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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Siskiyou)

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PETER ARTH, JR.,

Plaintiff and Appellant,

v.

CHRIS RAINE et al.,

Defendants and Respondents.

C071303

(Super. Ct. No.  
SCSCCVPT110000181)

Peter Arth, Jr., challenges an order requiring him to pay statutory attorney fees to Citizens for a Better Dunsmuir (Citizens). The trial court awarded statutory attorney fees, paralegal fees, and court costs to Citizens after sustaining a demurrer to Arth’s second amended petition for writ of mandate. In the petition, Arth alleged Citizens and some of its members violated the Ralph M. Brown Open Meetings Act (Brown Act) (Gov. Code, §§ 54950–54963),<sup>1</sup> Political Reform Act of 1974 (§ 81000 et seq.), and common law. Statutory attorney fees and paralegal fees, and “CourtCall” fee

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<sup>1</sup> Undesignated statutory references are to the Government Code.

totaled \$15,449.06 and were awarded by the trial court under sections 54960.5 and 91003.

On appeal, Arth contends the award of attorney fees must be reversed because (1) Citizens did not seek the attorney and paralegal fees by noticed motion or affidavit, (2) Citizens is not the prevailing party, (3) attorney fees are not required by statute in this case, (4) this case is not frivolous and therefore does not allow an award of attorney fees under section 54960.5, (5) insufficient evidence supports the award of fees and costs, and (6) \$90 for a “CourtCall” cost must be stricken as unauthorized under the local rules of court. We note Arth challenges only the attorney fees, paralegal fees, and \$90 “CourtCall” cost, not the court costs awarded in the amount of \$555.

We conclude the trial court erred in awarding statutory attorney fees and paralegal fees in the absence of a noticed motion or affidavit filed in support of the fees as required by Code of Civil Procedure section 1033.5, subdivision (c)(5). As to Arth’s challenge to the \$90 “CourtCall” cost, we conclude the issue has not been preserved for appeal. Accordingly, we strike the attorney and paralegal fees but affirm the court costs.

#### FACTUAL AND PROCEDURAL HISTORY

##### ***The prior litigation: Citizens for a Better Dunsmuir v. City of Dunsmuir***

The City of Dunsmuir (City) has a city council consisting of five elected members whose authority encompasses regulation of water rates for residents of the City and adjoining areas. Prior to November 2010, the city council (under the leadership of then-mayor Arth) voted to undertake long-delayed upgrades to City water and sewer systems and to raise water rates over a three-year period. A number of residents, unhappy with the increase in rates, formed an unincorporated entity (Citizens) to challenge the increase by filing a lawsuit in August 2010 in the case of *Citizens for a Better Dunsmuir et al. v. City of Dunsmuir et al.*, Siskiyou Superior Court case No. SC CV PT 10-1148. While the lawsuit was pending, Arth was recalled and a new slate of candidates concerned with issues of the water rates was elected. Nick Mitchell was elected the new mayor, and

Christopher Raine elected vice-mayor. Elected to the city council were Diane Dolf, Arlis Steele, and Ed Steele.

At a January 4, 2011, meeting of the members of Citizens, three city council members were in attendance. No city council business was transacted. Instead, the meeting appears to have focused on fundraising for Citizens' legal counsel. Various options, such as a bake sale, were considered.

At a January 13, 2011, city council meeting the pending lawsuit was brought up. Council members were informed the lawsuit "was to be dismissed as moot," and therefore were asked to consider whether to waive the City's attorney fees in exchange for dismissal of the lawsuit. Mitchell and Raine recused themselves from voting, and the action failed on a two-to-one vote. At a special meeting a few days later, the matter was reconsidered and, this time, Raine supplied the vote necessary to pass the proposed settlement. The lawsuit was dismissed February 14, 2012. But on February 24, 2011, the city council reconsidered the matter and voted unanimously to rescind its earlier vote to waive its attorney fees. No further action was taken on the attorney fee issue.

