COURT OF APPEAL - STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

CALIFORNIANS AWARE and RICHARD McKEE,

Petitioners and Appellants,

v.

JOINT LABOR MANAGEMENT BENEFITS COMMITTEE and LOS ANGELES COMMUNITY COLLEGE DISTRICT,

Respondent and Appellee.

CASE NO. B227558

L.A. Superior Court
Case No. BS124856
Hon. David P. Yaffe

APPELLANTS' PETITION FOR REHEARING

LAW OFFICES OF KELLY A. AVILES
Kelly A. Aviles (SBN 257168)
1502 Foothill Blvd., Suite 103-140
La Verne, California 91750
Telephone: (909) 991-7560
Facsimile: (909) 991-7594

DENNIS A. WINSTON, A PROFESSIONAL CORPORATION
Dennis A. Winston (SBN 68049)
3221 Carter Ave., Apt. 444
Marina Del Rey, California 90066
Telephone: (310) 306-4099
Facsimile: (310) 306-4499
Attorneys for Petitioners/Plaintiffs

JOSEPH T. FRANCKE (SBN 88654)
2218 Homewood Way
Carmichael, California 95608
Telephone: (916) 487-7000

Attorneys for Petitioners/Appellants
CALIFORNIANS AWARE and
RICHARD P. MCKEE

1. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Californians Aware ("CalAware") and Richard P. McKee ("McKee")(collectively, "Appellants"), petition this Court for rehearing to reverse its opinion filed November 10, 2011, ("Opinion") because "owing to [a] mistake of law …[the] decision has done an injustice in the particular case…and it is seriously doubted whether we have correctly decided[.]" ***In re Estate of Jessup*** (1889) 81 Cal. 408, 471-472; *Cal. Rules of Court ("CRC") 8.268(a)(1).*

Rehearing should be granted because the Opinion improperly awarded Respondents costs in violation of Government Code § 54960.5. In an action involving the Ralph M. Brown Open Meeting Act (Government Code § 54950, et seq.), costs (and attorneys' fees) may *only* be awarded to a government defendant upon an express finding that "the action was clearly frivolous and totally lacking in merit."

> **A court may award** court **costs** and reasonable attorney fees to a defendant in any action brought pursuant to Section 54960 or 54960.1 **where** the defendant has prevailed in a final determination of such action **and the court finds that the action was clearly frivolous and totally lacking in merit.** [1]

Government Code § 54960.5.

Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1113, 1121.

The Opinion neither recites nor makes any findings that Appellants' Action was "clearly frivolous and totally lacking in merit." The specific provisions governing actions under the Brown Act take precedence over the general *CRC 8.278(a)(1).* ***Boyle***, 70 Cal. App. 4th at 1121. Accordingly, the award of costs to Respondents was improper as a matter of law.

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[1] Unless otherwise indicated, all emphasis supplied all internal quotation marks omitted.

Not only did *this* Court make no finding of clear frivolousness and a complete lack of merit, the trial court below *expressly* declined to award Respondents Joint Labor Management Benefits Committee and Los Angeles Community College District (collectively, "Respondents") costs based upon Appellants' citation to Government Code § 54960.5. (Clerk's Transcript ("CT") at 000258 ("**Objection by plaintiffs to award of costs based upon Govt Code § 54960.5 is sustained**.")

LEGAL ARGUMENT

2. THE OPINION ERRED AS A MATTER OF LAW IN AWARDING RESPONDENTS COSTS WITHOUT A FINDING THAT THE ACTION WAS CLEARLY FRIVOLOUS AND TOTALLY LACKING IN MERIT

This Court made no finding (nor could it have) that Appellants' Action (or the appeal of the judgment) was clearly frivolous and totally lacking in merit. Absent such a finding, an award of costs is improper. *Government Code § 54960.5*.

