California Supreme Court No. S180890
First District Court of Appeal No. A123006

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LES JANKEY
Plaintiff-Appellant-Petitioner,

v.

SONG KOO LEE, Individually and dba K&D MARKET,
Defendant-Respondent.

ANSWER TO PETITION FOR REVIEW

Re: Decision of the Court of Appeal
First Appellate District, Division Four

On Appeal from the Superior Court for San Francisco County
Case No. CGC07-463040
Honorable Patrick J. Mahoney, Judge

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I. INTRODUCTION

Petitioner asserts in their petition, as they must, that the issue they present is "one of first impression before this Court" and that "critically important questions" exist regarding whether the Court of Appeal correctly determined that a prevailing defendant may recover his attorney's fees under Civil Code Section 55 without first having to establish that a disabled plaintiff's claims were frivolous.[1] *See* Petition for Review at 2. Yet, while petitioner fervently declares the "critical importance" of this issue and the need for clear guidance from this Court, counsel for petitioner also admits that the *identical* issue has twice been presented to and rejected by this Court. *See id.* Indeed, counsel admits the most recent attempt for review of this issue was in a petition for review that he presented in *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, *review denied by Molski v. Arciero Wine Group*, 2008 Cal. LEXIS 12251 (Cal. Oct. 16, 2008). *See id.* Thus, like the prior petitions for review referenced by counsel, the Court should deny review on this third attempt to secure review on an issue that this Court has already considered and denied. Put another way, the petition should be denied because it fails to establish sufficient grounds warranting review by this Court.

[1] As used herein, the term "frivolous" refers to claims that are frivolous, unreasonable or groundless and to instances where a plaintiff continues to litigate a claim after the claim has clearly become frivolous.

To begin with, review is not required or warranted in this case to secure uniformity of decision in the State because there is no dispute to be resolved among courts in the appellate districts of California. Indeed, the two California appellate courts to address the issue - the Second District in *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, and the First District in *Jankey v. Lee* (2010) 181 Cal.App.4th 1173 - have unanimously concluded that a prevailing defendant is not required to establish that a disabled plaintiff's claims were frivolous before recovering attorney's fees under Section 55.[2] Because the appellate courts that have addressed the issue presented in the instant petition have both reached the same conclusion, review is not required (or warranted) to secure uniformity of decision among courts in California.

In addition, the petition does not present an important question of law for this Court to settle or resolve. Nevertheless, petitioner lists six (6) separate errors allegedly committed by the Court of Appeal as grounds for review. *See* Petition for Review at 6-25. However, an examination of the alleged errors readily confirms that petitioner is asking this Court to correct perceived errors committed by the Court of Appeal, an insufficient reason for granting review. Because a grant of review under these circumstances

[2] Unless otherwise noted, subsequent statutory references are to the California Civil Code.

would lead this Court to exercise correctional, rather than institutional, review, the petition for review should be denied.

Moreover, respondent submits that this Court should deny the petition on the independent ground that the trial court determined that petitioner's claims were frivolous. *See* Attachment 1 (Trial Court's August 28, 2008 Order Granting Defendant's Motion for Attorney's Fees). Accordingly, regardless of whether a prevailing defendant under Section 55 must establish that a plaintiff's claims were frivolous or not, respondent submits that a factual basis exists to affirm the Court of Appeal's ruling. Thus, the petition for review should be denied.

In sum, petitioner has failed to present sufficient grounds to justify review of the Court of Appeal's decision below. Accordingly, this Court should deny the petition for review.

II. NATURE OF THE CASE AND PROCEDURAL HISTORY

In the underlying lawsuit against respondent Song Koo Lee, petitioner Les Jankey and plaintiff Disability Rights Enforcement, Education Services' ("DREES") asserted that respondent violated their rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. Section 12101, *et seq.*, and similar state laws requiring businesses and other public accommodations to provide reasonable access to the goods and services that are offered to non-disabled individuals. Specifically, petitioner asserted that a raised step located at the entry of the K & D

Market was an architectural barrier that prevented him and other wheelchair bound individuals from wheeling directly into the store. According to petitioner, respondent was in violation of (1) the ADA, (2) the California Disabled Persons Act ("CDPA"), Cal. Civil Code Sections 54, 54.1 and 54.3; (3) the Unruh Act, Cal. Civil Code Section 51, *et seq.*; and (4) California Health & Safety Code Section 19955.

