

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**SALVIO STREET LLC,**  
**Plaintiff and Respondent,**  
**v.**  
**ALBERT LEE,**  
**Defendant and Appellant.**

**A133694**  
**(San Francisco County**  
**Super. Ct. No. CGC-06-455065)**

Albert Lee (Lee) appeals from an order denying in part his motion to strike or tax costs claimed by respondent Salvio Street LLC (Salvio) after this court awarded Salvio costs on appeal for one of two consolidated appeals. Lee contends the court erred in awarding Salvio too much toward Salvio’s costs of preparing an appendix and printing appellate briefs. Lee also appeals from the trial court’s denial of Lee’s motion for sanctions against Salvio for seeking an award of costs for reporters’ transcripts to which Salvio eventually agreed it was not entitled.

As to the order on Lee’s motion to tax costs, we will direct the trial court to tax an additional \$55.06 and otherwise affirm the order. We will also affirm the order denying Lee’s motion for sanctions.<sup>1</sup>

---

<sup>1</sup> Lee has filed a motion in this court for sanctions against Salvio and its attorneys for failing to provide citations to the record in violation of rule 8.204(a)(1)(C) of the California Rules of Court and making misstatements in its respondent’s brief. We deny the motion. We will ignore statements of fact that are not supported by the record,

## I. FACTS AND PROCEDURAL HISTORY

As has often occurred in the many appeals spawned by the underlying litigation over the past decade or so, the parties' recitation of the facts are so slanted, inaccurate, or otherwise insufficient that we reconstruct what happened largely on our own, based on the appellate record provided.

### A. *Prior Appeals*

In May 2008, judgment was entered in favor of Salvio and against Lee in this litigation. The court quieted title to the subject property in Salvio and declared that Salvio was the sole owner of the property in fee simple. The court further determined that Salvio was the prevailing party in the litigation and could seek an award of costs and attorney fees.

Lee appealed from the judgment on July 25, 2008 (appeal number A122408). The parties call appeal number A122408 the "Main Appeal."

Salvio filed a memorandum of costs seeking, among other things, recovery of expert witness fees. Lee filed a motion to strike or tax costs, which was granted in part. Lee appealed from the costs order and Salvio filed a cross-appeal (appeal number 123080). Salvio also filed a motion to recover \$176,470.75 in attorney fees, which was denied, and Salvio appealed from the denial (also appeal number A123080). The parties refer to appeal number 123080 as the "Fees Appeal."

The appeals were consolidated for decision. After consolidation, Salvio filed an appendix in lieu of a clerk's transcript, purportedly in regard to both the Main Appeal and the Fees Appeal. In September 2009, Salvio filed a combined respondent's brief for the Main Appeal and a cross-appellant's opening brief for the Fees Appeal. In February 2010, Salvio filed a reply brief solely in support of its Fees Appeal.

We issued our opinion in the consolidated appeals on July 29, 2010. As to the Main Appeal, we affirmed the judgment. As to the Fees Appeal, we modified the costs order by reducing it by \$49 and affirmed the order denying the award of attorney fees.

---

whether in the brief of Salvio or in the briefs of Lee. (E.g., *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1260 & fn. 1.)

We found that Salvio's appeal from the attorney fees denial was frivolous, and imposed \$1,000 in sanctions payable by Salvio and its counsel to Lee, and \$1,000 in sanctions payable by Salvio and its counsel to the clerk of this court. In this regard, we concluded that any reasonable attorney would have agreed that the appeal from the attorney fees order was completely without merit once we issued our opinion in another appeal on November 26, 2008, and Salvio should have dismissed its appeal from the attorney fees order.

We awarded Salvio its costs for the Main Appeal and awarded Lee his costs for the Fees Appeal; as modified on August 24, 2010, our opinion reads: "Salvio Street shall recover its costs on Lee's appeals [Lee's appeal from the judgment in A122408 and appeal from the cost order in A123080]. Lee shall recover his costs on Salvio Street's appeal and cross-appeal [Salvio's appeal from the attorney fees order and cross-appeal from the cost order in A123080]."

*B. Parties' Motions After Remittitur*

After the remittitur, both parties sought their respective costs under rule 8.278 of the California Rules of Court by filing a memorandum of costs. Only Salvio's memorandum of costs is at issue here.

