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No. _____

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.

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.

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appeals@tankelaw.com

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

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INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

Appellant D.L. Falk Construction, Inc. ("Falk Construction") is a small family-owned construction company. (2 AA 458.) To protect its assets pending appeal from a $681,000 attorney's fees award against it, Falk Construction posted a $955,000 appeal bond. (2 AA 446; 468-469.) To obtain a letter of credit that would serve as collateral for the bond, Falk Construction and its principal, David Falk, were required to borrow money and pay fees to a bank. (2 AA 239-241.)

Falk Construction ultimately won its appeal, obtaining a reversal of the attorney's fee award and a discharge of the appeal bond. (2 AA 457-483.) But when it claimed as a cost on appeal the interest and bank fees it was required to pay to obtain the letter of credit, the trial court denied its claim. (2 AA 522-523.) The Court of Appeal for the First Appellate District, Division Two, in an opinion by Justice James Richmond with Presiding Justice J. Anthony Kline and Justice Paul Haerle concurring, affirmed the trial court's order in a published opinion. (*Rossa v. D.L. Falk Construction, Inc.* (2010) 184 Cal.App.4th 438, Slip Opinion 4-5, 9-10, hereinafter "Opn.")

Falk Construction's petition for review raises the following issues of importance in California civil appeals:

1. **A party falls victim to a legally-flawed money judgment and is constrained to post an appeal bond collateralized by a letter of credit to protect its property from loss by execution pending an appeal. After obtaining reversal of the judgment, can such a party recover the interest expenses and bank fees for the letter of credit as "reasonable . . . costs to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral" under Rule 8.278, subdivision (d)(1)F) of the California Rules of Court?**

2. **Does an interpretation of Rule 8.278, subdivision (d)(1)(F) that does not allow recovery of interest payments and bank fees made for a surety bond, but nonetheless does allow recovery of interest for a cash deposit made in lieu of a surety bond, violate the equal protection clauses of the state and federal constitutions?**

By legislative command, the only allowable costs on appeal are those defined by court rules[1] enacted by the Judicial Council. (Code Civ. Proc., § 1034(b).)[2] Those rules govern the more than 3,000 civil appeals decided every year in our state. (Judicial Council, 2009 Statistics Report, p. 28.)

Before 1994, the recoverable cost of obtaining an appeal bond under former rule 26(c) was confined to "the premium on any surety bond procured

[1] All rule references are to the California Rules of Court.
[2] All statutory references are to the Code of Civil Procedure.

by the party recovering costs." In *Geldermann v. Bruner* (1992) 10 Cal.App.4th 640, the First District Court of Appeal rejected a prevailing appellant's cost-on-appeal claim for bank fees it paid to obtain a letter of credit necessary to collateralize an appeal bond. Observing that bank fees for letters of credit were not among the "only" appellate costs listed as recoverable in rule 26(c), the court predicted that "commercial realities" and "fairness" might convince the Judicial Council to amend the rule. (*Id.* at p. 643.)

The Judicial Council responded to *Geldermann* by amending rule 26(c), effective January 1, 2004, to include as an allowable cost on appeal not only "the premium on any surety bond," but also any "other expense reasonably necessary to procure the surety bond, such as the expense of acquiring a letter of credit required as collateral for the bond." (Former Rule 26(c), subs. (5) and (6).) (Appellant's Request for Judicial Notice in Support of Petition for Review ("RJN"), p. 67.)[3]

In *Cooper v. Westbrook Torry Hills, LP* (2000) 81 Cal.App.4th 1294, the Fourth District Court of Appeal allowed the appellant to recover reasonable and necessary "interest expenses" incurred to borrow funds to make a cash deposit in lieu of an appeal bond as permitted by section 995.710, subdivision (a). The First District refused to follow *Cooper* in this case. In a

[3] In a revision effective January 1, 2003 designed to achieve greater efficiency and clarity of language, the Judicial Council combined former subdivisions (5) and (6) of rule 26 into a single category of allowable cost that includes the "reasonable . . . cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral . . ." (RJN, p. 92.) With certain renumbering and organizational changes, the current rule 8.278, subd. (d)(1)(F) contains the same operative language. (RJN, p. 76.)

six-page criticism of *Cooper*, the court here found its premises unsound, its assumptions contrary to statute, its reasoning offensive to caselaw, and its implications intolerable. (Opn. 7-13.) Disregarding the plain meaning of rule 8.278, subdivision (d)(1)(F), the court held that "strict construction" required a holding that interest *could not possibly be* a "cost to obtain a letter of credit." If the court is right, there is nothing left of *Cooper*.

This case merits this Court's attention for three reasons:

- The court rule defining allowable bond and letter-of-credit costs governs thousands of civil appeals from money judgments. The need for consistency and fairness in the application of the rule gives rise to a question of statewide importance. This Court has not hesitated to grant review in similar cases involving the rules on appeal. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 125-128 [prison-delivery rule applies to self-represented prisoner's filing of a notice of appeal in civil case]; *Alan v. American Honda Motor Co.* (2007) 40 Cal.4th 894, 902-904 [sufficiency of documents to trigger 60-day period to file notice of appeal under rule 8.104].)
- The Court of Appeal's thorough disapproval of *Cooper* creates uncertainty in the award of costs on appeal throughout California. Given the depth and magnitude of the Court of Appeal's criticisms, future courts will be required to take sides.

Only this court's intervention will restore uniformity of decision.

- The commercial realities and fairness considerations recognized in *Geldermann* (10 Cal.App.4th at 643-644) and endorsed by the Judicial Council in the amendment to rule 26 effective January 1, 1994, are undermined by the Court of Appeal's decision. Small businesses like Falk Construction are often forced to borrow money to obtain letter-of-credit collateral to secure appeal bond protection for their assets pending appeal. Yet their opponents who secure erroneous money judgments are given security and 10% postjudgment interest during the appeal process. (§§ 685.010; 917.1, subd. (b.) There can be no equity in a rule interpretation which denies the reasonable out-of-pocket costs – in Falk's case the more than $100,000 needed to obtain the letter of credit for a nearly one million dollar bond – which are needed to make whole the victims of flawed orders and judgments.

Apart from its refusal to adhere to the plain meaning of the rule and its manifest purpose as revealed by its drafting history, the Court of Appeal's decision also raises a serious question of constitutional dimension that was avoided by the appellate court. By statute, appellants have the option of posting bonds or depositing cash as security for payment of the judgment. (§§ 917.1, subd. (b); 995.710, subd. (a).) The two methods are equivalent in all

material respects. Our Legislature has decreed they have the "same force and effect." (§ 995.730.) While *Cooper* mandates recovery of interest costs reasonably and necessarily expended to make a cash deposit, the present case denies interest when a bond is involved. The equal protection clauses of our state and federal constitutions decry such a result and compel a rule interpretation that avoids it.

DISCUSSION

The Court of Appeal's construction of rule 8.278(d)(1)(F) disregards the rule's plain meaning, rulemaking history, and manifest purpose to introduce commercial reality and fairness into awards of appellate costs. To honor the Judicial Council's intentions in enacting the rule and to preserve the rule's constitutionality, the Court of Appeal's decision must be reversed.

I. REASONABLE INTEREST AND OTHER BANK CHARGES PAID TO OBTAIN A LETTER OF CREDIT NECESSARY TO COLLATERALIZE AN APPEAL BOND ARE PART OF THE ALLOWABLE "COST TO OBTAIN A LETTER OF CREDIT AS COLLATERAL" UNDER RULE 8.278(d)(1)(F).

California law does not provide for a stay in the enforcement of money judgments pending appeal unless the appellant gives a bond to secure payment of the judgment amount, postjudgment interest, and costs in the event the judgment is affirmed or the appeal is abandoned or dismissed.

(Code Civ. Proc., § 917.1, subd. (b).) Without a bond, appellant's assets are vulnerable to immediate execution, sale, and the full range of judgment enforcement remedies notwithstanding pendency of the appeal. (Code Civ. Proc., § 917.1(a); see also §§ 683.010 [". . . [A] judgment is enforceable . . . upon entry."]; § 695.010 ["Except as otherwise provided by law, all property of a judgment debtor is subject to enforcement of a money judgment."].)