On the merits, however, petitioner and plaintiff DREES's claims were deficient because they failed to meet their burden to demonstrate violations under the ADA, CDPA, the Unruh Act, and Section 19955 of the Cal. Health & Safety Code. Accordingly, the trial court granted respondent's motion for summary judgment on all of petitioner and DREES's claims. Thereafter, as the prevailing party, respondent moved to recover his attorney's fees under Section 55. The parties fully briefed the applicable issues, including (1) whether the trial court should apply the Ninth Circuit's decision in *Hubbard v. SoBreck, LLC*, 531 F.3d 983 (9th Cir. 2008), *amended and superseded by Hubbard v. SoBreck, LLC*, 554 F.3d 742 (9th Cir. 2009), which held that a prevailing defendant seeking an award of attorney's fees under Section 55 of the CDPA must show that plaintiff's claims are frivolous; (2) whether the court should apply the Court of Appeal decision in *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, which held that no such showing is required for a prevailing defendant seeking attorney's fees under Section 55; and (3) what

is required to demonstrate that an action is frivolous and what facts supported respondent's contention that petitioner learned his claims were frivolous.

The trial court concluded that the *Molski* decision was controlling authority and determined that respondent was entitled to an award of reasonable attorney's fees and costs against petitioner and DREES, having prevailed on all claims in the underlying summary judgment motion. Upon considering respondent's evidence submitted in support of the fee motion, the trial court awarded respondent $118,458.00 in attorney's fees and $3,544.54 in costs for a total award of $122,002.54. Petitioner and plaintiff DREES appealed.

On appeal, the First District Court of Appeal (Division Four) analyzed the issues presented and applied conflict preemption principles articulated by the United States Supreme Court, which this Court has adopted in its prior decisions when analyzing whether federal law preempts state law. *See Jankey*, 181 Cal.App.4th at 1183-87. After carefully considering the issue, the Court of Appeal reasoned that Section 55 is not in direct conflict with the ADA and is therefore not preempted by federal law. *See id.* Thus, the Court of Appeal concluded that a prevailing defendant is not required to demonstrate that a disabled plaintiff's claims are frivolous before recovering attorney's fees under Section 55. Accordingly, the Court

of Appeal affirmed the trial court's judgment for respondent in its entirety.

This Petition for Review followed.

III. DISCUSSION

A. Review Is Not Required To Secure Uniformity Of Decision Among The Courts Of Appeal In California.

As noted above, the two Courts of Appeal decisions (*Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786 and *Jankey v. Lee* (2010) 181 Cal.App.4th 1173) that have considered the issue of whether a prevailing defendant must establish that a disabled plaintiff's claims were frivolous before recovering attorney's fees under Section 55, have unanimously concluded that no such showing is required. *See Molski*, 164 Cal.App.4th at 791-92; *Jankey*, 181 Cal.App.4th at 1183-87.

In *Molski*, the appellate court considered, and rejected, plaintiff's assertion that the holding in *Christianburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 422 ("*Christianburg*") should apply to plaintiffs engaged in access litigation in California state court. *See Molski*, 164 Cal.App.4th at 791. In *Christianburg*, the Supreme Court reasoned that a plaintiff who unsuccessfully seeks to enforce his rights under Title VII should not be assessed attorney's fees unless the claims were frivolous, because imposition of fees against a Title VII plaintiff presenting non-frivolous claims would "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *See id.* However, the *Molski*

Court reasoned that "[t]his concern does not apply to access litigation in California state court, where a plaintiff controls the relative risks, burdens and benefits by selecting from among several statutory options." *See id.; see also id.* at 791-92 (noting that a disabled plaintiff can make an election of remedies and can avoid an adverse fee award by carefully assessing the merits of his or her claim under Section 55 before deciding to prosecute or continuing to prosecute such claim).