***The Present Litigation: Arth v. Raine et al.***

In February 2011, Arth filed a petition for writ of mandate naming Raine, Arlis Steele, Dolf, and Citizens as defendants. The petition sought to recover the City's attorney fees and a declaration that defendants had met in violation of the Brown Act and the Political Reform Act. Arth amended his petition twice. Each version of the petition was successfully challenged by a Citizens demurrer. After the last amendment, the trial court sustained the demurrer without leave to amend as to claims against Citizens.

In a statement of decision dismissing Citizens as a defendant, the trial court found: "Clearly the disagreement over the handling of the water infrastructure and rate matters by the previous City Council has been the source of conflicts and heated debate that resulted ultimately in not only the filing of the instant lawsuit, but the filing by some citizens of Dunsmuir of the [*Citizens for a Better Dunsmuir et al. v. City of Dunsmuir et*

*al.*, Siskiyou Superior Court No. SC CV PT 10-1148] lawsuit.” The statement of decision further recounted: “The instant lawsuit has listed a long list of perceived grievances that has frustrated [Arth] and other residents. These grievances address procedural matters during Council meetings, the nature and length of discussions, the procedures for placing matters on the agenda, the appointment and composition of committees. [Arth] further claim[s] that the present water rate structure is ‘unlawful’ under State law. As indicated below many of these complaints deal with the discretion of the City Council in conducting its own meetings, and its procedures in conducting city business, all issues that must be deferred to the legislative and executive sound judgment of the City Council. The instant Petition however *does* raise meritorious issues relating to the interpretation of provisions of the Fair Political Practices Act regarding conflicts of interest on the part[s] of two of the Respondents who have voted on matters involving water issues.”

Although Citizens was dismissed as a defendant, the trial court noted that “there has not been a resolution of the pending writ proceeding and the individually name[d] respondents may still be liable.”

After Citizens was dismissed from the case, Citizens filed a memorandum of costs claiming \$13,776.67 in statutory attorney fees under sections 54960.5 and 91003. Citizens also claimed \$90 for “CourtCall” costs and \$1,582.39 in paralegal fees. Arth moved to tax costs. The trial court denied the motion to tax costs. From the order denying Arth’s motion to tax costs, Arth has timely filed a notice of appeal.

## DISCUSSION

### I

#### ***Statutory Attorney Fees Must be Claimed as Prescribed by Statute***

Arth contends the award of statutory attorney fees must be stricken for failure of Citizens to comply with the requirements set forth in Code of Civil Procedure section 1033.5. The contention has merit.

**A.**

***Statutory Attorney Fee Requirements***

To claim statutory attorney fees, a party must comply with the statutory requirements for claiming such fees. Here, the attorney fees awarded to Citizens were awarded pursuant to sections 54960.5 and 91003. Neither section specifies any *manner* in which the fees must be claimed because neither mentions procedural vehicles such as noticed motions, affidavits, or applications.

Section 54960.5 authorizes attorney fees by providing that “[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.”

Section 91003, subdivision (a), provides that “[a]ny person residing in the jurisdiction may sue for injunctive relief to enjoin violations or to compel compliance with the provisions of this title. . . . The court may award to a plaintiff or defendant who prevails his [or her] costs of litigation, including reasonable attorney’s fees.”

Even though sections 54960.5 and 91003 do not specify any procedural manner in which to claim fees, they are subject to the requirements of Code of Civil Procedure section 1033.5, subdivision (c)(5), which provides in pertinent part: “When any statute of this state refers to the award of ‘costs and attorney’s fees,’ attorney’s fees are an item and component of the costs to be awarded and are allowable as costs pursuant to [to the subdivision allowing statutory attorney fees]. . . . Attorney’s fees allowable as costs pursuant to [statute] may be fixed as follows: (A) upon a noticed motion, (B) at the time a statement of decision is rendered, (C) upon application supported by affidavit made concurrently with a claim for other costs, or (D) upon entry of default judgment.”

