No. S183523

First District Court of Appeal
Division Two

Case No. A125567

IN SUPREME COURT OF THE STATE OF CALIFORNIA

STEVE ROSSA and CONNIE ROSSA

Plaintiffs and Respondents,

vs.

D.L. FALK CONSTRUCTION, INC.,

Defendant and Appellant.

ANSWER BRIEF ON THE MERITS

On Appeal from the Honorable Marie Weiner
(San Mateo Superior Court Case No.: CIV 442294)

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I. INTRODUCTION

Petitioner and Appellant D. L. Falk Construction, Inc. ("Falk") seeks to reverse the decision of the First Appellate District that interest is not a "cost" awardable pursuant to Cal. Rule of Court 8.278(d)(1)(F). Falk maintains that the "plain language" of the rule permits the awarding of interest incurred for money borrowed to obtain a letter of credit collateralizing an appeal bond. This is neither correct nor "plain." The four judges that have analyzed the rule in this case have determined that, by its plain meaning, the rule does not include interest. The word "interest" does not appear in the rule or its legislative history, and cases prior to its enactment exclude interest as a recoverable cost. Nothing in the rule's legislative history expresses an intent to change pre-existing law to add interest as an awardable cost on appeal.

Falk's argument is based on a subjective interpretation of the word "cost" in rule 8.278 and the erroneous decision of the Fourth Appellate District in *Cooper v. Westbrook Torrey Hills, LP* (2000) 81 Cal. App.4th 1294. *Cooper* permitted the recovery of interest for cash posted in court in lieu of an appeal bond. However, the *Cooper* court, *inter alia*, interpreted a rule with different language and neglected to consider Cal. Code Civ. Proc. § 995.250 which specifically limits a court to awarding "the premium on a bond" as a cost. This Court should thus not follow Cooper, but instead affirm the First Appellate District's decision.

Falk's argument that the awarding of interest is fair or required to reimburse an appellant that has paid interest to secure an appeal bond is an argument for the Legislature or Judicial Council, not this Court. While the Legislature has authorized the Judicial Council to establish rules "allowing costs on appeal" (Cal. Code Civ. Proc. § 1034(b)), this legislative authorization does not mention interest. Nor does the promulgated rule. Pursuant to Cal. Code Civ. Proc. § 1034(b), the Judicial Council has exclusive power to make interest awardable as a cost on appeal. It has never done this. There is no basis for this Court to import this new element of recovery into the rule. Only the appropriate legislative body (here, the Judicial Council), not this Court, may add interest as a cost that can be awarded a successful appellant.

The questions for this Court to decide are thus:

1. **Does the plain language of Rule 8.278(d)(1)(F) include interest as a cost that a successful appellant may recover for money borrowed to obtain a letter of credit collateralizing an appellate bond?**

The answer to this is "no."

2. **Does the legislative history of Rule 8.278 show a clear legislative intent to change prior law excluding interest as a recoverable cost for obtaining appellate bonds.**

Again, the answer is "no."

II. STATEMENT OF CASE

This case involves a construction dispute regarding the home of Plaintiffs, Respondents and Opposing Parties Connie and Steve Rossa (the "Rossas") in which a jury awarded them $100,000 for breach of contract. (Opinion of First Appellate District ("Opinion"), p.1.) The trial court then awarded the Rossas $681,390.15 in attorney's fees, expert fees and costs. (Opinion, p.1.) Falk appealed the fees award as not properly apportioned between successful and unsuccessful causes of action. (Opinion, p. 2.) In a first appeal, the First Appellate District Court reversed the attorney's fees award and sent the case back to the trial court to apportion the fees. (Opinion, p.2.) It also awarded Falk its costs on appeal. (Opinion, p.2.)[1]

After remittitur, Falk filed a Memorandum of Costs that included a request for $99,289.81 in interest that it said it paid both to its principal, David Falk, and to its bank in order to obtain a letter of credit that secured its bond for the earlier appeal. (1 AA3; 239:12-20; OBM, p. 14.) In a hearing considering both the Rossas' post-remittitur motion for attorney's fees and motion to tax

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[1] The Rossas will not repeat the underlying facts of this case. They are not relevant to the issue before this Court. Such facts are recited in unnecessary detail by Falk in its Opening Brief On the Merits ("OBM"), and are also set forth in the two decisions of the First District, as well as the briefs filed for the first appeal and the present one. The Rossas want to make clear that they do not agree with Falk's one-sided and biased factual recitation. However, because such facts are not required by this Court for its decision, they will not waste the Court's time to nit-pick Falk's factual statement.

Falk's Memorandum of Costs, the trial court awarded the Rossas $238,844 in attorney's fees and struck the requested interest from the cost bill. (Opinion, p.3.)[2] The trial court, the Honorable Marie Weiner, wrote:

> The motion to strike costs of $99,289.81 as alleged 'interest on line of credit to secure bond' is GRANTED. A prevailing appellant may recover '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', pursuant to CRC Rule 8.278(d)(1)(F). Defendant is being awarded the costs of the bond as well as the charges for the letter of credit as the collateral for the bond. Defendant seeks to rely on case law pertaining to the situation where an appellant posts *cash* instead of a bond. That is not the situation here. If Defendant had actually posted, as the appeal security, the fund of *cash*, Defendant

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[2] Falk attempts to characterize the Rossas' papers in support of this motion to tax as "effectively conceding" that interest is recoverable under rule 8.278. (OBM, p. 18.) This is nonsense, as an examination of the papers show. The Rossas have never conceded that interest is a recoverable cost that can be awarded a successful appellant. (See the Rossas' Reply Memorandum for the motion to tax, 2 AA 504-507.) The Rossas specifically indicated interest could only be permitted to the extent certain cases—those discussed herein—"have not been overruled with regard to disallowing interest. . . ." (2 AA 507.) They, of course, did not provide in the limited pages permitted at the trial court level the same sort of case and policy analysis as is proper in appellate courts.

> may well have been entitled to the interest paid to obtain that cash, Cooper v. Westbrook Torrey Hills, LP (2000) 81 Cal. App.4th 1294. Instead, Defendant posted a bond, and Defendant cannot recovery [SIC] both the expense of posting a bond as well as seek the expenses for [it as] if he had posted cash—Defendant doesn't get both. Although the bank required that Defendant become a customer with certain cash funds on deposit, the *cost* to obtain the letter of credit was $950.00. (2 AA 522-523.) (Emphasis in original.)

Falk filed an appeal limited to determining whether the trial court properly granted the motion to tax. (Opinion, pp. 1-3.) The only question on appeal was whether the taxing of the $99,289.81 in interest was proper and Falk did not challenge any other item not awarded in its cost bill. This is made clear on page 19 of Appellant's Opening Brief filed in the First Appellate District. Interest was the only issue analyzed and determined by the First Appellate District in its Opinion. (Opinion, p. 1.)[3] The question presented there was "whether this rule [Rule 8.278(d)(1)(F)] allows the recovery of

[3] For this reason, the few instances in Falk's brief (see, e.g. OBM, pp. 22-23) that appear to challenge other items of costs on its cost bill that the trial court did not award it, such as its "extension-of-credit expenses," should be ignored. The appeal in the First Appellate District did not encompass such issues.

interest paid on sums borrowed to fund a letter of credit used to secure the undertaking." (Opinion, p. 1.)

In its decision certified for publication, the First Appellate District affirmed the trial court's ruling on the following grounds and with the following reasoning:

1. Falk having to pay interest to obtain a letter of credit to secure its bond does not make such interest a recoverable cost under Rule 8.278(d)(1)(F). (Opinion, p. 3.)
2. Without express authorization for interest in the rule, interest could not be awarded. (Opinion, p. 4.)
3. Rule 8.278(d)(1)(F), as a cost rule, must be strictly construed. (Opinion, pp. 4-5.)
4. The holding of the Fourth Appellate District in *Cooper v. Westbrook Torrey Hills, LP* (2000) 81 Cal. App.4th 1294 is "not controlling" where the issue involves a letter of credit, not a cash deposit. (Opinion, p. 6.)
5. The premise of *Cooper* "does not withstand scrutiny." (Opinion, p. 7.) While *Cooper* correctly notes a deposit in lieu of a bond is treated the same as a bond (Cal. Code Civ. Proc. § 995.730.), it ignores Cal. Code Civ. Proc. § 995.250 which "limits recovery of costs for a bond to the premium paid for it—with no mention of any collateral or ancillary expenses. . . ." (Opinion, p. 8.) Thus,

Cooper suffers from "its unstated assumption that interest paid on an appellate bond is recoverable" which the applicable statutory scheme does not support. (Opinion, p. 8.)