*1. Salvio's Cost Memorandum and Lee's Motion to Strike or Tax Costs*

Salvio's memorandum of costs sought an award for filing fees in connection with the consolidated appeals (\$1,510.00), preparation of reporters' transcripts (\$650.00), printing of appellate briefs (\$516.24), and record preparation (\$943.17).

Lee filed a motion to strike or tax costs on January 10, 2011, arguing that all of the amounts should be taxed (except for \$46.75 in printing costs), because the costs were incurred with respect to the Fees Appeal that Salvio lost (i.e. Salvio's appeal from the attorney fees order and its cross-appeal from the cost order).

On January 13, 2011, Salvio withdrew its request to recover the filing fees of \$1,510.00. As to the reporters' transcripts, printing costs, and record preparation, Salvio stated in its opposition to Lee's motion that this court awarded Salvio its costs on appeal in the Main Appeal, and the Main Appeal "was the predominant appeal and was the

predominant cause of all costs on appeal.” Salvio also produced invoices for the printing costs and clarified that the \$943.18 in record preparation costs was for the preparation of the appendix it filed in the consolidated appeals.

On January 26, 2011, Lee filed a reply brief in support of his motion to strike or tax. As to the \$650 reporters’ transcript costs, Lee contended that the docket indicated those transcripts were ordered for Salvio’s appeal from the order denying Salvio’s attorney fees and Salvio’s cross-appeal as to the order denying expert witness costs, and the \$650 was in any event refunded to Salvio by the court clerk (apparently, because Lee had already ordered and paid for them). As to the printing costs, Lee argued that the \$516.24 figure should be reduced to \$16.83 because: only pages 23-39 of Salvio’s respondent/cross-appellant’s brief pertained to the Main Appeal; the printing services on February 19, 2010, were for printing Salvio’s reply brief in its unsuccessful Fees Appeal; and Salvio’s charge for index tabs was inappropriate because the tabs were used for the Fees Appeal. As to the appendix, Lee argued that none of the cost was recoverable because the appendix pertained entirely to the Fees Appeal. Lee also disputed Salvio’s claim that the Main Appeal predominated.

## *2. Lee’s Section 128.7 Motion*

On or about January 27, 2011, Lee delivered to Salvio’s attorney, Carlos Alvarez, a notice of motion and motion under Code of Civil Procedure section 128.7. The motion, dated January 26, 2011, contended that Salvio and its attorneys should be sanctioned for its memorandum of costs on grounds including that the reporters’ transcripts were not prepared for the Main Appeal and the court clerk had refunded the cost to Salvio anyway. There is no indication that this particular motion was ever filed: it does not appear in the docket, and the copy in the record does not bear a file-stamp or a signed proof of service.

On February 16, 2011, Salvio served a notice that acknowledged “Lee’s most recent motion for sanctions” and “withdr[ew] any request for the cost of the reporter’s transcripts on the hearing on the motion for fees and costs, if any.”

On July 12, 2011, Lee filed a motion under Code of Civil Procedure section 128.7 with the court, but this motion was not the same as the motion that had been previously

provided to Salvio's attorney Alvarez. Lee's filed motion sought sanctions solely on the basis of Lee's contention that Salvio was claiming \$650 for reporters' transcripts that were not for the Main Appeal but for the two appeals Salvio lost, and the court clerk had refunded the \$650 to Salvio through counsel.

Salvio did not file opposition papers to the July sanctions motion; it would later claim it had not been served with this motion.

### *3. Hearing on Sanctions Motion and Motion to Strike/Tax Costs*

The motion to tax or strike costs and the sanctions motion came on for hearing on August 3, 2011.

As to the motion to strike or tax costs, Salvio's attorney Alvarez argued, among other things, that Salvio had paid the \$650 reporters' transcript fee and could not explain the documentation in the record that indicated the fee was refunded by the court clerk. Alvarez speculated that, since there was no way he could have obtained the transcripts for free, the fee might have been paid twice, and the refund pertained to the second (duplicate) payment. Salvio acknowledged, however, that the documents before the court did not show two \$650 payments. Salvio obtained a further opportunity to brief the issue by August 10, 2011.