The bond-premium and letter-of-credit costs incurred by Falk Construction to secure and maintain an appeal bond are typical of those required of other appellants subject to money judgments. The surety, International Fidelity Insurance Company, provided a bond in the amount of $955,000, which was one and one-half (1 ½) times the amount of the attorney's fee award against Falk. (1 AA 244, Code Civ. Proc., § 917.1.) For providing the bond, the surety charged an annual bond premium of $9,550 or 10% of the bond amount. The bond was twice renewed during the appeal after its insurance, resulting in a premium charge of $28,650. (1 AA 239:1-11.)[4]

As the Court of Appeal observed, in order to process the appeal bond, Falk had to obtain a letter of credit. (Opn. 2.) Before issuing the bond, the surety required Falk Construction to produce a standby letter of

[4] With one exception for payment made for what it called an unearned premium of $8,754, the trial court did award the premium charge to Falk and that cost was not at issue on appeal. (2 AA 522.)

credit by which a financial institution would guarantee payment of the bond amount in the event a claim were made against the bond. (1 AA 239:12-20.)

When Falk Construction sought to obtain the letter of credit from Wells Fargo Bank, the bank insisted that the company open a deposit account and deposit funds as collateral security in the sum of $954,070. To obtain the funds needed to make the deposit, Falk had to draw down the remainder of its corporate line of credit with the bank in the amount of $483,070. Lacking additional credit, it borrowed the $471,000 balance of the required deposit from the personal credit line of its principal and president, David Falk, and agreed to reimburse him for the actual interest and expenses of his use of his credit line. (1 AA 239:21-26.)

The costs paid by Falk Construction to obtain the appeal bond thus consisted of four items, two of which were allowed and two of which were denied by the trial court:

1. Premium costs for the appeal bond, which were for the most part allowed. (Opn. 2; 2 AA 521.)
2. $950.00 in bank letter of credit fees including two annual charges of $450 each and two $25 charges for courier services. (Opn. 2; 2 AA 241:22-28.) These fees were also allowed. (2 AA 522-523.)

3. $1,784.00 from an additional "non-refundable commitment loan fee" to extend the Falk Construction business line of credit for an additional month "because the funds collateralizing the letter of credit had been drawn down by the Bank, pending an order discharging the surety bond. The withdrawal of funds had been triggered by Wells Fargo's decision not to renew the Letter of Credit." (Opn. 2-3 & fn. 3; 2 AA 242:1-9; 386.) This item was denied. (2 AA 522.)

4. $99,289.81 in interest: (1) paid by Falk Construction on its business credit line; and (2) reimbursed to its principal David Falk on his personal line of credit which were used to make the bank deposit to collateralize the appeal bond. (Opn. 3.) This item, of course, was also denied. (2 AA 522-523.)

Each of the above out-of-pocket costs was reasonable and necessary to procure the appeal bond. Neither the trial court nor the appellate court found otherwise. Rule 8.278(d)(1)(F) offers no basis to distinguish among them; the Court of Appeal erred in so holding.

A. The Plain and Ordinary Meaning of the Rule Includes Interest Expenditures and Bank Charges as Part of the "Cost to Obtain a Letter of Credit as Collateral."

This Court has described the rules of construction applicable to the interpretation of the California Rules of Court:

> "The Judicial Council, of course, is the entity charged by the California Constitution with adopting statewide rules for court administration, practice, and procedure. The California Rules of Court '"have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions."' The rules applicable to interpretation of the rules of court are similar to those governing statutory construction. Under those rules of construction, our primary objective is to determine the drafters' intent." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 125, citations omitted; *Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043, 1047; Cal. Const., art. VI, § 6; see also Gov. Code, § 68070, subd. (b); Cal. Rules of Ct., rule 10.1.) "'In determining such intent, a court must look first to the words of the [rule] themselves, giving to the language its usual, ordinary import and according significance, if possible, to

every word, phrase and sentence in pursuance of the [drafters'] purpose.' [Citation.]" (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043; *San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 831.)

Rule 8.278, subdivision (d)(1)(F), makes recoverable "*the cost to obtain a letter of credit as collateral" to secure an appeal bond.*[5] With respect to obtaining a letter of credit, the plain and ordinary meaning of "cost" includes interest expenditures.

Black's Law Dictionary defines "cost" to mean "[t]he amount paid or charged for something; price or expenditure." (Black's Law Dict. 8th ed. 2004) p. 371, col. 2.) The term "price" is defined as "[t]he amount of money or other *consideration asked for or given in exchange for something else*; the cost at which something is bought or sold." (Black's Law Dict. 23 (8th ed. 2004) p. 1226, col. 2.) And "expenditure" is defined as *"[a] sum paid out.*" (Black's Law Dict. (8th ed. 2004) p. 617, col. 2.) Black's Law Dictionary also treats "cost" as synonymous with "expense," which means "*[a]n expenditure of money, time, labor, or resources to accomplish a result.*" (Black's Law Dict. (8th ed. 2004) p. 617, col. 2.) Similarly, Merriam-Webster's Collegiate Dictionary defines "cost" to mean "the amount or equivalent paid or charged for something" and "*the outlay or*

[5] All emphasis is added unless otherwise stated.

expenditure . . . made to achieve an object." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 262, col. 1.)

In order to obtain the letter of credit to secure the bond, Falk was required to incur an obligation to pay interest. Accordingly, interest payments were part of "[t]he amount paid or charged" for the letter of credit, and were part of the "*consideration asked for [and] given in exchange for*" the letter of credit. They were indeed "*paid out*" by Falk, and the obligation to make such payments was required to "*accomplish [the] result*" of obtaining the letter of credit as collateral to secure the appeal bond. As an indispensable part of the consideration for the letter of credit, interest expenses therefore be considered part of the "cost" of obtaining the letter of credit.

In justifying its decision to disregard the plain meaning of the rule's language, the Court of Appeal pointed to the rule of strict construction of cost statutes and what it perceived to be the demands of the "'legal and broader culture.'" (Opn. 4-7 & fn. 5.) Neither supports the decision.

The rule of strict construction of cost statutes exists to insure that courts do not invent novel kinds of costs without legislative authorization. Thus, the rule on its face confines prevailing parties to "only the following," costs listed in the rule's subsections. (Rule 8.278, subd. (d)(1).) But the specifically listed costs are recoverable by the prevailing party as a matter of right. (*Ladas v. California State Auto. Assn.* (1993) 19

Cal.App.4th 761, 773-774; Rule 8.278, subd. (a)(1) ["the party prevailing in the Court of Appeal in a civil case . . . is *entitled* to costs on appeal"]; 9 Witkin, Cal. Proc. 5th (2008) Appeal, §§ 954, 968, pp. 1009, 1017.) As a result, the cases cited by the Court of Appeal reveal that so-called strict construction applies to limit awarded costs to those that are both expressly authorized *and* reasonable. (See, e.g., *Ladas, supra,* 19 Cal.App.4th 761 [strict construction of section 1033.5 to disallow recovery of costs for attorney lunches, trial exhibits, binders and tabs, faxes, local travel expenses, delivery charges, computer legal research, and department of insurance fees]; *Geldermann v. Bruner* (1992) 10 Cal.App.4th 640, 642-643 [strict construction of former rule 26(c) to prohibit recovery of a "charge incurred for a letter of credit to secure an appeal bond [because it] is not a listed cost"]; *Sequoia Vacuum Systems v. Stansky* (1964) 229 Cal.App.2d 281, 289 [strict construction of former sections 1035 and 1054a in refusing to award interest on a cash deposit in lieu of a preliminary injunction bond].)

In this case, the reasonable and necessary "cost to procure a surety bond, including the premium and *the cost to obtain a letter of credit as collateral*" – and *all* of that cost – is expressly authorized by the language of the rule. Nothing in the text of the rule or its history confines the recoverable "cost" to bond premiums or bank fees paid to open a letter of credit. Nothing excludes interest costs. The Judicial Council easily could

have confined "costs" to specific bank fees or simply excluded interest. It elected not to do so, opting for recovery of all reasonable bond and letter-of-credit costs.

Nor does the "legal culture" favor the court's decision. The manifest purpose of the rule, as shown by its language and its history in the legal culture of our state, is to address the commercial unfairness of denying recompense to an appellant who incurs what may be large out-of-pocket expenses to protect his or her assets from the sharp thrust of an erroneous judgment. (See Sections I(B) and I(C) below.) The Court of Appeal's construction defeats that purpose.