6. *Cooper* is "dubious" in ignoring Cal. Code Civ. Proc. § 1033.5 which permits the recovery of only premiums on surety bonds. (Opinion, p.10-11.)

7. Including interest as a recoverable cost, where it is not specifically provided for in Rule 8.278 and Cal. Code Civ. Proc. § 1033.5, would permit an expansive definition of recoverable costs that would be "hard to contain." (Opinion, p. 11-12.)

8. Awarding $100,000 in interest would conflict with the "presumption of proportionality" of the cost statutes. (Opinion, p. 12.)

9. Lastly, the First Appellate District declined to consider Falk's equal protection argument since it had not been raised in the trial court. (Opinion, p. 13.)

The opinion of the First Appellate District is well reasoned and well supported by the law. The court did not err or "disregard . . . the plain meaning" of Rule 8.278, its legislative history (which Falk had not presented to the court) or its "manifest" purpose, as Falk argues. (OBM, p.22.) It disagreed with the interpretation of the rule that Falk proffered and that would have entitled Falk to almost $100,000. It is simply not "plain" that the rule was

intended to include interest as a recoverable appellate cost. The four judges who have examined the language of the rule in this case have all determined that the rule has no such plain meaning. In essence, Falk is attempting to read a term into the rule that is not there. If anything, the plain language of the rule establishes that costs awardable under it do not include interest.

As the First Appellate District recognized, in light of the strict construction of cost rules and statutes, there are no grounds to insert into the rule interest as a recoverable cost, and *Cooper* does not provide a basis to do so. Cal. Code Civ. Proc. § 1858 prohibits this, saying, "[i]n the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, . . ." Any addition of interest as an awardable cost should be done by the legislative process (here, the Judicial Council), not judicial interpretation. (*See, Serrano v. Priest* (1976) 18 Cal.3d 728, 775, n.54 ("ultimate solutions must come from the lawmakers . . . .") quoting the United States Supreme Court in *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1, 59.)

III. LEGAL ANALYSIS

A. Cal. Rule of Court 8.278(d)(1)(F) Does Not Authorize A Court to Award Interest On Funds Borrowed To Obtain A Letter of Credit Used As Collateral For An Appeal Bond

1. The Plain Language of Rule 8.278(d)(1)(F) Does Not Include Interest As An Awardable Cost

Cal. Rule of Court 8.278(d)(1)(F) includes as awardable appeal costs:

> 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.

Interest is not mentioned. Only two items of cost are identified: the premium and the cost to obtain a letter of credit. The term "cost" is singular; it does not permit multiple costs. The language of the rule does not support Falk's position that awardable costs on appeal include interest paid to obtain letters of credit that secure surety bonds.

Moreover, the listing of only the premium and the cost to obtain a letter of credit constitutes an exclusive list, not a list of examples. The law is clear on this and is so old that it is in Latin: *expressio unius est exclusio alterius.* "The expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) Because rule 8.278(d)(1)(F) mentions two only specific cost items, all others (including interest) are excluded.

Only by adding to the language of the rule could interest be included in it. Cal. Code Civ. Proc. § 1858 prohibits such an insertion of an omitted term. (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 496, n.16.) This Court does not "rewrite [a] statute so as to make it conform to a presumed

intention which is not expressed." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737, quoting, *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75.)

The plain language of rule 8.278 does not include interest as a recoverable cost. It precludes interest.

2. The Legislative History of Rule 8.278(d)(1)(F) Shows Interest Is Not An Awardable Cost On Appeal

a. By The Rules of Statutory Construction This Court Should Presume The Judicial Council Did Not Intend to Change The Meaning of Terms Used In Rule 8.278

The primary task of a court in construing a statute or rule is to determine the intent of the Legislature in promulgating it. (*Jarrow Formulas, Inc., supra,* 31 Cal.4th at 733.) The first step in this is to "look to the words of the statute." (*Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 811.) If the language of the statute is unambiguous, then "it must be applied according to its terms [and] judicial construction is neither necessary nor permitted." (*Ventura County Deputy Sheriff's Assn., supra,* 16 Cal.4th at 496, n.16.) Accordingly, if this court finds that the words of rule 8.278 show, without ambiguity, that interest is not included as a cost that can be awarded on appeal, its inquiry stops there and it does not need to examine the legislative history of which Falk has requested judicial notice.

However, even when the meaning of a statute is clear, this Court may examine legislative history to confirm its understanding of the plain meaning of a statute. (*Olmstead, supra,* 32 Cal.4th at 811.) In such an examination, the

Court cannot adopt a construction of a statute that is broader than is shown by the legislative intent, as is indicated by its use of terms with well-established legal meanings. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19.)

Words used in a statute are construed according to their particular legal meanings. (Cal. Civ. Code § 13; Cal. Code Civ. Proc. § 16.) This Court has numerous times repeated that, where a term has a legal meaning that has been established by judicial construction, this is the meaning presumed used in all similar statutes. (See, *Arnett, supra,* 14 Cal.4th at 20 ("lawmakers are presumed to have used the word in its specifically legal sense."); *People v. Kalii* (1999) 21 Cal.4th 452, 457-458 ("Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it."); *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 ("Generally, where the language of a statute uses terms that have been judicially construed, the presumption is almost irresistible that the terms have been used in the precise and technical sense which had been placed upon them by the courts." (Emphasis added.) (Citations and quotations omitted).) A good example of this is *Arnett*, where the term "discovery" in a statute was deemed to have been used with its well-established legal, not common meaning. (*Arnett, supra,* 14 Cal.4th at 24.)

Moreover, a statute is interpreted with reference to "the entire scheme of law of which it is part." (*People v. Superior Court (Zamudio)* (2000) 23

Cal.4th 183, 194.) This includes a presumption that words used in the same or similar statutes have the same meanings. (*Estate of Griswold* (2001) 25 Cal.4th 904, 915; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 199; *Estate of Sax* (1989) 214 Cal. App.3d 1300, 1304.) As stated by *Estate of Griswold, supra,* 25 Cal.4th at 915-916:

> Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

This Court has stated several times that legislative intent to vary the meaning of a term with an established legal meaning must be clear. Without an expression of a clear intent to change such meaning the previously established meaning will be deemed to be the one used by the statute. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1325; *Zamudio, supra,* 23 Cal.4th at 199; *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1046.) Thus, in *Brodie*, this Court said:

> [W]e do not presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied. (Citations and quotations omitted.)

Appellate courts have similarly ruled that an established term is interpreted as previously used unless the legislative history makes clear that the term is to have a different meaning. In *Gaetani v. Goss-Golden West Sheet Metal Profit Sharing Plan* (2000) 84 Cal. App.4th 1118, 1128-1129, a panel of the First Appellate District said:

> We generally presume the Legislature is aware of appellate court decisions and do not presume that the Legislature, in the enactment of statutes, intends to overthrow long-established principles of law unless such an intention is made clear by declaration or necessary implication. (Citations omitted.)

Another appellate court, *County of Ventura v. Gonzales* (2001) 88 Cal. App.4th 1120, 1124, ruled:

> Generally speaking, identical words in different statutes relating to the same subject matter are construed as having the same meaning. Absent a clear indication to the contrary, an order terminating parental rights under section 366.26 should be given the same meaning and effect as a termination of parental rights under Family Code section 7800 *et seq.* and its predecessor statutes.