As for the sanctions motion, Alvarez contended that he had never been served with Lee's July motion; the court suggested, and the parties agreed, that it would set a schedule for Salvio to file an opposition to the motion, and for Lee to file a reply, after the court ruled on Salvio's claim for the reporters' transcript costs.

On August 10, 2011, Salvio withdrew its request for the reporters' transcript costs. A declaration from Alvarez states that, having manually reviewed Salvio's billing records, he discovered that a \$650 credit had indeed been received (and, implicitly, that only one payment of \$650 had been made).

### *4. Trial Court's Ruling on Lee's Motion to Strike or Tax Costs*

On August 24, 2011, the court ruled on Lee's motion to strike or tax the costs claimed by Salvio (as well as Salvio's motion to strike or tax Lee's costs, not at issue here). The court noted: "The central difficulty is a function of the fact that the record on

appeal was used to some extent by both sides in both appeals, and then both make plausible claims for at least allocation of the costs of those records.”

The court ruled that Salvio’s claim for \$1,510.00 in filing fees had been withdrawn and was therefore moot, and the \$650.00 for the reporters’ transcripts would be taxed in its entirety in light of Salvio’s agreement that it should be. As to the printing costs, the court acknowledged Lee’s claim that 17 of the 48 pages of the “brief for which printing costs [were] claimed” were attributable to the Main Appeal with the rest attributable to the Fees Appeal, but found upon its own review that only about one-fifth of the brief was attributable to the Fees Appeal. The court then taxed one-fifth of the \$516 requested for printing costs, reducing the recoverable amount by \$103.20. Lastly, the court allowed the entirety of Salvio’s claim for the cost of preparing the appendix. The court explained: “I find that Salvio actually incurred the costs, which are reasonable, and did so in connection with the Main Appeal. While some of the costs of preparing this record (respondent’s appendix) were useful in the Fees Appeal, as it happened, nevertheless the costs would have been incurred without that subsequent [Fee] appeal. I will not tax these costs.”

The court set a new hearing date for the sanctions motion and ordered a briefing schedule.

##### *5. Trial Court’s Denial of Lee’s Motion for Sanctions*

Salvio filed its written opposition to the sanctions motion, contending that Code of Civil Procedure section 128.7 does not apply to a memorandum of costs, Salvio’s initial request for the \$650 reporters’ transcript costs had been an honest mistake, the sanctions motion before the court was not the same motion Salvio had received from Lee in January 2011, Lee refused to meet and confer, and the sanctions request was overstated.

After a hearing, the court denied the sanctions motion by written order filed on September 16, 2011. In explaining its denial, the court observed that the primary dispute over the \$650 reporters’ transcript costs had been whether the costs were allocable to the Fees Appeal, not whether the \$650 was refunded, and it was further disputed whether the sanctions motion was properly served on Salvio (the court ultimately found service was

made). In addition, the court stated: “The present motion and the desired sanctions are disproportionate to the fault, such as it is. Aside from the time spent on this motion, the failure of plaintiffs to withdraw the \$650 costs item led to little or no additional expense to Lee, and to no further delays in the case. This item was one of many items both sides were disputing in their respective cost bills following the appeals. Plaintiff’s fault is not clear cut, and is attributable in great part to the predominating role (in the costs bill fight) of the issue of allocation. Finally, permitting an award of sanctions with these facts would encourage satellite litigation. [¶] For these reasons, I have exercised my discretion to deny the motion.”

This appeal followed.

## II. DISCUSSION

Lee contends the trial court erred by failing to tax more of Salvio’s costs and by failing to sanction Salvio for seeking \$650 for the reporters’ transcripts. We address each contention in turn.

### *A. Motion to Tax Costs*

Lee argues that the court should have taxed some of Salvio’s claimed costs of preparing the appendix and an additional amount of Salvio’s claimed costs of printing appellate briefs.

#### *1. Preparation of Appendix*

The trial court determined that Salvio incurred the costs of preparing the appendix in connection with the Main Appeal, and that the costs for portions useful in the Fees Appeal would have been incurred anyway.

Lee urges that the court should not have awarded Salvio all of its costs of preparing the appendix, because pages 393 through 1595 of the appendix pertained solely to the Fees Appeal, for which Salvio Street was not entitled to recover its costs.