B. The Rulemaking History of Rule 8.278, Particularly the 1994 Amendment to Former Rule 26, Confirms That Interest Expenditures Are Recoverable Costs on Appeal.

When the plain meaning of the language of a statute or court rule is clear, there is no need to resort to history. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046; *Trans-Action Commercial Investors, Ltd. v. Jelinek* (1997) 60 Cal.App.4th 352, 363.) Even if the rule at issue here were to be deemed ambiguous, its revealing history undermines any view that the rule should be construed to mean other than what it says.

Before January 1, 1994, prior rule 26 (the predecessor to rule 8.278) made recoverable as an appeal bond cost only "the premium on any surety bond procured by the party recovering costs." (Former rule 26, subd.

(c)(5), as amended Jan. 1, 1987; see also *Cooper, supra*, 81 Cal.App.4th at p. 1300.) No other costs were listed.

Thus, in *Geldermann, supra*, 10 Cal.App.4th at pp. 641-642, decided in 1992 under the prior version of the rule, the prevailing party on appeal sought to recover interest and borrowing charges incurred to obtain a letter of credit. Affirming the trial court's order striking these charges, the Court of Appeal explained that because only the costs specifically enumerated in the rule were recoverable, and because a "charge incurred for a letter of credit to secure an appeal bond [was] not a listed cost," such a charge was therefore not recoverable. (*Id.* at pp. 642-643.) Thus, *Geldermann's* "strict construction holding was, like those in other pre-*Cooper* cases declining to award cost items not expressly endorsed in the rules, simply a reflection of the limitations on recoverable costs that clearly appeared in the governing language.

The *Geldermann* court did not pretend that its holding comported with either manifest equity or sound economics. Although approving appellant's observation that denial of letter-of-credit costs ignored "commercial realities as to the true costs of obtaining appeal bond," the court explained that the clear language of the rule trumped all other factors:

> "Commercial realities might convince the Judicial Council to amend rule 26(c) to permit recovery of charges for letters of credit, but that has not yet happened. Absent such

authorization, we may not rely on practical considerations to permit recovery of a charge that is not among the 'only' costs recoverable under rule 26(c)." (*Id.* at pp. 643-644.)

Constrained by the limiting language of the rule, the *Geldermann* court urged the Judicial Council to undertake reform to permit recovery of letter-of-credit costs. As the court stated:

"We agree with [appellant] Bruner that rule 26(c) ignores the commercial realities of today which may require an expenditure for a letter of credit to use as security for the appeal bond. Fairness in this case would compel Geldermann to reimburse Bruner for the cost of the letter of credit. Unfortunately, this is not a matter of equity, but a rule which we must construe strictly. Although it will not benefit Bruner, we suggest his argument must be addressed to the Judicial Council. That body possesses the authority to adopt or amend California Rules of Court; we do not. Our authority is limited to applying them as written." (*Id.* at p. 644.)

The *Geldermann* decision was written by former Justice Donald King of Division Five of the First Appellate District. True to what he wrote in *Geldermann*, Justice King called the decision to the attention of the Judicial Council and recommended that rule 26 be amended to allow recovery of the expense of obtaining a letter of credit to serve as collateral

for an appeal bond. A Judicial Council internal memorandum dated July 20, 1993 from the Council's Appellate Standing Advisory Committee, chaired by Justice Marvin Baxter, recounted the history of a proposed rule change designed to address *Geldermann*:

> "Rule 26 – Recoverable costs on appeal. Justice Donald King referred us to *Geldermann, Inc. v. Bruner* (1992) 10 Cal.App.4th 640, which denied recovery, as costs, of *the expense of a letter of credit required in order to obtain the appeal bond. He suggests amending rule 26 to allow recovery of such expense.*
>
> Comments. The Appellate Court Committees of the Los Angeles and San Diego County Bar Associations support the proposal. There was no opposition.
>
> Recommendation. The Appellate Standing Advisory Committee recommends that the Judicial Council amend rule 26, effective January 1, 1994, to permit *the expense of a letter of credit needed to secure an appeal bond to be recovered as costs.*
>
> The text of the proposed amendment is at pages 9-10." (RJN p. 4.)

In direct response to the *Geldermann* court's concern that rule 26(c) ignored commercial realities, the Judicial Council added subparagraph (6)

to subdivision (c), making recoverable any "other expense reasonably necessary to procure the surety bond, such as the expense of acquiring a letter of credit required as collateral for the bond." (Rule 26, subdivision (c)(6), as amended Jan. 1, 1994; *Cooper*, *supra*, 81 Cal.App.4th at p. 1300.)

While the new rule could have addressed *Geldermann's* holding narrowly by allowing, for example, only "bank fees charged to open a letter of credit," the Judicial Council chose to address the commercial constraints and equities referred to in *Geldermann* more broadly and realistically. The language of the new rule thus goes beyond a single selected kind of expense to include *any* expense necessary to obtain the bond, giving as but one example the expense of acquiring a letter of credit to serve as collateral for the bond.

Between 1994 and the present, rule 26, subdivision (c)(6) was modified as a part of wholesale changes in language and rule numbering made to streamline and simplify the operation of the rules on appeal. None of the changes altered the substance of the rule which expressly allows recovery of interest and all other reasonable letter-of-credit expenses incurred to collateralize an appeal bond. The particular change resulting in the current language of current rule 8.278, subdivisions (d)(1)(F) was made effective on January 1, 2003. That change revised former rule 26(c)(6) to substitute "cost" for "expense" language to provide that the "reasonable . . . cost to procure a surety bond, including the premium and the cost to obtain

a letter of credit as collateral" are fully compensable to a prevailing appellant. (RJN, p. 92.)

The Judicial Council's intention to preserve to the present day the broad rule of bond and letter-of-credit cost recovery first enacted in 1994 is confirmed by the rulemaking history. The 2003 change resulting in the language of current rule 8.278 subdivision (d)(1)(F) is discussed in a memorandum to the Judicial Council from the Appellate Advisory Committee, Justice Joyce L. Kennard, Chair, dated October 3, 2002. With respect to rules revisions under consideration at that time, including changes resulting in rule 27, subdivision (c)(1)(F) [now rule 8.278, subdivision (d)(1)(E)], the committee explained that such revisions were purely stylistic unless otherwise explained in an Advisory Committee Comment:

> "Rationale for Recommendation to Adopt Revised Rules 19-29.9 Existing rules 19-29.9 suffer in varying degrees from the same deficiencies of language and structure as former rules 1-18 (revised in the first installment of this project), i.e., obscure and ambiguous wording, redundant and obsolete provisions, long and complex sentences and paragraphs, and inconsistencies of style and terminology. To cure these deficiencies, the revision simplifies the wording and clarifies the meaning of each provision; restructures individual rules

into subdivisions to promote readability and understanding; and rearranges the order of subdivisions tor the rules themselves when logic or clarity dictates. The vast majority of the changes are stylistic only; but when necessary and appropriate, the revision also make selected substantive changes for limited purposes, i.e., to resolve ambiguities; to fill unintended gaps in rule coverage; to conform older rules to current law, practice, and technology; and to otherwise improve the appellate process. *Whenever the revision results in a substantive change, the Advisory Committee Comment to the rule identifies and explains the change*." (RJN, pp. 79-80.)

No substantive change was identified in any Advisory Committee Comment. (See also RJN, p. 124.)

Thus, while subparagraph (6) of rule 26, subdivision (c) eventually migrated to rule 8.278, subdivision (d)(1)(F) and the text of the rule was changed in immaterial ways, the substance of the rule and its rationale remained unaltered. In light of commercial realities which often require expenditures to obtain a letter of credit as collateral to secure an appeal bond, the rule makes recoverable "the cost to obtain a letter of credit as collateral" to secure an appeal bond. (Rule 8.278, subd. (d)(1)(F).) As *Cooper*, *supra*, 81 Cal.App.4th at p. 1300, discussed immediately below,

confirms, those commercial realities require that interest expenditures be considered a cost of obtaining a letter of credit.

Finally, the Judicial Council has reaffirmed in another way its manifest and continuing intention, as expressed in rule 8.278(1)(d)(F), to allow recovery of *all* expenses that are reasonable and necessary to obtain an appeal bond. Judicial Council Form MC-013, Memorandum of Costs on Appeal, which was adopted for mandatory use by prevailing appellants in claiming appellate costs, and was last revised on January 1, 2007, contains as Item No. 9 the "Premium on any surety bond on appeal." (1 AA 207.) Then, as Item No. 10, the Cost Memorandum form broadly invites submission of all: "*Other expenses reasonably necessary to secure surety bond.*" (*Id.*) Among such other expenses are, of course, the interest on a loan required to purchase a letter of credit as collateral for the bond.