Accordingly, without legislative history clearly indicating that the term "cost" was to have a meaning other than previously judicially determined, it

would have to be presumed to have the same meaning as established by previous judicial construction.

b. The Legislative History of Rule 8.278 Shows The Judicial Council Did Not Intend To Include Interest As an Awardable Appellate Cost

i. The Original Amendment of the Predecessor of Rule 8.278 Was to Permit Only The Fee Charged By A Bank For A Letter of Credit Securing an Appellate Bond

The above rules of statutory construction show that this Court does not need to consider the legislative history of rule 8.278 because its meaning is plain: by its terms it does not provide for interest. Moreover, the legislative history of the rule establishes that the Judicial Council had no intent to include interest as a cost that may be awarded a successful appellant.

The legislative history of the rule, as provided by Falk in its Request for Judicial Notice, establishes that the rule was promulgated in response to *Geldermann, Inc. v. Bruner* (1992) 10 Cal.App.4th 640. (Falk Request for Judicial Notice ("RJN"), p. 4.) (See also, *Cooper, supra,* 81 Cal. App.4th at 1299-1300.) Judge Donald King referred *Geldermann* to the Judicial Council, which characterized the case as denying "recovery, as costs, of the expense of a letter of credit required in order to obtain an appeal bond." (RJN, p. 4.) More particularly, *Geldermann* involved a bank fee charged to obtain a letter of credit that secured a surety bond. (*Geldermann, supra,* 10 Cal.App.4th at 642.) It did not concern—or even mention—interest.

The appellate panel on which Judge King sat held that the language of the then operable rule 26 (the predecessor to rule 8.278) precluded the awarding of such a fee to obtain the letter of credit. (*Geldermann, supra,* 10 Cal.App.4th at 642-643.) It stated:

> 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 . . . The charge is therefore unrecoverable.[4]

While the court agreed that commercial realities "may require an expenditure for a letter of credit to use as security for an appeal bond" (*id.* at 644), it noted, "appellate costs are not made recoverable by the mere fact that they are reasonable." (*Id.* at 643.) It recognized that it was the Judicial Council that decided what costs were awardable and stated "commercial realities might convince the Judicial Council to amend rule 26(c) to permit recovery of charges for letters of credit. . . ." (*Id.* at 643.)[5] It thus referred the issue of the bank charge—and nothing else—to the Judicial Council. As the Report

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[4] The use of the term "charge" by the *Geldermann* court and the case's facts showing that only a bank fee was involved establish the limitation of Judge King's referral: interest was clearly not involved.

[5] The Judicial Council did not adopt the "commercial realities" rationale for changing former rule 26. This rationale discussed in *Geldermann* is nowhere mentioned in the legislative history and this suggests that the Judicial Council rejected it.

Summary of the Rules and Forms Committee, dated July 1993, states, Judge King "suggests amending rule 26 to allow recovery of such expense." (RJN, p.4.)

In response to Judge King's concerns, the Judicial Council proposed an amendment to make awardable as an appellate cost, in addition to the premium on a surety bond already included,

> 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. (RJN, p. 10.)[6]

This is the language that was eventually enacted in rule 26, the predecessor of rule 8.278. (RJN, p. 60-61.)

ii. Cases Decided Prior to The Enactment of Rule 2.278 Precluded Interest As An Awardable Appellate Cost

The case law prior to the amendment of former Rule of Court 26 also shows that the amendment was not intended to make interest recoverable as an appellate cost. At the time the amendment to former rule 26 was being considered no case had held that interest was included as a recoverable appellate cost. Instead, such cases followed the established law that the language of the governing rule must be strictly construed, only permitting the

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[6] The use of the word "expense" (and later "cost") in the singular indicates only the particular bank charge involved in *Geldermann* was added to the rule, and that the rule does not include interest.

specific costs that the statute identified. (*Geldermann, Inc., supra,* 10 Cal.App.4th at 642; *Golf West of Kentucky, Inc. v. Life Investors, Inc.* (1986) 178 Cal.App.3d 313, 316. *See also, Moss v. Underwriters' Report, Inc.* (1938) 12 Cal.2d 266, 274 (only costs specifically authorized by code are awardable.) These cases held that the former version of the rule did not allow the recovery of costs for a letter of credit that secured a surety bond.

Under this line of cases, interest paid for money borrowed to secure an undertaking or surety bond had long been determined to be an unrecoverable litigation cost. This was made clear in *Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281, 289. There a panel of the First Appellate District reversed a trial court's awarding as costs interest incurred on borrowed funds used for an undertaking. It rejected as a cost item "interest paid . . . on cash . . . borrowed and deposited as an undertaking on the issuance of the preliminary injunction." (*Id.*)

The *Sequoia Vacuum Systems* court dismissed the argument that such interest was recoverable because cash could be posted in lieu of a surety bond. (*Id.*) The court noted that "the courts have strictly construed the statutes permitting costs and only those items specifically enumerated are recoverable." (*Id.*) It found "[t]he necessity to set limits is obvious and dictates a close adherence to the clearly expressed legislative intent." (*Id.*) It reasoned that "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." (*Id.*) Accordingly, interest was denied as a cost. (*Id.*)

In *Golf West of Kentucky, Inc., supra,* 178 Cal.App.3d 313, the Second Appellate District found "[t]here is no authority for awarding [appellants] as costs on appeal any fees paid for letters of credit." (*Id.* at 315.) In *Golf West of Kentucky*, successful appellants requested costs for a surety bond that included a $57,102 premium on the appeal bond and $210,015.48 representing "fees paid to two banks for letters of credit to secure said bond." (*Id.*) The amount of the letter of credit fees strongly suggest that it was more than the discrete fee for the issuance of the letter of credit, but included interest. The court affirmed the trial court's awarding only the appeal bond premium and not the other requested costs. (*Id.*)

Examining the language of the relevant rules and statute, the appellate panel found "the language is clear and leaves no room for the exercise of any discretion. Costs recoverable [on appeal] are only those recoverable by statute or rule of court even though the item may be a reasonable one." (*Id.* at 316.) (Citations and quotations omitted.) As does Falk in the OBM at page 24, the court even examined *Black's Law Dictionary* to see if the language could be stretched to include the letter of credit costs, but determined it could not be. (*Id.* at 317.) It rejected a "broad interpretation" of the appellate cost rule because "[t]o do so 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." (*Id.*)[7]

Similarly, in *Geldermann,* the case that triggered the original change in the language of former rule 26, the First Appellate District held that, due to the language of former rule 26, it could not award a prevailing appellant more than the $28,000 a bank changed to obtain a letter of credit that secured a surety bond. (*Geldermann, supra,* 10 Cal.App.4th at 642-643.) It stated:

> 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 . . . The charge is therefore unrecoverable.

The above represents the well-established case law that is the background to the Judicial Council's amendment of former rule 26. It indicates that the definition of "cost" in statutes and rules regarding trial and appeal cost awards was limited and strictly construed. It shows that only the costs specifically identified in the statute were permitted. This, as clearly shown by *Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at 289, precluded the awarding of interest incurred to obtain an appellate bond or a securing letter of

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[7] This proportionality argument in *Golf West of Kentucky, Inc.* and other cases support the First Appellate District's rationale in the Opinion that the awarding of interest is precluded by a "presumption of proportionality" in cost statutes. (Opinion, p. 12.)

credit. To change such established law, which the Judicial Council would have been presumed to know, required an explicit declaration of an intent to change it. (*Brodie, supra,* 40 Cal.4th at 1325.)

If the Judicial Council had intended to change the meaning of "cost" in the rule and as established by earlier case law—other than adding the specific bank fee involved in *Geldermann* ("the cost to obtain a letter of credit as collateral")—it would have clearly said so. (*Griswold, supra,* 25 Cal. 4th at 915-916.) In fact, the Judicial Council did not say it was expanding the list of awardable costs beyond the fee a bank charged to obtain a letter of credit. It did not say that cost statutes were no longer strictly construed. It did not say that it intended to change the law to include interest as an appellate cost. It did not mention interest at all in the statute or in the documentation of its consideration of the change of the rule. Thus this Court must presume such a change of law was not intended. (*Estate of Griswold, supra,* 25 Cal.4th at 915-916.)