As explained by the court in ***Boyle v. City of Redondo Beach*** (1999) 70 Cal. App. 4th 1109, 1121:

> The City defendants, and outside counsel defendants, request attorney fees and costs on appeal pursuant to *section 54960.5*. "[S]tatutory attorney fee provisions are interpreted to apply to attorney fees on appeal unless the statute specifically provides otherwise." (*Morcos v. Board of Retirement (1990) 51 Cal. 3d 924, 929 [275 Cal. Rptr. 187, 800 P.2d 543].) Section 54960.5*, quoted *ante*, contains no language specifically excluding appeals from the statutory authorization of "court costs and reasonable attorney fees to a defendant in any action brought pursuant to *Section 54960* or *54960.1*." **The general rule of appellate application therefore governs**. (*Gonzales v. ABC Happy Realty, Inc. (1997) 52 Cal. App. 4th 391, 395 [60 Cal. Rptr. 2d 566]*.)

> Nonetheless *section 54960.5* does condition the award of court costs and reasonable attorney fees to a defendant upon a finding by the court "that the action was clearly frivolous and totally lacking in merit."

In ***Decker v. The U.D. Registry, Inc.*** (2003) 105 Cal.App. 4th 1382 ("***Decker***"), in deciding the propriety of an analogous award of attorneys' fees upon a successful SLAPP motion (*Code of Civil Procedure § 425.16),* the court observed:

> In the order awarding plaintiffs their attorney fees, the trial court stated only that UDR's motions were "frivolous." This is insufficient. The court's written order should be more informative than a mere recitation of the words of the statute. (Citation omitted.)
>
> The usual remedy when a sanctions order fails to comply with subdivision (c) of section 128.5 is remand for the trial court either to enter a new order or to vacate the attorney fees award. (Citation omitted.) We decline to do so because, we conclude, the record does not support an award of attorney fees under the frivolousness and delay standards of sections 425.16 and 128.5.
>
> The trial court did not find, and the record does not disclose, any evidence that UDR brought the motions to strike solely to cause unnecessary delay or to harass plaintiffs.
>
> The record does not support a finding of frivolousness. A determination of frivolousness requires a finding the motion is "totally and completely without merit" (§ 128.5, subd. (b)(2)), that is, any reasonable attorney would agree such motion is totally devoid of merit. [] [O]ur review of the briefs and the record leads us to conclude UDR's arguments in response to plaintiffs' evidence submitted on the probability of prevailing were not totally and completely without merit.

Decker, 105 Cal. App. 4th at 1392, 1393.

Indeed, the trial court *expressly* declined to award Respondents costs in light of Government Code § 54960.5. (CT at 000258.)

The purpose of the Brown Act to encourage individuals to enforce its provisions would be completely undermined if petitioners in non-frivolous actions could suffer the imposition of costs and fees if they lose. The Brown Act specifically provides protections to ensure that such a result does not occur. This Court's award of costs without the prerequisite findings of clear frivolousness and a total lack of merit should be reheard and reversed.

3. CONCLUSION

For the foregoing reasons, Appellants request that this Court grant this petition for rehearing and reverse the award of costs to Respondents.

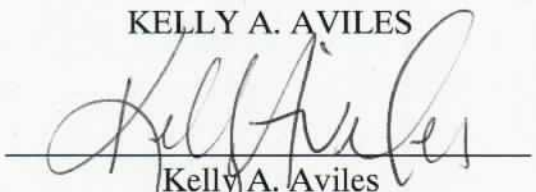
DATED: November 22, 2011

Respectfully submitted,

DENNIS A. WINSTON, A PROFESSIONALCORPORATION

JOSEPH T. FRANCKE

LAW OFFICES OF KELLY A. AVILES



Kelly A. Aviles
Attorneys for Petitioners/Appellants
CALIFORNIANS AWARE and
RICHARD P. McKEE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I reside or work within in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1502 Foothill Blvd., Suite 103-140, La Verne, CA 91750.

On **November 22, 2011**, I served the foregoing documents described as **Appellants' Petition for Rehearing** on the interested parties in this action as listed in the attached service list by the following means:

SERVICE LIST

Joshua Morrison
Atkinson, Andelson, Loya, Rudd & Romo
12800 Center Court Drive, Suite 300
Cerritos, CA 90703
Attorneys for Respondents

Hon. David Yafee
c/o Clerk, Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012

By United States Mail

I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses above and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at La Verne, California.

In addition, pursuant to Californian Rules of Court, Rule 8.212, I served the document on November 22, 2011 on the Clerk of the California Supreme Court by electronic transmission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: November 22, 2011

Albert D. Aviles