C. *Cooper's* Interest-As-Cost Approach Addresses the Practical Realities and Profound Equities Facing Victims of Erroneous Money Judgments.

Although the Court of Appeal declines to address them, the commercial realities and fairness considerations outlined in *Geldermann* were recognized by the Judicial Council in its January 1, 1994 revision of the rule and sensitively addressed in *Cooper*. Those concerns were wholly disregarded in this case.

An appellant – especially one of limited means – who confronts a flawed money judgment faces a daunting set of legal hurdles. Falk Construction, for example, lost a construction contract case and was subjected to a $100,000 judgment after defeating hundreds of thousands of dollars in additional claims made against it by respondent Rossas. Notwithstanding this modest result, the trial court made an attorney's fees award against Falk Construction for $630,000 that included no allocation for the numerous unsuccessful claims and disregarded established California law governing attorney's fee awards. (1 AA 39-41.) Falk Construction had to overcome the presumption of correctness in the trial court's fee order and meet the deferential abuse of discretion standard in order to obtain a reversal in full. (Opn. 1-2; see also 2 AA 470-481; *Rossa v. D.L. Falk Construction, Inc.*, No. A116151 (September 9, 2009).)[6]

As the beneficiaries of an erroneous money judgment, the Rossas insisted on and received the protection of a surety bond of one-and-one-half (1 ½) times the judgment amount that could insure immediate payment of the fee order were upheld on appeal. (§ 917.1, subd. (b); *Grant v. Superior Court* (1990) 225 Cal.App.3d 929, 934 ["The [bonding] statute . . . insures that [a] successful litigant will have an assured source of funds to meet the amount of the money judgment, costs and postjudgment interest after

[6] Falk Construction later paid a more modest award of trial costs and attorney's fees of $238,844 made on remand. (Opn. 3 & fn. 4.)

postponing enjoyment of a trial court victory."].) The appeal bond amount secures payment of the principal plus a generous above-market interest rate of 10% on the judgment amount. (§ 685.010.)

When a money judgment proves to be improvidently issued and has to be reversed on appeal, the judgment debtor's recompense is the recovery of costs on appeal. As *Geldermann*, *Cooper*, and the Judicial Council's enactment of rule 8.278(d)(1)(F) recognize, both the practical necessity of paying interest to secure letter-of-credit collateral and the simple equity of making whole an appellant wrongly aggrieved by a money judgment demand that all bonding costs – especially including interest which may be the largest – be reimbursed.

In making appellate victims of legally incorrect money judgments whole, rule 8.278(d)(1)(F) does equity to respondents as well. To the extent respondents like the Rossas receive the benefit of security for a judgment they were ultimately not entitled to collect, they, and not the victims of such a judgment, should in fairness pay for it.

II. THE COURT OF APPEAL'S REFUSAL TO FOLLOW *COOPER* IS BASED ON FLAWED CRITICISM AND WILL GIVE RISE TO CONFUSION AND UNCERTAINTY IN THE APPLICATION OF RULE 8.278, SUBDIVISION (d)(1)(F).

The Court of Appeal's wide-ranging criticism of *Cooper*, including express disapproval of its premises, assumptions, and statutory

underpinnings, is alone sufficient to create uncertainty in California caselaw as future courts are left in a quandary as to whether reasonable interest and bank fees paid to obtain bonds or deposits in lieu of bonds are or are not allowable costs on appeal. It is the primary mission of this Court to resolve such a conflict and to establish a uniform interpretation of the rule throughout our state. (Rule 8.500, subd. (b)(1) [review may be ordered "[w]hen necessary to secure uniformity of decision"].) The urgency of the cause is underscored by three fundamental flaws in legal analysis that undermine the Court of Appeal's criticisms of *Cooper* and its entire approach to rule 8.278(d)(1)(F):

- The Court of Appeal faults *Cooper's* reliance on section 995.730 in treating bonds and cash deposits as equivalents for cost award purposes. (Opn. 7.) But it nowhere explains why the statute does not apply nor does it justify the propspect of differential treatment.
- The Court of Appeal finds the prospect of an interest award as part of bonding costs to be unsupported by statute. (Opn. 7-11.) But it disregards completely section 1034, subdivision (b) which expressly authorizes the Judicial Council to define allowable costs on appeal and mistakenly relies on statutes that do not restrict this authority and largely address trial-court and not appellate costs.

- The court predicts disaster from a straightforward construction of the rule, maintaining interest costs would be limitless and would lead to awards of non-out-of-pocket awards employee salaries and other uncontrollable expenses. (Opn. 11-12.) But it ignores the rule's mandate that *all costs be "reasonable" and necessary* and the trial court's ability, as it routinely does with other kinds of money claims, to impose sensible limits.

A. The Cost-Equivalence of Bonds and Cash Deposits Is Statutorily Mandated and Consistent With Equal Protection of the Law.

By statutory allowance, appellants seeking review of money judgments may choose to provide security by a surety bond or a deposit of cash or cash-equivalent instrument in lieu of a bond. Section 995.710, subdivision (a) provides:

> "Except as provided in subdivision (e) [governing deposits with the Secretary of State] or to the extent the statute providing for a bond precludes a deposit in lieu of bond or limits the form of deposit, the principal may instead of giving a bond, deposit with the official [i.e., the court with which the bond is filed under section 995.160] any of the following: [listing cash, bearer bonds, certification of deposit, savings

and share accounts, or investment certificates in federally-insured amounts]."

As *Cooper* recognized, the consequences of making a deposit and posting a bond must be legally identical as declared by section 995.730 which provides that: "A deposit in lieu of a bond has the same force and effect, is treated the same, and is subject to the same conditions, liability, and statutory provisions, including provisions for increase or decrease of amount, as the bond." (*Cooper*, 81 Cal.App.4th at 1298-1300.)

The Court of Appeal calls *Cooper's* recognition of the equivalence of bonds and cash deposits a "fault line" (Opn. 7), but nowhere explains why section 995.730 does not mean what is says or why the *Cooper* court's application of the statute to costs on appeal is in any way suspect. While the court points to other statutes in the Bonds and Undertaking Law, but none of these enactments provide for or mandate different treatment of bonds and cash deposits with respect to appellate costs. (Opn. 7-9.) *Cooper's* holding that bonds and deposits are to be treated the same for costs and other purposes in well recognized in California practice and flows from the plaint statutory terms of section 995.730. (Eisenberg, et al., *California Practice Guide – Civil Appeals and Writs* (Rutter Group 2010), § 7.116-7.125.)

The Court of Appeal often gives no reasonable basis for distinguishing bonds from cash deposits for cost purposes. A rule of court,

like a statute, should be construed to avoid doubts as to its constitutionality. (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 858, citing in part *In re Howard N.* (2005) 35 Cal.4th 117, 134.) *Cooper's* construction avoids such doubts; the Court of Appeal's construction exacerbates them. (See Section III below.)

In short, the Court of Appeal offers no reason why *Cooper* does not apply directly here in view of the statutory and constitutional equivalence of bonds and deposits. But even if it did, *Cooper's* reasoning is grounded on the proposition that interest costs paid to obtain bonds are recoverable. As shown above and below (see Sections I and II(C)), that proposition is incorrect.

B. The Court of Appeal's Criticism of *Cooper* is Fundamentally Flawed and Devoid of Support in Applicable Statutory Authority.

The central theme of the Court of Appeal's disagreement with *Cooper* lies in the premise that *Cooper* is inconsistent with cost statutes and provisions of the Bond and Undertaking Law. (Opn. 7-10.) But that premise is flawed at the outset because the Legislature has given *plenary authority to the Judicial Council to specify recoverable costs on appeal*, thereby rendering other statutory provisions, e.g., those governing trial court costs or other matters, inapposite.