In contrast, when the Legislature previously wanted to discuss interest, it specified interest, such as in the former version of Cal. Code Civ. Proc. § 1033, where it indicated:

> where the court determines that interest should not be recovered from a date prior to the entry of judgment under subdivision (b) of Section 3287 of the Civil Code, the clerk of judge shall include in the judgment entered by him, any interest on the verdict or decision of the court, from the time

it was rendered or made, and the costs, if the same have been taxed or ascertained.[8]

The Judicial Council's failure to mention interest in the rule or the legislative history supporting it indicates interest was not intended to be included.

Accordingly, it must be presumed by this Court that the only change intended by the Judicial Council in amending former rule 26 was to add the specific cost that was denied in *Geldermann*, the fee charged by the bank to obtain a letter of credit. This was the only cost referred to it by Judge King and is the only cost supported by the language of the rule and the documentation in the legislative history.

iii. The Judicial Council's Changing "Expense" to "Cost" in Its Second Amendment of the Predecessor to Rule 8.287 Shows It Intent to Incorporate the Judicially Determined Meaning of "Cost."

Effective January 1, 2003, rule 26 became California Rule of Court 27 and the surety bond expense language was changed and placed in subsection (c)(1)(E), which now permitted recovery of the following cost:

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.[9]

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[8] This statute was repealed and replaced in 1986 by another cost statute.

[9] In addition to the change of language, this new version combined subsections (5) and (6) of former rule 26c.

The legislative history does not specify why the term "expense" used in former rule 26 was changed to "cost." However, according to the Report Summary to Members of the Judicial Council, dated October 3, 2002, regarding the changes proposed:

> Existing rules 19-29.9 suffer from a variety of stylistic and organizational deficiencies that have accumulated in the appellate rules since they were first adopted almost six decades ago. The revision undertakes to cure these deficiencies by simplifying the wording of the rules and restructuring them to clarify their meanings and to facilitate their use. Most of the changes are stylistic only, but selected changes are necessary to fill unintended gaps and conform older rules to current law; each substantive change is identified and explained in the Advisory Committee Comment to the rule. (Emphasis added.) (RJN, p. 78.)

This explanation suggests the change of the term "expense" to "cost" is a correction to "conform the older rules to current law." Thus the change is a recognition that the use of the word "expense" in former rule 26 was a "deficiency" that needed to be cured. In other words, the change indicates that the word "cost" should have been used in the original amendment responding to *Geldermann*. The rule had always meant "cost" as judicially interpreted. The term "expense" was one without judicial definition. The change to use the

traditional word, "cost," shows that the Judicial Council had not intended to use a word that had not been formerly judicially defined, "expense," but that it had intended to use the well-established term "cost" and use it in a way that would "conform" the rule "to current law." The recoverable costs permitted by the rule were the same ones that had always been permitted—and no more—other than the specific change to permit the bank fee expense that *Geldermann* had not permitted.[10]

The above shows that the legislative history materials of which Falk requests judicial notice are not helpful to it. This explains why its counsel determined not to submit this material to the First Appellant District, although he indicates he had commissioned the obtaining of such legislative history. (Declaration of Tony J. Tanke in support of Request for Judicial Notice, ¶ 2.)[11] The legislative history establishes that interest as an awardable cost was not a concern of the Judicial Council when it promulgated the predecessor to Rule 8.278(d)(1)(F). It merely added one new particular cost, the bank fee disallowed in *Geldermann*. Otherwise, it did not intend to change the judicial

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[10] The only other change in the rule occurred in 2007, when the rules were renumbered and former rule 27 became California Rule of Court 8.276. However, this entailed no change in the wording of the applicable phrase.

[11] In light of this, it is disingenuous for Falk to chide the First Appellate District for not considering the rulemaking history of the rule. (OBM, p. 22.) It was Falk that decided not to provide such history to the First Appellant District.

determined definition of "costs." In particular, it did not intend to expand the definition of "cost" to include interest.

3. Rule 8.278 Should Not Be Broadly Read to Include Interest

a. Neither Its Language Nor Legislative History Indicate Rule 8.278 Should Be Broadly Read to Include Interest

Falk suggests at pages 31-35 of its OBM that rule 8.278 should be read broadly. It says, "[t]he language of the new rule 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." (OBM, pp. 31-32.) (Emphasis in original.) There are several problems with this reading: it is counter to the language of the statute, it is not supported by the rule's legislative history and it leads to the possibility of a variety of costs that are "hard to contain." (Opinion, p. 11-12.)

The first thing to note about Falk's broad reading argument is that it is not based on the language of the current rule—the rule at issue here. It is based on the original language amending former rule 26. There the Judicial Council changed to rule to make awardable, "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." (RJN, p. 10.) (Emphasis added.) While this language may suggest a list of examples as opposed to specific limited items as costs, this is not the current rule, the rule at issue here.

The current version of the rule changed this language to: "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." The Judicial Council's decision to use the term "including" here—and not "such as" as in the former rule—shows it was limiting the application of the rule. The change shows that the Judicial Council did not intend its listing of only two awardable costs to be mere examples, but that these were the only specific cost items that were awardable. By the maxim *expressio unius est exclusio alterius*, no other costs are permitted. (*In re J.W.* (2002) 29 Cal.4th 200, 209.) Moreover, as shown above, the language of the rule was revised effective 2003 to "clarify" the meaning of the rules then changed and to "conform" them "to current law" (RJN, p. 78.) Thus, the legislative history shows that the Judicial Council did not intend the more expansive reading that might be supported by its initial wording of former rule 26, but that it intended the limited wording of the current rule.

In addition, there is no evidence that the Judicial Council, when it originally amended former rule 26, intended to change the then-existing law other than to add the bank fee denied in *Geldermann*. Nor is there evidence that it intended to change the long-established rule of strictly construing cost statutes, permitting only those costs specifically enumerated in them. (*Moss, supra,* 12 Cal.2d at 274; *Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at

289.) If the Judicial Council intended such radical changes, it would have clearly said so. (*Brodie, supra,* 40 Cal.4th at 1325.)[12]

The Judicial Council's replacing the term "expense" with the traditionally used term, "cost" in 2002 also shows an intent to incorporate the jurisprudence that has interpreted this term, instead of the undefined term "expense." Under such jurisprudence, the term is strictly construed, permitting the awarding of only identified costs. (*Moss, supra,* 12 Cal.2d at 274; *Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at 289.) Only "ordinary costs" are recoverable. (*Ferrell v. County of San Diego* (2001) 90 Cal.App.4th 537, 543-544.) Such costs must be "actually incurred." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 410-411.) The current rule, particularly since it now uses the traditional term, incorporates such judicially determined meaning of the word "cost." (Cal. Civ. Code § 13; Cal. Code Civ. Proc. § 16; *Arnett, supra,* 14 Cal. 4th at 19.)

A recent case, *Sanders v. Lawson* (2008) 164 Cal.App.4th 434, shows how the term "cost" should be narrowly read. The Second Appellate District in

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[12] Falk suggests that Form MC-013 for appellate costs indicates an intent to include interest because there is a line for a surety bond premium and a line for "other expenses reasonable necessary to secure the bond." (OBM, p. 35.) It assumes that, "[a]mong such other expenses are, of course, the interest on a loan required to purchase a letter of credit as collateral for the bond." (OBM, p. 35.) This form, of course, shows no such thing. It merely gives a place for the other expense—now cost—permitted by rule 8.278—the expense for a bank fee to obtain the letter of credit securing the bond. There is no basis to believe this line is for interest.