Accordingly, Lee argues, the preparation costs of \$943.18 should have been taxed by \$677.59.<sup>2</sup>

Lee, however, never presented this particular argument to the trial court. Although Lee tries in his appellate briefs to make it seem like the trial court ruled in spite of his urging that pages 393 through 1595 of Salvio's appendix pertained exclusively to the Fees Appeal, nowhere is that argument found in Lee's motion to strike or tax costs, or in his reply papers, or in the record of the hearing on the motion. The trial court did not err in failing to accept an argument that Lee never made.

Lee contends it was obvious from the face of the appendix before the court that pages 393 through 1595 pertained to the Fees Appeal, and Salvio's briefing showed that those pages were used for the Fees Appeal rather than the Main Appeal. But if that was so obvious to Lee, it gave Lee all the more reason to point it out to the trial court. Yet, he did not.

Furthermore, while Lee disputed Salvio's contention that the Main Appeal predominated, the record in this appeal is insufficient to establish that the trial court erred in finding that the portion of the appendix consisting of papers related to the attorney fees motion were useful in, or sufficiently related to, the Main Appeal. The appellate record in this appeal contains the appendix's table of contents. According to the table of contents, the titles of the documents comprising pages 393 through 1595 ostensibly pertain to Salvio's motion for attorney fees, but without the documents themselves and a

---

<sup>2</sup> Lee states: "In sum, the costs for that portion of the appendix should have been taxed. Salvio Street made enough copies for four sets of appendices. (See AA 70, 49.) Pages 393 through 1595 of its appendix contained 1,203 pages that were solely for the Fees Appeal. (AA 40-43.) The per page copying cost was 12 cents per page. (AA 70.) 1,203 pages times four sets times 12 cents per page is \$577.44. It also charged 5 cents per page to number the pages. (AA 70.) 1,203 pages at 5 cents per page is \$60.15. In addition, Salvio used four sets of 20 divider tabs for this portion of its appendix at a cost of 35 cents per divider tab which is \$28.00. (AA 40-43, 70, 66.) It used at least 12 GBC binds at \$1.00 each = \$12.00. (AA 66.) All told, adding \$577.44 plus \$60.15 plus \$28.00 plus \$12.00 results in \$677.59. Thus, \$677.59 should have been taxed from the \$943.18 record preparation claim."

clearer demonstration by counsel, we cannot evaluate the trial court's conclusion that the portions of the appendix useful in the Fees Appeal were useful in the Main Appeal.

Lee fails to establish error.

## 2. *Printing*

In the trial court, Lee contended that Salvio's \$516.24 in costs for printing briefs should be taxed because only some of the pages of Salvio's respondent/cross-appellant's brief was devoted to the Main Appeal; Lee also noted that the \$68.77 invoice for printing services in February 2010 was exclusively for the reply brief in the Fees Appeal. The trial court, however, addressed the printing costs only by reference to Salvio's respondent/cross-appellant's brief. Lee contends the court thus erred, arguing that the court's failure to exercise its discretion with respect to the reply brief was itself an abuse of discretion.

We agree that Salvio was not entitled to \$68.77 based on its invoice for printing services performed in February 2010. That invoice indicates it was for the printing of a tan-colored brief (the color of an appellate reply brief) and provides a reference number of "A123080," which was the Fees Appeal. Furthermore, the reply brief was entitled, "Salvio Street's Reply Brief in Case No. 123080," and the first paragraph stated expressly that it was submitted in regard to the appeal of the denial of the motion for attorney fees and request for expert witness costs — "(the 'Fee Appeal')."

While Salvio was not entitled to recover for the February 2010 invoice, correcting the trial court's order in this regard is not as simple as reducing Salvio's cost award by \$68.77. When the court adjusted the amount of Salvio's printing costs by the proportion that Salvio's respondent/cross-appellant's brief pertained to the Fees Appeal, the court apparently thought that the respondent/cross-appellant's brief represented the *entirety* of the \$516.24 claimed for printing costs: the court referred to "Lee[']s claim] that 17 of 48 pages of the brief for which costs are claimed;" the respondent/cross-appellant's brief is 48 pages; and the court, finding that only "about 1/5 of *the* brief [was] attributable to the Fees Appeal," taxed one-fifth of \$516 – approximately the entirety of the \$516.24

requested for printing costs – reducing the allowable amount by \$103.20. (Italics added.)<sup>3</sup>