Section 1034(b) provides that: "*The Judicial Council shall establish by rule allowable costs on appeal and the procedure for claiming those costs*." (Stats. 1986, c. 377, § 15.) The Council's plenary authority to establish allowable costs on appeal stands in contrast with its more limited authority regarding allowable trial court costs which are defined by statute: "*Prejudgment costs allowable under this chapter* [i.e., the statutes in Chapter 6 in Title 14 of the Code of Civil Procedure entitled "of costs"] shall be claimed and contested in accordance with rules adopted by the Judicial Council." (§ 1034(a).) Thus, when allowable costs *on appeal* are in issue, the central question is whether such costs are authorized by the plain meaning of court rules and not whether they are independently listed in other statutes.

With one exception, all of the statutes referred to the Court of Appeal as allegedly inconsistent with the award of interest as bond interest are inapposite because they disregard section 1034 subdivision (b)'s authorization to the Judicial Council to establish allowable costs on appeal.

For example, the Court of Appeal points to its prior decision in *Sequoia Vacuum Systems v. Stansky* (1964) 229 Cal.App.2d 281, a case that antedates all of the rule changes and case authority at issue here, and observes that former section 1035, which allows only *bond premiums* to be recovered as costs, and 1054a, which permits cash in lieu of bonds, are substantially continued in the Bond and Undertaking Law. (Opn. 9-10.)

But these statutory provisions no longer govern *appellate costs* in light of the Legislature's authorization in section 1034, subdivision (b) to the Judicial Council to define appellate costs. (Stats. 1986, c. 377, § 15.) The Court of Appeal has fallen into the trap of confusing trial costs which are governed by statute and appellate costs which are governed by court rule. (See *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 91 Cal.Rptr.3d 241, 258-259 [reversing decision for confusing trial cost statutes and appellate cost court rules].)[7]

Similarly, the court cites section 995.740 for the proposition that interest on a deposit is "statutorily recoverable" only to the extent there are no proceedings pending to enforce the principal's liability. (Opn. 8.) But that statute has nothing to do with recoverable appellate costs. It requires only that *cash depositors be paid interest on their deposits* as long as no claim against the deposit has been made. It says nothing about what depositors may collect as costs from their opponents if they win an appeal. That is defined solely by rule 8.278(d)(1)(F) as authorized by section 1034, subdivision (b).

Moreover, the court further asserts that *Cooper* is "dubious" because it construed former rule 26(c) to allow recovery *as a matter of law* of loan interest paid to secure a cash deposit notwithstanding section 1033.5,

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[7] As *Cooper* notes, *Sequoia* has been superseded by the rule at issue here and section 1034, subdivision (b) which expressly authorized it. (81 Cal.App.4th at 1299.)

subdivision (c)(4) which makes items not listed in that statute (e.g., bank fees or interest costs) allowable *in the court's discretion*. (Opn. 10-11.) This statute is likewise inapposite because it does not govern allowable costs *on appeal*. By statutory authority conferred in section 1033 subdivision (b), only the rules of court define such costs. (*Alan S., supra*, 172 Cal.App.4th 238, 91 Cal.Rptr.3d at 258-259 [§ 1033.5 does not apply to costs on appeal].)

The only conceivably relevant statute the Court of Appeal cites is section 995.250, which the court calls "the most pertinent provision of the Bond and Undertaking Law." (Opn. 8.) Section 995.250 allows bond premiums paid "in an action or proceeding" which are paid "pursuant to a statute that provides for the bond" *or* "in connection with the action or proceeding." (§ 995.250, subds. (a) and (b).) But that statute does not provide that these are the *only* allowable costs. It simply authorizes them. Nothing in the statute restricts cost recovery on appeal or undermines the Judicial Council's authority to define allowable costs on appeal as vested by section 1034, subdivision (b).

C. The Court of Appeal's Prediction of Dire Consequences Will Not Come True Because the Rule Allows Recover of Only Reasonable and Necessary Costs.

The Court of Appeal further contends that its rule of strict construction should operate deny interest costs on appeal because there

would otherwise be no way to avoid awarding credit card interest, employee time and labor, and other "difficult to calculate" expenses. (Opn. 11-12.) The court takes no account of the express provision of rule 8.278(d)(1) that no costs on appeal of any kind are awardable unless "*reasonable*." To the extent that an appellant claims sums that exceed reasonable market-rate interest or the actual out-of-pocket costs of securing credit necessary to obtain a letter of credit, they will be disallowed. (See also *Muller v. Reagh* (1959) 170 Cal.App.2d 151, 154 [only out-of-pocket costs are recoverable: "A definite sum of money must be paid out."].)

III. THE TRIAL COURT'S INTERPRETATION OF RULE 8.278, SUBDIVISION (d)(1)(F), VIOLATES THE EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The Court of Appeal declined to consider Falk's alternative argument based on equal protection because it was not raised in the trial court, observing that: "The issue of costs seems particularly one where specific dollars-and-cents comparisons would be pertinent." (Opn. 13.) But, as the Court of Appeal acknowledged, a pure question of law, particularly one that involves "an important issue of public policy," can be decided on appeal notwithstanding that it was not first raised in the trial court. (*Id.*) Those principles apply here. The facts of this case showing what costs were incurred are extensively developed and documented in the

record without substantial dispute. (2 AA 238-394.) The statutory command that bonds and cash deposits in lieu of bonds be treated identically is indisputable. There is manifest unfairness in treating two similarly-situated appellants differently based on their choices of alternatives having the same purpose and importing the same consequences.

Falk respectfully asks this Court to consider the constitutional question should it be necessary to do so to resolve this case. In any event, examination of the question is relevant to application of the established canon of construction that, whenever possible, appellate courts construe statutes and rules of court in a manner that preserves their constitutionality. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; *Conservatorship of Cooper* (1993) 16 Cal.App.4th 414, 418.)

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike. [Citation.]" (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439.) "'The equal protection clause of the California Constitution similarly states that a person "may not be denied equal protection of laws" (Cal. Const., art. I, § 7), and statutory classifications challenged thereunder are analyzed by the same rules applicable to challenges to the Fourteenth Amendment.

[Citations.]'" (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 364-365.)

It cannot be seriously disputed that, for purposes of recovering costs on appeal, a victorious appellant who posts an appeal bond is situated similarly to a victorious appellant who deposits cash in lieu of an appeal bond. Indeed, the Legislature has mandated by statute that such appellants are not merely *similarly* situated, but must be treated *identically* for purposes of recovering costs on appeal. (Code Civ. Proc., § 995.730 ["*A deposit given instead of a bond has* the same force and effect, is treated the same, and is subject to the same conditions, liability, and statutory provisions . . ."].)

Accordingly, assuming the trial court's interpretation of Rule 8.278, subdivision (d)(1)(F), is correct, i.e., that interest is recoverable with respect to a cash deposit, but not with respect to obtaining a letter of credit to secure an appeal bond, there must be a rational basis for such a distinction or the rule would run afoul of the Equal Protection Clause.

Because the court's unequal treatment of Falk has no rational relationship to any conceivable legislative purpose behind the award of costs to a victorious appellant in a civil case, its interpretation of rule 8.278, subdivision (d)(1)(F), violates the Equal Protection Clause and our state's constitutional provision insuring equal protection. Fortunately, that interpretation also runs afoul of the correct interpretation of the rule, i.e.,

that reasonable interest expenditures are recoverable where necessary to obtain a letter of credit to secure an appeal bond – just as they are recoverable where necessary to obtain the cash deposited in lieu of such a bond. The rule should be interpreted in accordance with the intent of the drafters, thereby avoiding the constitutional invalidity of the Court of Appeal's multiply-flawed interpretation.

CONCLUSION

Review should be granted forthwith to remove uncertainty from the conflict in authority between *Cooper* and this case and to establish a correct and consistent statewide interpretation of rule 8.278(1)(d)(F) with respect to interest costs allowable on appeal.

DATED: June 11, 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 7,477 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: June 11, 2010

LAW OFFICES OF TONY J. TANKE

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

Filed 5/6/2010

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

STEVE ROSSA et al., Plaintiffs and Respondents, v. D. L. FALK CONSTRUCTION, INC., Defendant and Appellant.	A125567 (San Mateo County Super. Ct. No. CIV442294)

A party required to post an appellate bond is statutorily entitled to recover the premiums necessary for the bond if that party prevails on the appeal. (Code Civ. Proc., § 1033.5, subd. (a)(6).) Rule 8.278(d)(1)(F) of the California Rules of Court specifies that a recoverable cost of appeal is "The cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary."[1] The question presented is whether this rule allows the recovery of interest paid on sums borrowed to fund a letter of credit used to secure the undertaking. We conclude that the rule in its current form does not include interest as part of "the cost to obtain a letter of credit," the same conclusion reached by the trial court. We thus affirm.