Sanders examined an issue similar to that involved here, whether expenses not identified in relevant statues could be awarded as costs to a successful litigant. It found trustee fees could not be so awarded. (*Id.* at 438.) The court analyzed Elder Abuse Act, Section 15657.5 (Cal. Welf. & Inst. Code, § 15657.5), and Cal. Code Civ. Proc. §§1032 and 1033.5 regarding trial costs, and found that under these statutes the term "costs" did not include trustee fees. (*Id.* at 439.) While costs included the cost of a conservator, it nowhere included the cost of a trustee. (*Id.*) Reciting the rule that the relevant statutes "delineate[d] the items allowable as costs," the court declined to expand costs that were not specifically enumerated in the "comprehensive list" of the statutes. (*Id.*)

The court further reasoned that the Legislature knew about the trustee fees issue when it enacted the relevant statutes and "chose not to include trustee fees . . ." (*Id.* at 440.) It continued:

> Where the words of a statute are clear, we may not add to or alter the statute to accomplish a purpose which does not appear on its face. Had the Legislature intended to include as costs in section 15657.5 the reasonable fees for the services of a trustee, it could have said so, given it was aware of the itemized list of costs in Code of Civil Procedure section 1033.5 and the absence therein of a reference to trustees. We decline to expand the list of statutory costs to include those of

the trustee where the Legislature has conspicuously failed to do so. (*Id.*) (Citations and quotations omitted.)

The *Sanders* court also noted the decisions of *Golf West of Kentucky, Inc., supra,* 178 Cal.App.3d at 317, and *Cooper,* and held that, as in *Golf West of Kentucky*, it would be improper to do something that "would substantially expand the range of recoverable costs. . . . Modification of costs recoverable on appeal is best left to the Legislature. . . ." (*Id.*) Accordingly, it ruled trustee fees could not be awarded since they were not specified as awardable costs. (*Id.* at 440-441.)

Similarly, here, the term "cost" in rule 8.278 should continue to be read narrowly and strictly construed. The legislative history does not indicate this jurisprudence was overturned by the amendment adding the bank fee charged for letters of credit as a recoverable cost. There is no authority for a broad reading of cost statutes or rules: they continue to be strictly construed—including rule 8.278.

b. The "Commercial Realities" Rationale of *Geldermann* Does Not Expand the Meaning of Rule 8.278 Because This Rationale Was Not Adopted by the Judicial Council

Falk argues that interest should be included as a "cost" under rule 8.278 because the rule was promulgated for the "manifest purpose to introduce commercial reality and fairness into awards of appellate costs." (OBM, p.22.)

As indicated above, the "commercial realities" rationale is a phrase arising from *Geldermann*. There the court said:

> We agree with Bruner [the Appellant] 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. (*Geldermann, supra,* 10 Cal.App.4th at 644.)

It thus said:

> 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. (*Id.* at 643.)

An examination of the legislative history shows that the Judicial Council did not adopt this "commercial realities" rationale in amending former rule 26. It neither mentioned nor alluded to "commercial realities." Accordingly, there is no evidence that this was in fact a purpose behind the change in the law—much less it being the "manifest purpose." While it is possible that Judge King referred the issue to the Judicial Council with such "commercial realities" in mind, whether the Judicial Council amended former rule 26 for such a purpose is mere speculation, and thus the *Geldermann*

passage does not serve as evidence that the rule should have the expansive reading proffered by Falk.

c. Dictionary Definitions Cannot Be Used to Expand the Meaning of "Cost" in Rule 8.278

Falk argues interest is a cost because *Black's Law Dictionary* defines costs as including "expenditures." (OBM, p. 24.)[13] This is not helpful here because it is the judicially determined meaning of "cost" that supplies its legal meaning, not a dictionary definition. (*Estate of Griswold, supra,* 25 Cal.4th at 915-916.) In fact, even the definitions depended on by Falk do not say "interest" is included as an "expenditure." Interest is not mentioned.

At law, the dictionary definitions are inapplicable because awardable litigation costs are defined as only those specified in the relevant statutes or rules. (*Moss, supra,* 12 Cal.2d at 274; *Rabinowitch v. Cal. Western Gas Co.* (1967) 257 Cal.App.2d 150, 161; *Agnew v. Cronin* (1959) 167 Cal.App.2d 154, 156-157.) For instance, the Fourth Appellate District in *Ferrell, supra,* 90

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[13] While dictionary definitions may generally be used to interpret statutes to find their usual and ordinary meanings, where established legal terms are used, this is not true. (Cal. Civ. Code § 13; Cal. Code Civ. Proc. § 16; *Arnett, supra,* 14 Cal.4th at 19; *See also, Ceja v. J. R. Wood, Inc.* 196 Cal. App.3d 1372, 1375 ("When construing the meaning of words in a statute, courts should first look to the plain dictionary meaning of the word unless it has a specific legal definition.") Here, "cost" has a technical legal meaning—that which is recoverable after litigation. Thus, only the cases that consider and interpret the term within this context determine its meaning. (*Kalii, supra,* 21 Cal.4th at 457-458; *Alter v. Michael* (1966) 64 Cal. 2d 480, 482, disapproved in part on other grounds in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176.)

Cal.App.4th at 543-544, rejected the use of dictionary definitions to expand the definition of costs from that set forth in the applicable rules and statutes. Without interest being specified in Rule 8.278(d)(1)(F) as a cost, dictionary definitions are irrelevant because there is no authority to award interest in the first place.

The broad reading of the term "cost" is also improper because no statute or rule regarding recoverable trial or appellate costs permits the awarding of interest or similar indirect expenses. The use of similar words in similar statutes is considered in construing such terms. (*Estate of Griswold, supra,* 25 Cal.4th at 915-916; *Arnett, supra,* 14 Cal.4th at 19-24.) Moreover, similar statues should be construed so that there is some uniformity between them. (*Zamudio, supra,* 23 Cal.4th at 194.) As stated by this Court in *Fair, supra,* 40 Cal.4th at 199, "We construe related statutes so as to harmonize their requirements and avoid anomaly." The broad interpretation proffered by Falk would mean that appeal costs would be significantly broader than costs permitted for parties successful at trial. While this is proper when specifically indicated by a rule, such as here with respect to the bank fee expense, without a specific indication that a broader meaning is intended, this Court should not

presume the Judicial Council intended to fashion an appellate rule that is so different from similar trial rules.[14]

d. Policy Reasons Dictate Against A Broad Reading of Rule 8.278

Policy reasons also militate against the expansion of recoverable appeal costs to include interest. For instance in *Golf West of Kentucky, Inc., supra,* 178 Cal.App.3d 313, the court found it inappropriate for an appellant to obtain such costs where, as here, they were exponentially larger than the actual fee required to obtain a bond. In addition, as indicated in *Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at 289, there is an inequity in awarding interest to an appellant that borrows money to make a deposit, but not to one who uses his own money.[15] Similarly, there is the unfairness that an appellant who borrowed such money might recover interest on it, while a litigant after trial would not be permitted the same interest because Cal. Code Civ. Proc. § 1033.5(a)(D)(6) permits a trial cost to award only "premiums on necessary surety bonds."

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[14] The Judicial Council can certainly promulgate appellate cost rules that differ from trial cost rules. The legislature has given it the power to make such rules under Cal. Code Civ. Proc. § 1034(b). However, unless these rules are clearly intended to be broader than the analogous trial rules, their interpretation should be similar. (*Zamudio, supra,* 23 Cal.4th at 194; *Fair, supra,* 40 Cal.4th at 199.)

[15] This also applies here, where Falk seeks interest payments it supposedly made to its own principal. (2AA 239-240.)

An expansion of the rule to include as an appellate cost interest for borrowed money raises the concern where such an expansion should end. For instance, Falk argues the term cost means "any expense incurred" to obtain a letter of credit to secure an appeal bond. (OBM, p. 24.) 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 cost of that employee's time and labor to do so. Here, for instance, Falk's vice president, Janice Sutton, submitted a declaration that indicated she arranged for the letter of credit. (2 AA 239.) Under Falk's argument, the cost of her hours in doing this might also be an awardable appellant cost.

Similarly, for instance, recoverable appellate costs include "the *costs* to produce additional evidence on appeal"; "the *costs* to notarize, serve, mail, and file the record, briefs, and other papers"; and "the *cost* to print and reproduce any brief . . . ." (Rule of Court 8.278(d) (1) (C), (D) and (E).) (Emphasis added.)) If such "costs" include all expenses as interpreted by Falk, then they include employee time for them, overhead for them, and similar intangible and indirect expenses that would be difficult to calculate. Moreover, a party's borrowing funds to pay for such an item would, under Falk's argument, entitle that person to recover the interest incurred for this. This would also, as the *Sequoia Vacuum Systems* court noted, support the awarding of interest in the form of lost opportunity costs when a litigant used his or her own money for such costs. (*Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at 289.) As the

First Appellate District's Opinion notes, this expansive reading would "open a can of worms" regarding when interest might be awarded, the extent of such interest, and the calculation and evidence required to award such interest under both appellate cost and trial cost rules. (Opinion, p.12.)