Instead, the court should have applied the one-fifth deduction only to the cost of printing the respondent/cross-appellant’s brief. The parties and the record do not clearly identify the cost of printing that particular brief, but the sum of two invoices not attributable to the reply brief is \$447.47 (\$120.07 plus \$327.40). On this basis, the one-fifth deduction for the respondent/cross-appellant’s brief should have been \$89.49. This sum of \$89.49, plus \$68.77 as a deduction for the reply brief’s printing costs, amounts to a total deduction of \$158.26. Lee is therefore entitled to have the printing costs taxed by \$158.26 instead of \$103.20, a difference of \$55.06.

*B. Sanctions Motion*

Lee contends the court erred in failing to sanction Salvio in connection with its efforts to recover \$650 in reporters’ transcript costs.

Under Code of Civil Procedure section 128.7, a court “may” impose a sanction against an attorney or party who has presented a pleading, petition, notice of motion, or similar paper that is frivolous or otherwise fails to meet the standards set forth in Code of Civil Procedure section 128.7, subdivision (b), and the party has failed to withdraw the paper within 21 days after service of the opponent’s notice of motion for sanctions. (Code Civ. Proc., § 128.7, subd. (c); see *Kojababian v. Genuine Home Loans, Inc.* (2009))

---

<sup>3</sup> The court was under the impression that all of the printing costs were for the respondent/cross-appellant’s brief because of what the attorneys said at the hearing. When the court asked Lee what briefs he was describing in his argument, Lee referred only to the Salvio brief attached as Exhibit 14 to Salvio’s opposition to the motion to tax, which was the 48-page respondent/cross-appellant’s brief filed in both appeals. Lee apparently was explaining that only those pages in that one brief were attributable to the Main Appeal. When the court suggested that \$516 pertained to Salvio’s respondent/cross-appellant’s brief alone, Salvio’s attorney (Alvarez) agreed, without any correction by Lee.

174 Cal.App.4th 408, 422.) We review for an abuse of discretion. (*Kojababian, supra*, at pp. 420-422.)<sup>4</sup>

Here, the court cited numerous reasons for its denial of Lee's sanctions motion, including that Salvio's failure to withdraw the \$650 cost request earlier had led to "little or no additional expense to Lee, and to no further delays in the case," since "[t]his item was one of many items both sides were disputing in their respective cost bills following the appeals." In fact, Lee did not demonstrate what if any additional expense or delay resulted from Salvio's tardiness in retracting the request for reporters' transcript costs in particular, or how such expense or delay would support a sanctions award to Lee in any particular amount. Lee's declaration in support of his sanctions motion merely stated: "I have and will have incurred reasonable and necessary charges of my attorney, John Hartford, for the research and preparation of this motion for sanctions and for filing the motion to strike/tax Salvio Street's requested transcript costs, reviewing its opposition and preparing reply papers in the sum of no less than \$1,500.00. The filing costs for each motion is \$40.00 each for a total of \$80.00 in filing costs."

Contrary to Lee's assertion, the trial court did not state or imply that it was refusing to consider issuing a lesser sanction or was unaware it could. To the contrary, the record indicates that the court carefully considered the circumstances and exercised its discretion in deciding not to impose sanctions, and that Lee had not provided evidence or argument sufficient for an award of a lesser sanction. Based on the arguments and evidence presented to the court, Lee has failed to establish a prejudicial abuse of discretion.

### III. DISPOSITION

The trial court's order as to Lee's motion to strike or tax costs is reversed only as to the costs allowed for the printing of appellate briefs: in this regard, the trial court is directed to tax the amount Salvio requested by \$158.26 rather than \$103.20; the order is

---

<sup>4</sup> We will assume *arguendo*, for purposes of this appeal only, that Code of Civil Procedure section 128.7 applies to a memorandum of costs.

otherwise affirmed. The trial court's order denying Lee's motion for sanctions is affirmed. Each party to bear its own costs on appeal.

---

NEEDHAM, J.

We concur.

---

SIMONS, Acting P. J.

---

BRUINIERS, J.