BACKGROUND

After a jury awarded plaintiffs Steve and Connie Rossa (plaintiffs) $100,000 for breach of contract, the trial court added approximately $680,000 in costs, expert witness fees, and attorney fees pursuant to the contract they had with defendant D. L. Falk

[1] Statutory references are to the Code of Civil Procedure unless otherwise indicated. Citation to a "Rule" is to the indicated provision of the California Rules of Court.

Construction, Inc. (Falk). Falk appealed only from the fee award, which we reversed. Concluding that the fee award was an abuse of discretion because the trial court did not explain why plaintiffs' should be awarded the full amount requested when they had prevailed on only one of five causes of action, we remanded in order that the trial court could consider this issue of apportionment. We also awarded Falk its costs on appeal. (*Rossa v. D.L. Falk Construction, Inc.* (Sept. 9, 2008, A116151) [nonpub. opn.].)

On remand, Falk filed a memorandum of costs seeking (among other items) $28,650 for "Premium on [] surety bond on appeal"; $950—subsequently amended to $2,734—for "Other expenses reasonably necessary to secure surety bond"; and $99,289.81 for "Other: Int[erest] on LOC [line of credit] to Secure Bond."

The details of the interest item were explained in a declaration by Janice Sutton, a vice president of Falk: "In order to obtain the issuance of the appellate bond in the amount of $955,000, the surety required [Falk] to procure a Standby Letter of Credit, having an acceptable financial institution guarantee payment in the event a claim was made against the bond. At the time, [Falk] was banking with Wells Fargo Bank . . . [which] required [Falk] to open a deposit account and deposit funds as security totaling $954,070." Falk provided $483,070, and its president, David Falk, provided $471,000, sums drawn from existing lines of credit. The $99,289.81 was the combined total of "interest expense,"[2] that is, interest paid by Falk and David Falk on these sums from the posting of the undertaking to its exoneration by the trial court. The $1,784 added as "Other expenses reasonably necessary to secure surety bond" appears to have been a special interest charge.[3]

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[2] The amount cited was intended to be a net figure. Ms. Sutton explained that from the amount of interest paid, she subtracted "the interest payments received on the deposited funds," which totaled $55,588.57.

[3] Ms. Sutton explained this item as follows: "The additional charge included on the Amended Memorandum of Costs was for a fee charged by Wells Fargo to extend [Falk's] commercial line of credit by an additional month because the funds collateralizing the Letter of Credit had been drawn down by the Bank, pending an order discharging the surety bond. The withdrawal of funds had been triggered by Wells

Plaintiffs moved to strike these items on the ground they were not reimbursable under rule 8.278. Falk responded that the expenses were proper under the rule as construed in *Cooper v. Westbrook Torrey Hills* (2000) 81 Cal.App.4th 1294 (*Cooper*). After hearing extensive argument, the trial court determined that *Cooper* was distinguishable, and granted plaintiffs' motion to strike Falk's claim for the $1,784 and $99,289.81 of interest incurred on the sums borrowed to fund the letter of credit used to collateralize the undertaking.[4]

DISCUSSION

The essence of Falk's position is not hard to comprehend: money paid as interest on money borrowed to obtain a letter of credit which is used to secure an undertaking is an out-of-pocket expense and thus a "cost to procure a surety bond, including . . . the cost to obtain a letter of credit as collateral" within the plain language of rule 8.278(d)(1)(F). Citing the interlocking definitions of "cost," "price," and "expenditures" in Black's Law Dictionary, Falk argues: "In order to obtain the letter of credit to secure the bond, Falk was required to incur an obligation to pay interest. Accordingly, interest payments were part of '[t]he amount paid or charged' for the letter of credit, and were part of '*consideration asked for [and] given in exchange for*' the letter of credit. They were indeed '*paid out*' by Falk, and the obligation to make such payments was required to '*accomplish [the] result*' of obtaining the letter of credit as collateral to secure the appeal bond. [¶] Simply put, the obligation to pay interest was part of the consideration of the letter of credit and must therefore be considered part of the 'cost' of obtaining such letter of credit." We are not persuaded.

Fargo's decision not to renew the Letter of Credit. Wells Fargo charged [Falk] $1,784 for this service."

[4] Much of the argument at this hearing concerned plaintiffs' renewed motion for attorney fees. Shortly before Falk perfected this appeal from the order granting plaintiffs' motion to strike the interest claims, the trial court made an order awarding plaintiffs *trial* costs and attorney fees of $238,844. Neither side appealed from this order. This second attorney fee order, and the order which is the subject of this appeal, were not made by the same judge who made the fee order that was reversed on the prior appeal.

Rules of court are examined according to the same canons governing construction of statutes. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 125; *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 902.) That makes the issue of construing rule 8.278(d)(1)(F) an issue of law for our de novo review. (*Vidrio v. Hernandez* (2009) 172 Cal.App.4th 1443, 1452; *In re R.D.* (2008) 163 Cal.App.4th 679, 684.) Were the issue solely one of abstract logic, we might agree with plaintiffs. But it is not a blank slate we examine, and rule 8.278(d)(1)(F) cannot be examined in splendid isolation. This rule comes to us with a quite a history.

It was at the end of the 19th century that our Supreme Court first enunciated the principle that "The right to recover costs is purely statutory, and, in the absence of a statute, no costs could be recovered by either party." (*Fox v. Hale & Norcross S. M. Co.* (1898) 122 Cal. 219, 223.) Premiums for undertakings frequently fell victim to excision for lack of express statutory authorization. (*Moss v. Underwriters' Report, Inc.* (1938) 12 Cal.2d 266, 274-275; *Williams v. Atchison etc. Ry. Co.* (1909) 156 Cal. 140, 141; *Christenson v. Cudahy Packing Co.* (1927) 84 Cal.App. 237, 238-239.)

What is now rule 8.278 was originally rule 26 of the rules on appeal drafted by Bernard Witkin in 1943. The principle of strict construction was retained, and early versions of rule 26 made no mention of bond premiums. (See Witkin, *New California Rules on Appeal* (1944) 17 So.Cal.L.Rev. 232, 258-259; 36 Cal.2d 22-23 [text of rule 26 as amended in 1951]; *Hogan v. Ingold* (1952) 38 Cal.2d 802, 814 [principle of strict construction applied]; *Lane v. Pacific Greyhound Lines* (1947) 30 Cal.2d 914, 918 [same].)

It was not until the enactment in 1951 of former section 1035 (Stats. 1951, ch. 1327, § 1, p. 3217.) that recovery of bond premiums had the requisite authorization. (See *Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 476-477; *Crag Lumber Co., Inc. v. Crofoot* (1958) 156 Cal.App.2d 568, 570.) It was not until 1959 that rule 26(c) was amended to allow recovery of "the premium on any surety bond procured by the party recovering costs." (50 Cal.2d 24-25.) In 1982, the substance of former section 1035 was reenacted in what is now section 995.250. (Stats. 1982, ch. 998, § 1,

p. 3662.) In the meantime, the principle of strict construction was still being applied. (E.g., *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774; *Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 241; *Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556, 566; *Combs v. Haddock* (1962) 209 Cal.App.2d 627, 633-634.)

In two instances, the Court of Appeal allowed a party prevailing on appeal to recover the premiums paid for undertakings, but denied recovery of "charges" or "fees" on letters of credit. (See *Geldermann, Inc. v. Bruner* (1992) 10 Cal.App.4th 640, 655 (*Geldermann*) [appellant sought recovery of $28,676 in "charges" for a letter of credit in addition to the bond premium of $26,340]; *Golf West of Kentucky, Inc. v. Life Investors, Inc.* (1986) 178 Cal.App.3d 313, 315-316 (*Golf West*) [appellant sought "$57,102 premium paid on the appeal bond and $210,015.48 fees paid to two banks for letters of credit to secure said bond"].) In one of those opinions, Division Five of this district applied the rule of strict construction but acknowledged that it might not reflect modern commercial reality: "The intent behind rule 26(c) is clear. *Only* the costs enumerated in the rule are recoverable, and the list of costs is to be strictly construed. A charge incurred for a letter of credit to secure an appeal bond is not a listed cost, and under the rule of strict construction the charge cannot be considered a 'premium' on the bond. The charge is therefore unrecoverable. [¶] . . . [A]ppellate costs are not made recoverable by the mere fact they are reasonable; they are recoverable only as authorized by statute or rule of court. [Citation.] Commercial realities might convince the Judicial Council to amend rule 26(c) to permit recovery of charges for letters of credit, but that has not yet happened. Absent such authorization, we may not rely on practical considerations to permit recovery of a charge that is not among the 'only' costs recoverable under rule 26(c)." (*Geldermann, supra*, at pp. 642-643.)

