No. A101500

In the Court of Appeal of the State of California

First Appellate District

Division Five

MICHAEL H. CLEMENT CORPORATION,

Plaintiffs, Respondents, and Cross-Appellants,

vs.

CITY OF ANTIOCH, et al.

Defendants, Appellants and Cross-Respondents.

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RESPONDENT'S BRIEF AND CROSS-APPELLANT'S OPENING BRIEF

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Appeal from Contra Costa County Superior Court
Case Nos. C93-03437, C95-03911
The Honorable Terence L. Bruiniers

_____

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INTRODUCTION

In the prior appeal of this action, this court determined that the City of Antioch had violated the California Constitution and the Landscaping and Lighting Act of 1972 in passing resolutions that had levied assessments on over 15,000 parcels throughout City District 2A. As a result of that determination, the trial court issued declaratory relief invalidating those resolutions, and declaring that the City's assessments violated the Constitution and the Act.

The City now contends that the "single impetus" for the instant appeal is its "disbelief" that this declaratory relief constituted the enforcement of a sufficiently important right to justify an award of attorney fees under Code of Civil Procedure section 1021.5. (Opening Brief of Appellant City of Antioch ("AOB") 1.)

Close review of the AOB reveals, however, that what the City really cannot believe is that it actually lost the prior appeal. (AOB 2, 4 n.6, 5 n.7, 6-7, 14, and 15 n.13.) The City continues to deride the Michael H. Clement Corporation's "crusade" as merely a "personal and subjective grievance – unechoed by any

fellow traveler," (AOB 13, 16), and its only regret is not that it violated the constitutional rights of its citizens, but that its counsel could not answer questions at oral argument regarding the "judicially-perceived 'surplus.'" (AOB 14, 15 n.13.)

The City's persistent refusal to accept this court's conclusion that the Clement Corporation had a valid grievance against these illegal assessments has now extended this litigation well into its second decade.

The City apparently concedes that establishing the illegality of those assessments has been enormously expensive, and it has elected not to contest the amount of the trial court's "munificent" attorneys fee award. The only question raised by the City's appeal is whether the trial court abused its discretion in awarding any fees at all.

There was no abuse of discretion, because this is precisely the type of case in which a section 1021.5 award is appropriate. The Clement Corporation incurred these huge fees even though the only potential financial recovery available to it was less than $5,000. This court should affirm the award.

Now that the entire record on appeal is before it,

the court should also consider again whether the appeal must be dismissed due to the City's failure to file a notice of appeal within the jurisdictional limits established by California Rules of Court, rule 2(a)(2).

Finally, if the court does consider the appeal on its merits, the Clement Corporation asks the court to consider its cross-appeal and add to the attorneys fee award more than $100,000 that the trial court erroneously determined was not recoverable.

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STATEMENT OF THE CASE

These consolidated cases sought monetary and declaratory relief from levies that the City imposed on

the taxpayers of District 2A under the guise of special assessments pursuant to the Landscaping and Lighting Act of 1972 ("Act") for the years 1992 through 1996.[1]

After more than nine years of litigation, this court on October 1, 2001 found that during the years 1992-96 the City had raised $7.2 million in District 2A, while spending only $5.9 million in that district. (10/1/01 Opinion of the First Appellate District, Division Five ("Opinion") 13; Appellant's Appendix In Lieu of Clerk's Transcript ("AA") 13. The court concluded that Clement Corporation had not received a proportional benefit, and that:

> the rights of district 2A property owners, including appellant, have been "substantially and adversely affect[ed]." ([Sts. & Hy. Code] § 22509.) This violation of the Act compels the conclusion that the assessments were, effectively, a special tax imposed on property owners in violation of article XIII A, section 4.

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[1] The City erroneously and repeatedly contends that no other taxpayers were ever a part of the case. (AOB 2, 2 n.4, 12, 16-17.) In opposing the motion below, however, the City had prepared a chart identifying the four additional original plaintiffs. (AA 244.) These names are also shown on the first page of the Complaint, which was page 1 of the Joint Appendix In Lieu of Clerk's Transcript filed in the prior appeal, *Michael H. Clement Corporation v. Keller*, Case No. A090584. Clement Corporation asks the court to take judicial notice of the record in that appeal.