In *Jankey*, the appellate court agreed with the holding in *Molski* regarding plaintiff's ability to control the relative risks, burdens and benefits of access litigation in California state court. However, the Court also addressed the issue of whether Section 55 is preempted by the ADA. Upon discussing the applicable standards governing its preemption analysis, the Court of Appeal concluded that "*Hubbard* improperly used conflict preemption principles to decide the issue before it, and in applying those principles, erroneously concluded that the ADA and Section 55 were in conflict." *Jankey*, 181 Cal.App.4th at 1184-85. The Court reasoned that Section 55 and other provisions of the CDPA as well as the Unruh Act (Civil Code Section 51) did not conflict with, but instead, complemented the ADA by providing greater protections to disabled plaintiffs than those available under the ADA. *See id.* Thus, rather than diluting the rights of plaintiffs, the legislative history of Section 55 revealed that the statute was designed to provide greater incentives and rights to disabled plaintiffs

pursuing access litigation in California, something that Congress envisioned when it passed the ADA. *See id.* at 1184-86. Accordingly, the *Jankey* Court concluded that *Hubbard* "improperly parsed the law" when it failed to consider the breadth and scope of the CDPA and Section 55 in relation to the ADA, electing instead to narrowly focus on the language of Section 55 to conclude the statute was in conflict with the ADA and therefore preempted under federal law. *See id.*

In sum, 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 petitioner's petition for review. Accordingly, the Court should deny the petition for review.

B. Review Is Not Required To Settle An Important Question Of Law.

Rule 8.500(b) of the California Rules of Court provides that the "Supreme Court may order review of a Court of Appeal decision: (1) when necessary to secure uniformity of decision or to settle an important question of law." *See* Cal. Rule of Court 8.500(b)(1) Thus, the Courts of Appeal function as an error correction court while the Supreme Court oversees the institutional development of the law. *See id.*; *see also People v. Davis* (1905) 147 Cal. 346, 350 (stating that the Court's role is to ensure "uniformity of decision and the settlement of important questions of law").

Here, petitioner has presented six (6) separate grounds for review. *See* Petition for Review at 6-25. Specifically, petitioner asserts that the Court of Appeal erred by (1) failing to apply the governing standards for conflict preemption; (2) not considering the preemption clause contained in the ADA; (3) relying on the express language of the ADA to state that an award of attorney's fees to a prevailing plaintiff is discretionary, but mandatory pursuant to the express terms of Section 55; (4) failing to consider the legislative history behind Section 55; (5) applying the plain meaning of Section 55's language to award attorney fees to defendant, the prevailing party; and (6) allegedly relying on a vexatious litigant order issued against petitioner's trial counsel, Thomas Frankovich, to rule against petitioner.

However, a review of the appellate court's alleged errors quickly confirms that petitioner is seeking correctional review from this Court, an improper and insufficient reason for granting review. In addition, respondent notes that petitioner 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. Instead, it is readily apparent that petitioner is seeking vindication of his narrow personal interests in this case, namely to avoid liability on the trial court's order awarding attorney fees to respondent. *See id.* Because the instant

petition does not present an important question of law for this Court to settle or resolve, the Court should deny the petition for review.

C. Review Is Unwarranted Where An Independent Basis Supports Affirming The Court Of Appeal's Decision Below.

As noted above, the trial court considered briefing from the parties on the issue of whether the Ninth Circuit's holding in *Hubbard v. SoBreck* or the Second District Court of Appeal's decision in *Molski v. Arciero Wine* was controlling authority on respondent's motion for attorney's fee. However, the trial court also requested that the parties submit supplemental briefing on the issue of what is required to demonstrate that an action is frivolous and what facts supported respondent's contention that petitioner's claims were frivolous.

Here, the trial court concluded that the *Molski* decision was controlling authority and determined that respondent, as the prevailing party, was entitled to recover his reasonable attorney's fees and costs from petitioner and plaintiff DREES. *See* Attachment 1 (Trial Court's August 28, 2008 Order Granting Defendant's Motion for Attorney's Fees) at 2. Although the trial court could have recited the award of attorney's fees immediately following its determination that *Molski* was controlling authority, it did not do so. *See id.* Instead, the trial court elected to address the "problematic" nature of petitioner's claims and the fact that petitioner failed to investigate and presented no evidence to substantiate his claims.