The language of such statutes and rules (as well as the cases analyzing them) does not indicate that the Legislature intended such a broad interpretation of the term "cost." Even Falk recognizes this when it agrees that only "out of pocket" costs are awardable. (OBM, p. 48.) The relevant rules and statutes authorize only discrete discernable costs. There is no suggestion that the legislature intended to authorize indirect expenses of the cost items it specifically authorized. There is no provision for overhead, employee labor charges or interest. Such expenses are not easily documented or proven and are subject to interpretation and manipulation. As in the case of Falk's vice president's declaration regarding the amount of interest incurred, the calculation of such expenses are subjective and malleable, particularly here where an arm's length transaction was not involved: David Falk lent money to his own company without documentation of terms or even a stated interest rate.[16]

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[16] Even Ms. Sutton's interest calculations are not supported by the documentation she attached to her declaration. For instance, she provided a spreadsheet to her declaration as Exhibit "C" that states certain amounts as monthly interest that Appellant paid its principal, David Falk, to borrow money from him. However, the numbers do not match up. For instance the September

In essence, these expenses are too indirect and too subject to manipulation to permit them as recoverable costs, particularly interest supposedly paid to Falk's own principal. Cases have long indicated that such indirect costs—including interest—are not recoverable under the applicable statutes. Only "ordinary costs" are recoverable. (*Ferrell, supra,* 90 Cal.App.4th at 543-544.) Such costs must be "actually incurred." (*Acree, supra,* 410-411.) Falk's expansive reading of rule 2.768 effectively argues that the rule *sub silentio* overturned this jurisprudence narrowly construing the term "cost." Such a ruling here would have the dire consequence of triggering arguments in trial courts across the state that any expense incurred to obtain an appeal bond would be recoverable—and might well be used to attempt to expand recoverable trial cost awards also. Any such expansion of litigation costs that may be recovered should be done by the Legislature, not this Court. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 752-753.)

Falk argues that such an expansion of awardable costs would be avoided because rule 8.278 only permits costs "if reasonable." (OBM, pp. 48-50.) This begs the question. Just as Falk is arguing "cost" includes interest as reasonable, so might other litigants argue their proffered costs are reasonable. Once the

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5, 2007 amount on the spreadsheet is higher than the amount of interest indicated on the September 2007 Wells Fargo bank statement, attached to declaration as Exhibit "E." (2 AA 272, 320.) It does not support her spreadsheet or calculations of interest paid.

term "cost" in rule 8.278 (and potentially, other litigation cost statutes and rules) is permitted to be expanded beyond the strict construction of the listed costs, all sorts of arguments are possible. Yes, a court can and will decide what is reasonable. But the indefiniteness of what would be an undefined term opens the door to substantial litigation over what "reasonable" recoverable costs are. Only by maintaining the strict and narrow construction of cost rules can this floodgate of potential litigation be avoided. The "reasonability" limitation does little to do this if Falk's argument is accepted, since such argument necessarily expands cost rules to permit a court to award costs that are not identified specifically in the rule.

B. The *Cooper* Case Does Not Make Awardable Interest On Money Borrowed To Obtain A Letter of Credit To Secure A Surety Bond

1. *Cooper* Involved Interest On Cash Deposited In Lieu of a Bond

As the First Appellate District opinion recognized, the facts of *Cooper v. Westbrook Torrey Hills, LP* (2000) 81 Cal. App.4th 1294, so differ from the situation of this case as to make *Cooper* inapplicable here. *Cooper* involved a developer's appealing a trial court's decision that it was obligated to pay for certain work done by an unlicensed contractor. (*Cooper, supra,* 81 Cal. App.4th at 1296-1297.) To avoid foreclosure of the subject property, the developer, Cooper, obtained an undertaking order which he funded with the proceeds of a loan deposited in the court in lieu of obtaining a bond. (*Id.* at 1297.)

After the appellate court reversed the trial court's determination, Cooper sought as a cost the interest payments he had paid. (*Id.*) The trial court refused to award this, reasoning that the then applicable Cal. Rule of Court 26, the predecessor to Rule 8.278, did "not permit a party to recover the expenses associated with making a cash deposit in lieu of a surety bond." (*Id.* at 1298.)[17]

The Fourth Appellate District reversed on the grounds that Cal. Code Civ. Proc. § 995.730 "explicitly requires that a deposit given in place of a bond must be treated in the same manner as a bond." (*Id.*) It distinguished earlier cases disallowing costs associated with obtaining similar letters of credit as overruled by the amendment to former rule 26 that added as recoverable costs expenses to obtain a letter of credit. (*Id.* at 1299.)

The *Cooper* court reasoned that Cal. Code Civ. Proc. § 995.730 required a bond and deposit in lieu of a bond to be treated as "equivalents" and that under rule 26(c)(6) "the cost of obtaining a bond is recoverable, the cost of making a cash deposit is also recoverable." From these premises, the court made the jump that interest payments a party made to borrow money that was then deposited in court in lieu of a bond were also recoverable. This was because such interest was deemed as "reasonable and necessary expenses . . .

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[17] It is important to note that the rule involved in *Cooper* was the old rule, using the term "expense" not "cost", and suggesting a non-exclusive listing of costs. This is not the current rule, or the one interpreted by the First Appellate District or trial court. It is the rule that the Judicial Council changed to confirm with current law. (RJN, p. 78.)

incurred in making the cash deposit." (*Id.* at 1300.) The court pointed to no case, statute, rule or other authority for its conclusion that interest was ever included as a recoverable expense for making a cash deposit. Moreover, it ignored Cal. Code Civ. Proc. § 995.250 that limits recoverable costs to the "premium on a bond" and does not provide for interest.

The ways the *Cooper* case differs from the present one are important. So are its analysis and the manner by which it comes to its decision. It involved a rule with different language. Further, while it holds that interest for borrowed money is recoverable when the money is posted in lieu of a surety bond, it does not discuss whether (1) this applies to money similarly borrowed for a letter of credit securing a surety bond or (2) whether any statute actually authorizes the payment of interest as a cost. In effect, the court bootstraps its own argument by indicating that, because deposits in lieu and surety bonds are equivalents and rule 26 permits the recovery of costs, such costs include interest. But it cites no authority for its premise—and indeed there is none—that interest incurred to obtain a surety bond is an awardable appellate cost in any situation.

As both the trial court and First Appellate District noted, *Cooper* only applies to a situation in which money was borrowed so as to make a direct deposit in court, when such deposit substitutes for a surety bond. (Opinion, p.7; 2 AA 528.) It does not apply to money deposited in a party's own bank account. More importantly, as the First Appellate District noted, the premises and reasoning of the *Cooper* court are "dubious," particularly in ignoring Cal.

Code Civ. Proc. § 1033.5 which permits the recovery of only premiums on surety bonds. (Opinion, p.10-11.)

2. *Cooper* Was Incorrectly Decided and Should be Overturned

In coming to its determination, the *Cooper* court relied on a 1982 amendment to surety bond statutes that provided, "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." (Cal. Code Civ. Proc. § 995.730.) (*Cooper, supra,* 81 Cal. App.4th at 1298.) However, this language of section 995.730 does not mention interest or authorize awarding it for funds borrowed to make deposits in lieu of bonds. Nowhere in the surety bond statutes (Cal. Code Civ. Proc. §995.010. *et seq.*) is there a provision permitting the recovery of interest. In fact, Cal. Code Civ. Proc. § 995.250, limits recoverable costs to the "premium on a bond."