(AA 2, 13-14.)

As an appropriate remedy for the violations, this court remanded the case with directions to issue declaratory relief to the effect that the City's District 2A assessments in the four fiscal years from 1992 to 1996 "were nonproportional and, therefore violated the Act and the state Constitution." (AA 15.) It further directed the trial court to declare that the resolutions adopting those assessments were invalid. (AA 15.)

The court limited monetary damages in the underlying action to a portion of the special taxes paid by Clement Corporation. (AA 15-16.) That portion was to be established upon remand, with the City bearing the "burden of determining what percentage of the assessment levied upon appellant did in fact benefit its property, and what percentage did not." (AA 16.)

The City filed a Petition for Rehearing and/or Clarification in which, *inter alia*, it asked permission to simply refund the entire $4,632 assessed against the Clement Corporation rather than conduct a reassessment that would probably be more costly. (AA 24.) This

court denied the petition, except that it allowed the City to make a full refund rather than conduct a reassessment. (AA 59.)

Following remand, and pursuant to Code of Civil Procedure section 1021.5, the Clement Corporation moved to recover its attorney fees and costs. (AA 63-172.) In opposing the motion, the City misrepresented this court's directive to issue declaratory relief, and indicated that it would not engage in any good faith reassessment process because this court was "mistaken" as to the surplus. (AA 176-89, 181 n.4, 183 n.5, 185 n.7, 186 n.8; see AA 194-96.)

At a hearing on April 18, 2002, the court adopted a tentative ruling to grant the motion for attorney fees, and scheduled a further hearing on June 3, 2002 to determine the amount of the fees and costs to be awarded. (4/18/02 Reporter's Transcript ("RT") 10, 14-15.)[2] When the court inquired about the issues remaining in the case, counsel for the City indicated

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[2] AA 202-03 appears to be an improper attempt to augment the record with an internal memorandum purportedly regarding the court's tentative ruling. While the document violates California Rules of Court, Rules 5.1(b) and 12, appellant agrees that it accurately sets forth the tentative ruling, which was incorporated into the court's written Order. (AA 204-06.)

that the City intended "to respond to the Appellate Court's order without necessity of an intervening directive from the Superior Court," and agreed to do so prior to the hearing. (4/18/02 RT 16-17.)

On April 19, 2002, the court issued its written Order Granting Motion for Entitlement to Recovery of Attorney Fees (C.C.P. § 1021.5), setting forth the reasons for its award; plaintiff gave notice of entry of the Order on the same date. (AA 204-12.)

On May 16, 2002, the City filed a document entitled City of Antioch's Response to Order of Declaratory Relief to Conduct a Reassessment of Plaintiff's Property, repeating the arguments raised in its Petition for Rehearing And/Or Clarification (one of them verbatim), and concluding that it owed no money to the Clement Corporation. (Respondent's and Cross-Appellant's Appendix In Lieu of Clerk's Transcript ("RA" 4-17); compare RA 15-16 and AA 20-22.) The Clement Corporation replied. (RA 18-27.)

At the June 3, 2002 hearing, the court listened to argument regarding the amount of the attorney fee award, (6/3/02 Reporter's Transcript ("RT") 3-21), and the adequacy of the City's reassessment. (6/3/02 RT 21-37.) The City continued to deny that it owed any

money to the Clement Corporation, while complaining that "there is no order from the Trial Court telling us what to do in reaction to the Appellate Court's decision," and indicating that it might have to produce testimony at a future date. (6/3/02 RT 22-26.)

The court set a hearing for August 5, 2002 to consider the remaining matters, at which time argument would be heard and testimony could be taken, if necessary. (6/3/02 RT 25-26, 33-37.)

On July 12, 2002, prior to the date set for hearing, the City filed a document entitled Response of City of Antioch to Oral Directive, in which it expressed its intent to "refund to plaintiff corporation the sum of $4,632.00," rather than conduct a reassessment. (RA 31-33.)