See id. Specifically, the trial court found that "[g]iven the extensive experience of plaintiff's counsel in these cases, it may be reasonably inferred that he and, in turn his clients, knew just how problematic this litigation was." *See id.* In addition, the trial court noted that plaintiffs "present no evidence to suggest that they had any reason to believe" certain assertions made in their complaint regarding defendant's premises. *See id.* Moreover, with respect to plaintiff DREES, the trial court noted that DRESS lacked standing and knew that its claims would fail in light of "a holding previously applied to DREES in *Molski v. Mandarin Touch Restaurant* (2005) 359 F.Supp.2d 924." *See id.* Yet, with full knowledge of the prior ruling on the issue of its standing, DREES nevertheless persisted with its claims against respondent and maintained those claims until the trial court granted summary judgment for respondent.[3]

Although 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, respondent submits that the trial court's findings in its August 28, 2008 order is tantamount to a specific determination that petitioner's and DREES's claims were frivolous. *See* Attachment No. 1 at 2. Thus, respondent

[3] Respondent is aware of at least one other ruling in a published decision where DREES was dismissed for lack of standing. *See Jankey v. Poop Deck*, 537 F.3d 1122, 1124 (9th Cir. 2008) (indicating that "[o]n July 25, 2005, the district court dismissed DREES for lack of standing," a ruling that DREES did not appeal). Moreover, plaintiff DREES in the instant case did not contest the trial court's tentative ruling on the finding that DREES lacked standing. Nor did DREES appeal the trial court's adverse ruling to the Court of Appeal below, thereby conceding on two occasions that its claims were frivolous from the inception of the lawsuit against respondent.

contends that an independent factual basis exists to affirm the decision of the Court of Appeal. Thus, it is immaterial in this case whether respondent was required to demonstrate that petitioner's claims were frivolous or not before attorney's fees can be awarded under Section 55, because the Court of Appeal's ruling (and in turn, the trial court's ruling itself) can be affirmed on the grounds that the trial court made the requisite determination that petitioner's and plaintiff DREES's claims were frivolous. Accordingly, the Court should deny the petition for review for this additional reason.

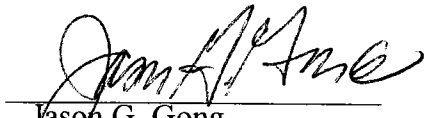
IV. CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the petition for review as petitioner has presented insufficient grounds for review of the Court of Appeal's opinion below.

Respectfully submitted,

Dated: April 12, 2010

LIVINGSTON LAW FIRM

By: 

Jason G. Gong
Attorneys for Defendant-Respondent SONG KOO LEE, Individually and dba K&D MARKET

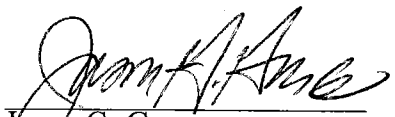
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court 8.204(c))

The text of Respondent's Answer to Petition for Review consists of 2,769 words as counted by Word, Version 2007, the word-processing program used to generate the document.

Dated: April 12, 2010

LIVINGSTON LAW FIRM

By: 

Jason G. Gong
Attorneys for Defendant-Respondent SONG KOO LEE, Individually and dba K&D MARKET

ATTACHMENT NO. 1

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and dba K&D MARKET

ENDORSED
FILED
San Francisco County Superior Court

AUG 28 2008

GORDON PARK-LI, Clerk
BY: JHULIE ROQUE
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

LES JANKEY, an individual; and DISABILITY RIGHTS ENFORCEMENT, EDUCATION, SERVICES: HELPING YOU HELP OTHERS, a California public benefit corporation, Plaintiffs, vs. SONG KOO LEE, an individual dba K & D MARKET; and DOES 1-20, inclusive, Defendants.	Case No. CGC07-463040 ~~[PROPOSED]~~ **ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY'S FEES** Date: 08/28/08 Time: 9:30 a.m. Dept.: 302 Complaint Filed: 05/03/07 Trial Date: *Vacated* (05/29/08)

Defendant Song Koo Lee's (an individual dba K & D Market) Motion for Attorney's Fees came on regularly for hearing on August 28, 2008, in Department 302 of the above captioned Court, the Honorable Patrick J. Mahoney, presiding. Jason G. Gong, Esq. of Livingston Law Firm appeared on behalf of defendant and moving party. Thomas E. Frankovich, Esq. appeared on behalf of plaintiffs and opposing parties Les Jankey and Disability Rights Enforcement, Education, Services: Helping You Help Others ("DREES").