The 1982 amendments to the Bond and Undertaking Law on which the *Cooper* court relied merely codified and consolidated in one chapter then-existing law. (*Milo Equipment Corp. v. Elsinore Valley Mun. Water Dist.* (1988) 205 Cal.App.3d 1282, 1285-1286; *Royster Construction Co. v. Urban West Communities* (1995) 40 Cal. App.4th 1158, 1167.) It did not change previous law that precluded recovery of interest on surety bonds (or money securing letters of credit) as a cost. (*Moss, supra,* 12 Cal.2d at 274; *Sequoia*

Vacuum Systems, supra, 229 Cal.App.2d at 289; *Golf West of Kentucky, Inc., supra,* 178 Cal.App.3d at 315.)

The Bond and Undertaking Law limits recoverable bond costs to the premium on the bond and nowhere provides for interest on a bond. Similarly, Cal. Code Civ. Proc. § 1034(b), by which the Legislature authorized the Judicial Council to make appellate cost rules, does not provide for interest. The *Cooper* court's use of section 995.730, while ignoring another provision of the Bond and Undertaking Law, Cal. Code Civ. Proc. § 995.250, as well as ignoring the fact that the law was a mere codification of previous law, undermines its decision that interest was an awardable cost on appeal. There was simply no authority to support this decision.

Falk tries to rescue the *Cooper* decision by making the distinction that section 1034(b) involves appellate costs and that general rules regarding surety bonds (or trial costs) were effectively overruled by the statute. Section 1034(b), however, only authorizes the Judicial Council to make appellate cost rules. It does not indicate interest or any other expenses are to be included as recoverable appellate costs. Accordingly, the statute is irrelevant to determine what costs are permitted under either section 1034(b) or rule 8.278. While the statute may have included the broad authorization to permit the Judicial Council to have included interest as a recoverable appeal cost, whether or not the Judicial Council did this is what is at issue before this Court. Section 1034,

as an authorization statute, is simply not helpful in making this determination.[18] It does not show that the *Cooper* court was correct in permitting interest because section 1034(b) does not provide for interest.

In addition, Falk's position requires it to take a pick and choose approach to the *Cooper* decision. Falk argues that the *Cooper* court was acting properly by not considering Cal. Code Civ. Proc. § 995.250 because it is not an appellate statute. Yet, it argues the court's use of section 995.730 regarding the equivalent treatment of bonds and cash deposits—which is also not an appellate statute—was proper. Falk's position makes no sense: either both statutes are inapplicable because they do not involve appellate costs, or they should both be taken into consideration as applying to bonds in both the appellate and trial contexts. The inconsistency undermines both the *Cooper* court's and Falk's argument.

The above shows that the *Cooper* court's decision was not correctly supported by legal authority or rationale and the case itself is thus not proper

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[18] This is also applicable to the other places Falk appears to depend on section 1034(b). As an authorization statute it did not overrule previous case law regarding the strict construction of cost statutes or broaden permitted costs. It only directs the Judicial Council to make appellate cost rules and empowers it to "establish by rule allowable costs on appeal and the procedure for claiming those costs." The Judicial Council did just that. But neither section 1034(b) nor rule 8.278 indicates interest is included as such an awardable cost.

authority that interest is a recoverable cost on any sort of appeal. Frankly, the case was incorrectly decided and should be overturned.[19]

C. The Decision Whether Interest Should be Included As An Awardable Appellate Cost Should Be Made By The Legislative Process, Not This Court

It is axiomatic that only the Legislature is authorized to enact statutes. (*Schaezlein v. Cabaniss* (1902) 135 Cal. 466, 467; *In re McLain* (1923) 190 Cal. 376, 379.) Cal. Code Civ. Proc. § 1034(b) authorized the Judicial Council to establish rules regarding recoverable appellate costs. This Court cannot interfere with this legislative process so as to direct a certain cost to be recoverable by judicial fiat. (*Santa Clara v. Superior Court* (1949) 33 Cal.2d 552, 556, 558; *See also*, *Geldermann, supra,* 10 Cal.App.4th at 644 (Courts' "authority is limited to applying [rules] as written.") The legislature has reserved this decision to the Judicial Council. (Cal. Code Civ. Proc. § 1034(b).)

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[19] Alternatively, the decision in *Cooper* regarding interest was *dicta* since it involved a different factual situation and a different rule than involved here. As the First Appellate District indicated, the "issue here is a letter of credit, not a cash deposit" as involved in *Cooper*. (Opinion, p. 7.) For this reason the First Appellate District decided "not to extend *Cooper* to letters of credit. . . ." (Opinion, p. 7.) (Emphasis added.) Discussion in an opinion not necessary to its determination is *dicta* and is not binding precedent. (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 62; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1301; *Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 66-67.) Since the *Cooper* case and the one before the First Appellate District involved different fact situations (a cash deposit in lieu of a bond instead of a letter of credit) and a different version of the rule (e.g., using the term of "expense" instead of "cost") this Court need not overrule *Cooper* to affirm the First Appellate District's Opinion.

This Court does not "rewrite [a] statute so as to make it conform to a presumed intention which is not expressed." (*Jarrow Formulas, Inc., supra,* 31 Cal.4th at 737.)

In a situation such as involved here, the Court needs to abstain and defer to the legislative process to make the required decision. (*Serrano, supra,* 18 Cal.3d at 775, n.54 *Alter, supra,* 64 Cal.2d at 483.) An analogous case is when this Court was asked to read a broad public-interest privilege into Cal. Civil Code § 47(3) in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711. In *Brown*, the news media argued that section 47 included a broad immunity for communications made in the public interest. The bulk of the argument was that public policy supported this broad protection. (*Id.* at 721.) The Court determined that the language of the statute did not support the protections proffered by the proponents and held: "If the Legislature had intended to create a broad public-interest privilege for the news media, the Legislature could easily have done so in reasonably clear language." (*Id.* at 724.)

The Court similarly indicated that neither the statute's legislative history nor case law supported the proffered reading. (*Id.* at 726-736.) Thus it indicated that the expansion of the statute was a "legislative prerogative" because, among other reasons, it "would raise serious public policy questions." (*Id.* at 739.) Moreover, the changes proposed would "require analysis of empirical data and are better dealt with in the legislative arena." (*Id.* at 740.) Since the statute was "a creation of the Legislature," that was the body that

should do this, "if it believes the statute should be expanded." (*Id.*) The Court thus held:

> We think it inappropriate to construe section 47(3) expansively based on mere intuition as to whether the news media need additional protection. Perhaps the media's arguments are well founded, and there may be ample empirical evidence that warrants a broad public-interest privilege. But, if so, such evidence should be presented to the Legislature. (*Id.* at 751-752.)

This legislative deference approach is similar to what happened in *Geldermann* with the earlier version of rule 8.278. There, as shown above, Judge King saw an unfairness in a rule that permitted the cost of a bond, but not the amount a bank charged to obtain a letter of credit necessary to obtain the bond. Thus he referred the question to the Judicial Council so it could change the rule. (RJN, p. 4, OBM, pp. 30-31.) Judge King and the other judges deciding *Geldermann* knew they did not have the authority to interpret the rule to permit the awarding of such an expense as an appeal cost. They knew that this was improper because the language of the rule and the cases interpreting it established that such expenditures were not included in the term "cost" as used in the rule and that "[o]nly those costs enumerated in the rule are recoverable." (*Geldermann, supra,* 10 Cal.App.4th at 642.) Thus they properly deferred to the Judicial Council, the only body with legislative authority to change the rule under Cal. Code Civ. Proc. § 1034(b). (*Id.*)

Indeed, this reference resulted in a change to correct the problems perceived in the rule. (RJN, p. 4.) Thereafter, the Judicial Council promulgated

an amended version of the rule that adding language to provide that the particular cost involved in *Geldermann*—the bank fee to obtain a letter of credit securing an appellate bond—was recoverable. (RJN, pp. 60-61.)

The approach taken by this Court in *Brown* and the appellate court in *Geldermann* is the one that should be followed by the Court in this case. Since Rule 8.278 does not by its plain language, intent or any other determinant of its meaning, provide for the awarding of interest borrowed to obtain a letter of credit used to collateralize an appeal bond, it is up to the Judicial Council to change the rule—if it determines that such a change is appropriate. If, for instance, it decides that commercial realities dictate this, and that such commercial realities are appropriate to protect under the rule, then it—not this Court—may make the required changes in the rule. (Cal. Code Civ. Proc. § 1034(b).)