Following *Geldermann*, rule 26 was further amended to allow recovery of the premium and " 'other expense reasonably necessary to procure the surety bond, such as the expense of acquiring a letter of credit required as collateral for the bond.' " (See *Cooper, supra*, 81 Cal.App.4th 1294, 1298, 1300, quoting former rule 26(c)(6).) Thus, it

appears that the scope of recoverable costs had expanded to reach, first, the premiums for bonds and then letters of credit, then the "other reasonably necessary to procure the surety bond, such as the expense of acquiring a letter of credit." This is how matters stood when *Cooper* was decided in 2000.

The reason for *Cooper*'s allure to Falk is obvious. Appellant Cooper was required to post an undertaking of $2.5 million. As the Court of Appeal summarized: "In order to finance the undertaking, Cooper obtained a $3 million loan and deposited $2.5 million of the loan proceeds with the clerk of the court. Cooper used the remaining loan proceeds to pay interest [totaling $200,000] on the loan." (*Cooper, supra*, 81 Cal.App.4th 1294, 1297.) The court held that the trial court had erred in not allowing "over $200,000 in expenses he had incurred in making his deposit." (*Ibid.*) Its reasoning was as follows:

"Rule 26(c)(6) requires that reasonable expenses necessary to acquire a bond are to be awarded to the prevailing party. Code of Civil Procedure section 995.730 explicitly requires that a deposit given in place of a bond must be treated in the same manner as a bond. Thus, contrary to the trial court's ruling, the reasonable expense incurred in making a deposit must be awarded a prevailing party such as Cooper.

"[¶] . . [¶] In 1982, the Legislature enacted a specific provision governing deposits in lieu of bonds, section 995.730. Section 995.730 provides: 'A deposit given instead of a bond has the same force and effect, is treated the same, and is subject to the same conditions, liability, and statutory provisions, including provisions for increase and decrease of amount, as the bond.' [Citation.]

"[¶] . . . [¶] In order to read rule 26(c) consistent with section 995.730, the reasonable or necessary costs associated with procuring a deposit in lieu of a bond must be awarded to a prevailing party . . . ."

"[¶] . . . [¶] Westbrook argues that the amendment to the rule is a strict one directed solely as the situations present in *Geldermann* and *Golf West*, that is, costs associated with obtaining a surety bond. However, as Cooper points out, under section 995.730 we are required to treat a bond and a deposit in lieu of a bond as equivalents. Besides, under rule 26(c)(6) the cost of obtaining a bond is recoverable, the cost of

making a cash deposit is also recoverable. Thus, contrary to the trial court's finding, Cooper was entitled to recover the reasonable and necessary expenses he incurred in making the cash deposit." (*Cooper, supra*, 81 Cal.App.4th 1294, 1298-1300, fns. and italics omitted.)

We agree with the trial court that *Cooper* is not controlling. At issue here is a letter of credit, not a cash deposit, so section 995.730 is inapposite—as the trial court rightly noted. Moreover, there are a number of reasons not to extend *Cooper* to letters of credit—indeed, to even question its holding.

The most obvious fault line in *Cooper* is its premise—derived from section 995.730—of treating deposits and bonds as equivalents demanding identical treatment. This premise does not withstand scrutiny.

No statute—and by extension, no rule—is read in isolation, but is to be considered with reference to the entire scheme of which it is a part.[5] (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83; *In re Marriage of Harris* (2004) 34 Cal.4th 210, 222; cf. *In re Derrick S.* (2007) 156 Cal.App.4th 436, 449 [construction of a rule of court "cannot be divorced from the statutes it is designed to effectuate"].) This principle was not employed in *Cooper*, which considered what was then rule 26(c)(6) only in conjunction with section 995.730. But there are other relevant provisions in the Bond and Undertaking Law that did not factor in *Cooper*'s analysis. There is no mention of the most pertinent provision of the Bond and Undertaking Law, section 995.250, the one

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[5] For the same reason, we cannot accept the effort of Falk to fix the meaning of rule 8.278(d)(1)(F) through Black's Law Dictionary. " '[T]o seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of a statute, and therefore its words, *in the legal and broader culture*. Obviously, a statute has no meaning apart from its words. Similarly, its words have no meaning apart from the world in which they are spoken.' [Citation.]" (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

governing costs, which limits recovery of costs for a bond to the premium paid for it—with no mention of any collateral or ancillary expenses incurred in obtaining the bond.[6]

Cooper is further undermined by its unstated assumption that interest paid on an appellate bond is recoverable, from which assumption the court concludes that interest paid on a deposit used in lieu of a bond is, by force of section 995.730, likewise recoverable. To satisfy the principle of strict construction, it would be necessary to establish statutory authority for recovery of interest on a bond, yet no such statute is cited in *Cooper*. Moreover, it appears that interest on a deposit is statutorily recoverable only to the extent there are "no proceedings . . . pending to enforce the liability of the principal on the deposit . . . ." (§ 995.740.)

Sections 995.250 and 995.730 were enacted together as part of the Bond and Undertaking Law (§§ 995.010-996.560), a consolidation of existing statutes recommended by the Law Revision Commission. (Stats. 1982, ch. 998, § 1, pp. 3662, 3669.) The Commission explained that its proposal was overwhelmingly procedural and nonsubstantive: "The Law Revision Commission recommends that the procedural bond and undertaking provisions be compiled into one statute and that the duplicative provisions be repealed or deleted from the codes. [¶] Consolidation of the numerous similar statutes to create one uniform statute necessarily involves many changes in wording, a few variations from existing procedures, and an occasional minor substantive change. The changes made in existing law by the proposed statute are noted in the Comments that follow each amended or repealed provision of existing law in the draft of conforming changes attached to this recommendation." (16 Cal. Law Rev. Com. Rep. (1982) pp. 507-508, fn. omitted.)

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[6] Section 995.250 provides: "If a statute allows costs to a party in an action or proceeding, the costs shall include all of the following: [¶] (a) The premium on a bond reasonably paid by the party pursuant to a statute that provides for the bond in the action or proceeding [¶] (b) The premium on a bond reasonably paid by the party in connection with the action or proceeding, unless the court determines that the bond was unnecessary."

The Comment for the proposed section 995.730 states simply that it "is drawn from portions of former Probate Code Sections 541.3 (executor or administrator) and 2331 (guardian or conservator)."[7] (16 Cal. Law. Rev. Com. Rep., *supra*, p. 532, reprinted as Leg. Com. Com., 18 West's Ann. Code Civ. Proc., (2009 ed.) foll. § 995.730, p. 277.) There is no mention of any substantive change, certainly nothing to indicate a shift of the magnitude discerned in *Cooper*. To the contrary, the very modesty of the Law Revision Commission's proclaimed intentions strongly militates against the *Cooper* court's conclusion.

This point is reinforced by examination of a decision from this court: *Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281 (*Stransky*). *Stransky* involved a suit by a corporation (and others) against a former officer for unfair competition and breach of fiduciary duty. Prior to trial, the plaintiffs obtained a preliminary injunction. On appeal, the officer argued that the trial court erred in allowing as a cost the "the interest paid by the respondents . . . on cash which they borrowed and deposited as an

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[7] Former section 541.3 of the Probate Code provided: "Every person to whom letters testamentary or of administration are issued may, instead of executing a surety bond, as otherwise required by this chapter, file with the clerk of the court a cash bond, or an assigned interest in an account or accounts in a bank or an insured savings and loan association, or by the posting of bearer or endorsed bonds of the United States or of the State of California, in the amount required in the case of a surety bond when the surety is an authorized surety company, subject to increase or decrease as provided with respect to surety bonds, conditioned the same as required of such surety bonds, and returnable to the executor or administrator on his discharge." (Stats. 1963, ch. 423, § 1, pp. 1239-1240.)