The Court, having considered the moving, opposing, reply and supplemental papers as well as other papers filed in support thereof, and oral argument of counsel at the hearing, and good cause appearing therefore, makes the following ruling:

///

The Court grants defendant Song Lee's Motion for Attorney Fees. The motion is granted based on the decision in *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786 that holds a claim need not be frivolous to support an attorneys' fee award to defendant where plaintiff unsuccessfully seeks a disability access injunction. This case alleges the identical causes of action as in *Molski* and that Court's analysis is controlling on defendant's right to attorneys fees.

In this case, plaintiff Disability Rights Enforcement Education Services ("DREES") lacked standing, a holding previously applied to DREES in *Molski v. Mandarin Torch Restaurant* (2005) 359 F.Supp.2d 924. As the Court's summary judgment order made clear, Mr. Jankey's claims were all premised on a four-inch step leading into a market in a 50 year old building. The parties agreed on the applicable law, *Colorado Cross Disability Coalition v. Hermanson Family Limited* (2001) 264 F.3d 999, 1002 that plaintiff had to establish that the removal of the barrier to entry is readily achievable. Yet, plaintiff's evidence was inadequate as a matter of law. Given the extensive experience of plaintiff's counsel in these cases, it may be reasonably inferred that he and, in turn his clients, knew just how problematic this litigation was. Plaintiffs' contend that they lacked knowledge that the building had not been remodeled until receiving defendant's interrogatory responses. Yet, they present no evidence to suggest that they had any reason to believe the building had been remodeled so as to require ADA improvements, and there is no evidence that plaintiffs sought records from the City of San Francisco as to any permits to remodel the premises.

The Court finds that billing rates for defendant's counsel are reasonable; in fact, the rates are at the low end of the San Francisco market. The Court awards fees of **$118,458** based on defendant's categories as follows: General handling/management: **$19,772**; Discovery: **$15,000** Depositions: **$12,252**; Pleadings: **$14,000**; Summary Judgment: **$45,000**; Pre-trial: **$1434**; and Prejudgment: **$11,000**.

IT IS HEREBY ORDERED that defendant Song Koo Lee's Motion for Attorney's Fees is GRANTED in the amount of **$118, 458** against plaintiffs Les Jankey and DREES.

///

///

The Court also awards costs of **$3,544.54.**

IT IS SO ORDERED.

Dated: AUG 28 2008

PATRICK J. MAHONEY

JUDGE OF THE SUPERIOR COURT

463040

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to the within action. I am readily familiar with this firm's business practice for collection and processing of documents for mailing with the U.S. Postal Service. My business address is 1600 South Main Street, Suite 280, Walnut Creek, California 94596. On April 12, 2010, I served the following document(s):

ANSWER TO PETITION FOR REVIEW

upon the following at the address(es) stated below:

Scottlynn J. Hubbard IV, Esq.
LAW OFFICES OF LYNN HUBBARD
12 Williamsburg Lane
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Tel: (530) 895-3252
Attys for: Petitioner Les Jankey

Clerk of the Superior Court
San Francisco County Superior Court
400 McAllister Street, Appeals Division
San Francisco, CA 94102
Copies (1)

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

Service was accomplished as follows:

✓ **BY US MAIL, According to Normal Business Practices.** On the above date, at my place of business at the above address, I sealed the above document(s) in an envelope addressed to the above, and I placed that sealed envelope for collection and mailing following ordinary business practices, for deposit with the U.S. Postal Service. I am readily familiar with the business practice at my place of business for the collection and processing of correspondence for mailing with the U.S. Postal Service. Correspondence so collected and processed is deposited with the U.S. Postal Service the same day in the ordinary course of business, postage fully prepaid.

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 April 12, 2010, at Walnut Creek, California.

Corine Darrow

Corine Darrow