This is the proper and fair way for laws and rules to be changed. Here, for instance, Falk argues that including interest is the only fair way to compensate him for having to protect himself from the Rossas' executing on their judgment against him while he appealed the trial court's attorney's fees ruling. However, it is at least as equally fair for a respondent on an appeal to rely on the law and appellate rules as written and currently in effect in making decisions regarding an appeal (or settling it). Only if such respondents can know in advance that they might be subject to paying interest, in addition to other appellate costs, can they make fully informed decisions regarding their

appeals. Here, the rule did not indicate interest was awardable and the case law, other than the improperly decided *Cooper*, indicated that such interest was not awardable. To hold now that it is awardable despite the plain language of the rule that does not include interest would be unfair to such respondents. It would be like a retroactive tax.

Thus Falk's "fairness" argument that he had to pay for interest as a "commercial reality" is countered by the Rossas' decision to continue to defend the appeal with the understanding, as indicating by the language of rule 8.278, that they would not face a six figure interest payment as a cost of such an appeal. If, however, in the future, the Judicial Council changed the rule to indicate clearly that interest for a letter of credit securing an appellate bond is a recoverable appellate cost, then all parties to an appeal would be properly and fully informed of the potential costs of such an appeal before litigating it. This is something only the Judicial Council or legislature can do. This Court cannot. This Court interprets the law as written, it does not add terms that are not there. (Cal. Code Civ. Proc. § 1858; *State Bd of Ed. v. Levit* (1959) 52 Cal.2d 441, 452.)

Both the law and fairness dictate that if this Court believes interest should be awarded for funds borrowed to obtain a letter of credit to secure an appeal bond, it should refer this matter to the legislative process, not add terms to the rule that were not previously there.

D. The First Appellate District's Decision Does Not Violate The Equal Protection Clause

Falk argues that affirming the First Appellate District's Opinion would be a violation of constitutional equal protection principles. The argument assumes that *Cooper* was correctly decided and will be upheld by this Court.[20] As indicated above, *Cooper* should be overruled because it failed to apply correctly the Bond and Undertaking Law and the predecessor to Cal. Rule of Court 8.278. Moreover, it does not even apply the rule as it currently exists. If this Court agrees that *Cooper* was improperly decided or inapplicable, Falk's equal protection argument fails: there would be no distinction between the treatment of interest on cash deposited in lieu of bonds and funds borrowed to secure bonds. Interest would not be permitted in both instances.

Moreover, Falk did not raise the equal protection argument in the trial court. A constitutional issue should be raised first in the trial court, which, since Falk did not do, it waived. (*Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal. App.4th 563, 585.) The First Appellate District thus properly declined to consider the argument. (*People v. Burgener* (2001) 29 Cal.4th 833, 860, n.1.) Similarly, this Court normally does not decide arguments not brought up in the lower courts. (Cal. Rule of Court 8.500(c)(1); *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481.) Because the issue was

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[20] It further seems to assume that it is proper to have disparities between trial costs and appeal costs.

not raised in the trial court, it was not developed there and it should not be considered here.

Moreover, Falk's equal protection argument is based on faulty premises. The state equal protection clause, Cal. Const. Art 1, section 7, requires only that similarly situated people be treated similarly. (*Griffiths v. Superior Court* (2002) 96 Cal. App.4th 757, 775; *Thompson v. Superior Court* (2001) 91 Cal. App.4th 144, 158.) Under it, absolute or identical equality is not required. (*People v. Jennings* (2000) 81 Cal. App.4th 1301, 1311; *In re Jose Z.* (2004) 116 Cal. App.4th 953, 960.) If there is a rational relationship for putative disparate treatment to occur, it will be permitted. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 841.) Where, as here, fundamental rights are not involved, legislation is presumed constitutional. (*Paretto v. Dept. of Motor Vehicles* (1991) 235 Cal. App.3d 449, 455.) Statutes imposing differing procedures on litigants are generally deemed valid where some rational basis exists for them. (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal. App.4th 442, 449.)

Falk's equal protection argument appears to depend on the contrast between *Cooper's* ruling that a person who posts money in lieu of a bond may receive interest, while a person who borrows money to deposit it in a bank account to obtain a letter of credit does not. It is not apparent that such persons are similarly situated. Each makes a different choice as to how to avoid an execution on a judgment. Further, the premise for the argument depends on the

propriety of the *Cooper* decision, which, as the First Appellate District decision shows, is dubious. It did not even involve the current rule.

Moreover, even if the litigants in *Cooper* and here were similarly situated, there are reasonable rationales to support different treatment. It may be fair and proper (as the trial court thought) that an appellant get only one cost, either that of the letter of credit and/or surety bond or interest on the deposit made to avoid having a surety bond. A reason for this putative disparate treatment might stem from the difference in the ability to calculate interest where it is posted in lieu of a surety bond verses deposited in a bank. For instance, where, as here, the deposit is made in a bank, the interest paid may be offset, in part or whole, by the interest provided by the bank. Other reasons the bank depositor may be treated differently from the appellant who posts cash in lieu of a surety bond include the depositor's ability to withdraw the money, get interest on it or choose a different way of securing the surety bond. Assuming there is a difference in treatment created by the *Cooper* decision, a number of reasonable rationales would permit this.

Lastly, Falk's equal protection argument is ironic in light of the disparate treatment, as indicated in the language of applicable statutes and rules, between an appellant and a litigant seeking costs after a trial. For trial litigants Cal. Code Civ. Proc. § 1033.5(a)(D)(6) permits a cost award only for "premiums on necessary surety bonds." This would preclude interest on money borrowed to obtain a letter of credit. Accordingly, the equal protection

argument proves too much. If Falk's argument is correct, it raises the question whether the law would violate equal protection with respect to trial costs: why should an appellant obtain costs not available to a successful trial litigant? Similarly, if *Cooper* is incorrect, then the same equal protection argument would apply between litigants who make cash deposits in court verses people who pay for bonds with money borrowed for letters of credit. There may be a disparity, but it is not irrational and it is not constitutionally impermissible.

CONCLUSION

For the reasons set forth above, Steve and Connie Rossa respectfully submit that the Court should affirm the decision of the First Appellate District. The plain language of California Rule of Court 8.278 does not include as a recoverable appellate cost interest incurred on money borrowed to obtain a letter of credit. Case law interpreting previous versions of the rule and the legislative history of the rule do not indicate interest was included as such a recoverable appellate cost. The determination as to whether interest is a recoverable appellate cost is one that should be made by the legislature, not this Court.

DATED: 12/8/2010

McLENNON LAW CORPORATION

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CERTIFICATION OF TYPE AND WORD COUNT

This Respondents' and Opposing Parties' Answer Brief On The Merits contains 12,780 words and is a 13 point font in Times New Roman Type.

DATED: 12/8/2010 McLENNON LAW CORPORATION

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PROOF OF SERVICE

I, the undersigned, declare that:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am associated with the law firm of McLennon Law Corporation, and my business address is 550 California Street, Suite 700, Sacramento Street Tower, San Francisco, California 94104. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Post Office. On this date, I caused to be served the following:

ANSWER BRIEF ON THE MERITS

_____ (BY ELECTRONIC SERVICE) by transmitting via internet the document(s) listed above to the recipient set forth below, or as stated on the service list, on this date before 4:00 p.m.

_____ (BY PERSONAL SERVICE) by personally delivering, or causing to be delivered, a true copy thereof to the person and at the address set forth below.

_XX__ (BY MAIL) by placing a true copy thereof, enclosed in a sealed envelope with first class postage thereon fully prepaid, at my place of business at 550 California Street, Sacramento Tower, Suite 700, San Francisco, California 94104, addressed as set forth below.

_____ (BY OVERNIGHT COURIER) by placing a true copy thereof enclosed in a sealed envelope placed with an overnight courier, at my place of business at 550 California Street, Sacramento Tower, Suite 700, San Francisco, CA 94109, addressed as set forth below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 10, at San Francisco, California.

Yelena Laudati