Former section 2331 of the Probate Code provided: "(a) A guardian or conservator may, instead of furnishing the required surety bond, file with the clerk of the court a cash bond, or an assigned interest in an account in a bank in this state or in an insured savings and loan association, or deposit with the clerk bearer or endorsed bonds of the United States or of the State of California, in the sum required in the case of a surety bond given by an authorized surety company. [¶] (b) The security furnished under subdivision (a) is subject to increase or decrease as provided with respect to the surety bond, shall be conditioned the same as required of the surety bond, and is returnable to the guardian or conservator on the termination of the service of the guardian or conservator or on later substitution of a surety bond or other adequate security." (Stats. 1979, ch. 726, § 3, pp. 2375-2376.)

undertaking on the issuance of the preliminary injunction." (*Id.* at p. 289.) We agreed: "In 1951, Code of Civil Procedure section 1035 was enacted, providing that a premium on a surety bond is a proper item of costs unless the court finds the bond unnecessary to the proceeding. Respondents argue that since Code of Civil Procedure section 1054a permits a cash deposit in lieu of a surety bond, interest is allowable. However, the courts have strictly construed the statutes permitting costs and only those items specifically enumerated are recoverable. [Citation.] The necessity to set limits is obvious and dictates a close adherence to the clearly expressed legislative intent. [Citations.] For example, the extension here urged would logically permit a party who was not required to borrow but could deposit his own money, to claim as costs the interest which he might otherwise be acquiring through investment elsewhere. The claim must be denied." (*Ibid.*)

Both of the statutes mentioned in our discussion were repealed with the enactment in 1982 of the Bond and Undertaking Law. (Stats. 1982, ch. 517, §§ 165 [former § 1035], 170 [former § 1054a].) There is no suggestion that a substantive change was intended. (See Cal. Law Rev. Com. coms., 18A West's Ann. Code Civ. Proc. (2009 ed.) foll. former § 1035, p. 290 ["The substance of former Section 1035 is continued in Section 995.250 (cost of bond recoverable)."]; *id.*, foll. former § 1054a, p. 361 ["The substance of former Section 1054a is continued in Sections 995.160 ('officer' defined), 995.710 (deposit in lieu of undertaking), and 995.720 (valuation of bearer bonds or notes)."].) Again, there is nothing here to suggest either the sea change found in *Cooper*, or an intent to diverge from our holding in *Stransky*.[8]

Cooper is also dubious in light of a factor not explicitly addressed in the opinion. As already shown, section 1033.5 mentions only premiums on surety bonds, with no mention of letters of credit or interest. It would follow that these items would be covered by that statute's subdivision (c)(4): "Items not mentioned in this section and items

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[8] *Stransky* was dismissed in *Cooper* as "no longer controlling" "in light of later statutory and rule changes." (*Cooper*, *supra*, 81 Cal.App.4th 1294, 1299.)

assessed upon application may be allowed or denied in the court's discretion." The trial court in *Cooper* ruled that "rule 26(c) does not permit a party to recover the expenses associated with making a cash deposit in lieu of a surety bond. In the alternative, the trial court stated that even if it had discretion to award [interest] to Cooper, 'I would not in my discretion award Mr. Cooper the costs.' " (*Cooper, supra*, 81 Cal.App.4th 1294, 1298.) There is no mention in *Cooper* of section 1033.5, or the trial court's alternative holding. Indeed, the disposition in *Cooper* implies that the Court of Appeal decided as a matter of law that interest was recoverable, and that the trial court had no discretion to conclude otherwise.[9]

The arguments against extending *Cooper* to the situation before us are weighty. First, there is the principle of strictly construing any entitlement to costs, a principle that is still being applied after *Cooper*. (E.g., *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 71; *Sanders v. Lawson* (2008) 164 Cal.App.4th 434, 439; *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1279; *Duale v. Mercedes Benz USA, LLC* (2007) 148 Cal.App.4th 718, 724; *Wagner Farms, Inc. v. Modesto Irrigation Dist.* (2006) 145 Cal.App.4th 765, 774.) Here, there is no express statutory authorization for such a dramatic change.

Second, we are not persuaded that our premise in *Stransky, supra*, 229 Cal.App.2d 281, 289—"[t]he necessity to set limits"—is no longer valid. If interest is recoverable on the cost of a letter of credit, it would appear to be no less proper for any other item of costs enumerated in section 1033.5 and rule 8.278 if the appellant had paid for them with borrowed money. For example, if an appellant had to draw on a line of credit to pay the bond premium. Or even used an ordinary credit card. As plaintiffs point out in their brief, the approach to "the cost to obtain a letter of credit" urged by Falk may be

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[9] The Court of Appeal's "conclusion" was as follows: "Because there was no basis in the record upon which the trial court could properly deny Cooper's request for the interest costs he incurred in making the deposit needed to stay foreclosure pending his prior appeal, the trial court's order must be reversed. On remand the trial court is directed to award Cooper such interest expenses as it finds reasonable and necessary." (*Cooper, supra*, 81 Cal.App.4th 1294, 1300.)

impossible to contain: "If this expansive definition of costs applied, then an appellant whose employee obtained a letter of credit to secure a surety bond would be able to obtain the costs of that employee's time and labor to do so," plus "overhead . . . and similar intangible and indirect expenses that would be difficult to calculate." It is hard to argue with the plaintiffs' conclusion that this approach "opens a can of worms."

Third, there is something like a presumption of proportionality. As evidenced by the figures shown by this case, interest charges can be substantial. Were there not a contractual provision for attorney fees, the interest charges would be far and away the largest amount claimed by Falk. In situations were there is no such provision, such charges could dwarf any other item of costs. The court in *Golf West* noted that allowing interest "would substantially expand the range of recoverable costs, particularly under these facts, where the ratio of the fees for the letters of credit to the appeal bond premium is nearly 4 to 1." (*Golf West, supra*, 178 Cal.App.3d 313, 317; accord, *Sanders v. Lawson, supra*, 164 Cal.App.4th 434, 440.) Here, the ratio of interest to bond premium is also nearly 4 to 1 ($101,073,81 to $28,650). And the interest is more than 68 percent of the total costs of $147,814.11 claimed by Falk. As we recently noted, courts do not lightly presume that substantial changes occur by "misdirection," "vague terms or ancillary provisions," or in a "cryptic" manner. (*State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 323.)

All of the foregoing persuades us that *Cooper*'s reasoning should not be extended to letters of credit, particularly as it may be read to authorize the recovery of interest on money borrowed to fund a letter of credit. De novo review does not clearly demonstrate that adoption of rule 8.278(d)(1)(F) was intended to permit a radical change of the recoverable costs of a successful appeal. *Cooper* stands as a conspicuous exception to the principles that costs are awarded only if statutorily authorized, and that such statutes are strictly construed. In light of the foregoing, we hold that the trial court did not err in striking the claimed interest charges.

Falk's final contention is that, if *Cooper* allows recovery of interest to appellant-depositors of cash, but appellants who fund a letter of credit do not get

comparable treatment, then the latter are denied the equal protection guaranteed by federal and state constitutions. However, this argument was not raised in the trial court, which ordinarily bars it from being considered on appeal. (E.g., *People v. Burgener* (2003) 29 Cal.4th 833, 860-861, fn. 1; *Hershey v. Reclamation District No. 108* (1927) 200 Cal. 550, 565; *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 585.) Although we have the discretion to relax the rule in order to consider a pure issue of law, particularly if it implicates an important issue of public policy, or if it is not dependent on the production of additional evidence (e. g., *Adams v. Murakami* (1991) 54 Cal.3d 105, 115, fn. 5; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 415, pp. 473-474), we decline to do so. The issue of costs seems particularly one where specific dollars-and-cents comparisons would be most pertinent.

DISPOSITION

The order is affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.

A125567, *Rossa v. D.L. Falk Construction*

Trial Court:	San Mateo Superior Court
Trial Judge:	Honorable Marie S. Weiner
Attorneys for Defendant and Appellant:	Law Office of Tony J. Tanke, Tony J. Tanke
Attorney for Plaintiff and Respondent:	McLennon Law Corporation, Daniel F. McLennon, Marc L. Sherman

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 June 11, 2010, I served the document(s) described as: **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

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

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

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

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

[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 June 11, 2010 at Davis, California

Jaycie C. Gibney, CLA