Because this case does not involve a default judgment or an award of attorney fees made at the time the statement of decision was rendered, Citizens could claim statutory

attorney fees only by (1) noticed motion or (2) affidavit filed concurrently with the claim of other costs. (Code Civ. Proc., § 1033.5, subd. (c)(5).) It is undisputed Citizens did not file a noticed motion to claim fees and costs. Consequently, the trial court properly awarded costs only if Citizens filed an affidavit in support of attorney fees concurrently with its claim for other costs. (*Ibid.*)

Citizens contends its memorandum of costs was “properly verified” by a statement of its attorney that to the best of her knowledge and belief, the memorandum of costs reflected costs necessarily incurred in this case. This might be enough for a claim of court costs. However, even the form used by Citizens’ attorney indicates more was necessary to claim statutory attorney fees. The memorandum of costs form prepared by the Judicial Council and used in this case admonishes to “enter here” the amount of attorney fees “if contractual or statutory fees are fixed without necessity of a court determination; otherwise a noticed motion is required.”

Both sections 54960.5 and 91003 provide for “reasonable attorney fees,” and the amount of reasonable attorney fees is subject to the discretion of the trial court rather than being “fixed without necessity of a court determination.” Thus, the form properly advised Citizens a noticed motion was necessary. Per Code of Civil Procedure section 1033.5, subdivision (c)(5)(C), we would add that an “application supported by affidavit made concurrently with a claim for other costs” also would suffice. Here, however, there was no affidavit.

A statement of Citizens’ attorney to the best of her knowledge and belief the fees were necessary does not suffice to meet the requirements of an affidavit. For a person to execute an affidavit, Code of Civil Procedure section 2015.5 requires a “writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution, or (2), if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the

State of California. The certification or declaration may be in substantially the following form: [¶] (a) If executed within this state: [¶] ‘I certify (or declare) under penalty of perjury that the foregoing is true and correct’: [signature and date lines] [¶] (b) If executed at any place, within or without this state: [¶] ‘I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct’: [signature and date lines].” (Brackets added.)

The attorney for Citizens did not file any affidavit under penalty of perjury. Because there was neither an affidavit nor a noticed motion, Citizens did not properly comply with the statutory provisions for claiming statutory fees. Accordingly, the attorney fees must be stricken. (*Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1723-1725, superseded on another ground by statute as stated in *Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1196.)

## **B.**

### ***Paralegal Fees***

Arth contends the paralegal fees awarded to Citizens must also be stricken. We agree.

The memorandum of costs lists paralegal fees in the amount of \$1,582.39 as “other” costs. No separate legal authority for the award of paralegal fees is listed.

Paralegal fees are commonly claimed as a component of attorney fees for purposes of fee shifting statutes and contracts. As recognized in *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, “In recent years, awards of attorneys’ fees for paralegal time have become commonplace, largely without protest.” (*Id.* at pp. 274-275, collecting authority.) Here, the paralegal fees appear to have no other authority for their award apart from the authority for attorney fees under sections 54960.5 and 91003. Just as the attorney fees under those sections require either a noticed motion or affidavit in support of the claim, so too paralegal fees must comply with the same requirements.

Consequently, Citizens' failure to file a noticed motion or affidavit in support of the paralegal fees requires those fees to be stricken along with the attorney fees.

## II

### *Telephone Appearance Fee*

Arth challenges the award of \$90 for a "CourtCall" cost as conflicting with a local rule of court. However, he did not mention this cost in his motion to tax costs. "Failure to raise specific challenges in the trial court forfeits the claim on appeal. ' "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]' " (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fns. omitted.) "Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack. . . . (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.)" ' (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830.)" (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) Accordingly, we deem the issue not preserved for appellate review.

## DISPOSITION

The order denying Peter Arth, Jr.'s, motion to tax costs is modified. The \$13,776.67 awarded for attorney fees and \$1,582.39 for paralegal fees are stricken. Accordingly, the trial court's award is reduced to \$645 in costs in favor of Citizens for a Better Dunsmuir. Citizens for a Better Dunsmuir's request for attorney fees on appeal is

denied. Peter Arth, Jr., shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

HOCH, J.

We concur:

ROBIE, Acting P. J.

BUTZ, J.