statutory command in section 975.730 that deposits in lieu of bonds have the same force and effect as bonds themselves. Thus, *Cooper's* syllogism proceeded as follows:

- *Major Premise*: Bonds and deposits in lieu of bonds must be treated alike for cost purposes because of the statutory command in section 975.730.
- *Minor Premise*: The recoverable costs of bonds include reasonable interest paid to obtain letter-of-credit collateral under rule 26(c).
- *Conclusion*: The recoverable costs of deposits in lieu of bonds must also include such interest.

The Court of Appeal here differs with both the major *and* the minor premises in *Cooper*. Both of these differences are necessary to its decision and therefore parts of its holding. Neither is dictum. *Rossa* has disapproved *Cooper* on both grounds by holding that bonds and deposits are not identical *and* that the rule pertaining to bonds does not authorize interest.

Any future application of *Cooper* to either deposits or letter-of-credit collateral will run afoul of *Rossa*. *Rossa* thus creates an overriding and persistent uncertainty as to awardable costs on appeal that can only be resolved by this Court.

IV. AWARDING THE FINANCIAL COSTS OF LETTERS OF CREDIT – INCLUDING INTEREST – IS NOT A LEGISLATIVE MATTER BECAUSE CODE OF CIVIL PROCEDURE SECTION 1034, SUBDIVISION (b) HAS LEFT THAT MATTER ENTIRELY IN THE HANDS OF THE JUDICIAL COUNCIL.

The Rossas argue throughout their Answer that an award of financial costs of obtaining letters of credit – including reasonable and necessary interest – must be left to the California Legislature. (Answer 10, 20-22.)

The short answer to the Rossas' omnipresent assertion of preemptive legislative power – which is echoed in the Court of

Appeal's decision (Opn. 8-13) – is that the Legislature has already spoken. Section 1034, subdivision (b) – which neither the Rossas nor the Court of Appeal bother to address – provides that: "The Judicial Council shall establish by rule allowable costs on appeal and the procedure for claiming those costs."

Thus, the Legislature has delegated any authority over appellate costs it may have to the Judicial Council. And the Judicial Council has enacted a rule expressly allowing recovery of all costs – including financial costs such as interest – of obtaining letter-of-credit collateral for bonds.[8]

CONCLUSION

The Rossas do not deny the importance of the question raised by this case, i.e. whether financial costs are awardable under the rule. Nor do they demonstrate that the Court of Appeal's rejection of *Cooper* has not created significant uncertainty. Review should therefore be granted.

---

[8] The Rossas' accusation that Falk has violated rule 8.500(c) by seeking judicial notice of rulemaking history or pointing out legal errors in the Court of Appeal's opinion without seeking rehearing is bogus. The Petition for Review does not seek to enlarge either the facts or the issues decided by the Court of Appeal. A petitioner need not file a useless petition for rehearing to tell the Court of Appeal it was legally wrong to decide an issue as it did.

DATED: July 12, 2010

LAW OFFICES OF TONY J. TANKE

By:______________________________
Tony J. Tanke,
Attorneys for Appellant D.L. Falk Construction, Inc.

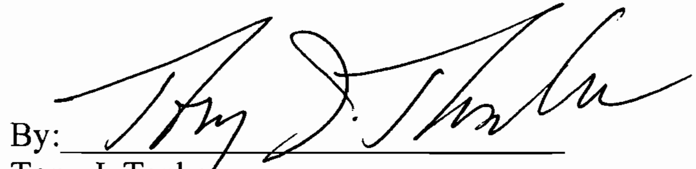
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 2,776 words as counted by the Microsoft Word 2008 for Mac version 12.2.4 word-processing program used to generate the brief. The entire brief is double-spaced. The font is 13 point Times New Roman.

DATED: July 12, 2010

LAW OFFICES OF TONY J. TANKE



By:____________________________
Tony J. Tanke,
Attorneys for Appellant D.L. Falk Construction, Inc.

PROOF OF SERVICE
STATE OF CALIFORNIA - COUNTY OF YOLO

I am employed in the City of Davis, County of Yolo, State of California. I am over the age of 18 and not a party to this action; my business address is: 2050 Lyndell Terrace, Suite 240, Davis 95616.

On July 12, 2010, I served the document(s) described as: **REPLY TO ANSWER TO PETITION FOR REVIEW** in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Daniel F. McLennon, Esq.
Marc L. Sherman, Esq.
McLennon Law Corporation
550 California Street
Sacramento Tower, Suite 700
San Francisco, CA 94104-1010
Attorneys for Plaintiffs and Respondents

William Frederick Gutierrez, Esq.
Carr McClellan Ingersoll Thompson & Horn, PLC
216 Park Road
Burlingame, CA 94010
Attorneys for Defendant and Appellant

Clerk of the Court
California Court of Appeal
First Appellate District
350 McAllister St.
San Francisco CA 94102

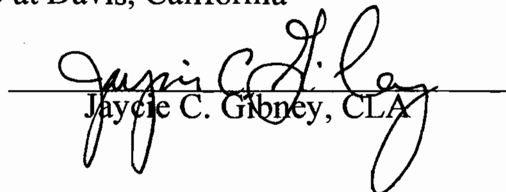
D.L. Falk Construction, Inc.
Defendant and Appellant

Clerk of the Court
San Mateo County Superior Court
400 County Center
Redwood City, CA 94063

[X] (**BY MAIL**) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (**STATE**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 12, 2010 at Davis, California



Jaycie C. Gibney, CLA