On August 2, 2002, the court filed its Order Re Attorney Fees, ordering the City to pay a total of $231,661 in fees and costs. Plaintiff gave notice of entry of the Order on August 7, 2002. (AA 266-83.) There was no appeal.

The trial court on August 5, 2002 filed its Order Following Remittitur from Court of Appeal, which ordered the declaratory relief that this court had directed the trial court to issue. The Order also gave

the City the option of conducting a reassessment or refunding the $4,632. Plaintiff gave notice of entry of this order on August 7, 2002. (AA 284-86.) No further hearing was ever held, and there was no appeal.

Pursuant to stipulation of the parties, the court on September 13, 2002 filed an Order Amending August 2, 2002 Order Re Attorneys Fee to Award $4,350.00 In Undisputed Expert Witness Fees, which increased the amount awarded to $236,011. (AA 294.) Plaintiff gave notice of entry of that order on September 16, 2002. (AA 296-98.) There was no appeal.

After being advised by respondent's counsel on November 27, 2002 that the time to appeal had passed, the City requested the court to file a document entitled, "Order of Judgment and Judgment." (RA 34-38, 42.) The court filed the requested document on December 19, 2002, and the City gave notice of its entry on January 2, 2003. (AA 300-05.)

The "Order of Judgment and Judgment" simply referred to the court's August 5, 2002 Order Following Remittitur, and the August 2, 2002 and September 13, 2002 orders regarding attorney fees, and ordered that judgment be entered in favor of plaintiff for $4,632.00 and $236,011.00, in accordance with those orders. (AA

300-01.)

On January 24, 2003, the City filed a notice of appeal from "that portion of the [December 19, 2002] Judgment pertaining to an award to plaintiff and respondent of attorneys' fees and costs." (AA 306.) The Clement Corporation has since filed a prophylactic cross-appeal from a portion of the court's order re attorney fees, solely to preserve its rights in the event this appeal is not dismissed. (RA 44-45.)

Prior to completion of the record on appeal, Clement Corporation moved to dismiss the appeal, which the court summarily denied on April 16, 2003.

ARGUMENT

I. PRIVATE ATTORNEY GENERAL DOCTRINE IS INTENDED TO ENCOURAGE LAWSUITS SUCH AS THIS ONE WHICH ARE BROUGHT TO EFFECTUATE PUBLIC POLICY RATHER THAN FOR PECUNIARY GAIN

This lawsuit perfectly illustrates the need for the "private attorney general" doctrine now codified by Code of Civil Procedure section 1021.5. Although the Clement Corporation and other taxpayers annually protested the City's blatant violation of the statutory and constitutional rights of District 2A taxpayers, the City resolutely refused to follow the law.

As the Supreme Court explained in *Woodland Hills Residents Association, Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917 ("*Woodland Hills II*"), an award of private attorney general fees is intended to encourage this type of lawsuit:

> The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.

(*Woodland Hills II*, 23 Cal.3d at 933.)

California has embraced the doctrine in order to foster "private actions to vindicate important rights affecting the public interest, without regard to material gain.... A central function is 'to call public officials to account and to insist that they enforce the law....'" (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 632 ("*Serrano IV*").

> "Where suit is brought against governmental agencies and officials, the necessity of private enforcement is obvious. In such situations private citizens alone must 'guard the guardians' and the disparity in legal resources is likely to be greatest."

(*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1299.)

As a result of the City's insistence on violating the law, this has been an enormously expensive case. Even if the City someday repays the Clement Corporation the $4,632 in illegal assessments, the cost of forcing the City to obey the law has obviously dwarfed any potential recovery, making an award under the private attorney doctrine particularly appropriate. (*Woodland Hills II*, 23 Cal.3d at 941.)

II. THE TRIAL COURT CAREFULLY AND CORRECTLY DETERMINED THAT THIS LAWSUIT SATISFIES ALL REQUIREMENTS FOR AN AWARD OF ATTORNEY FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE

As the City acknowledges, (AOB 9), Code of Civil Procedure section 1021.5 allows a court to award attorney fees "in any action which has resulted in the enforcement of an important right affecting the public interest." In determining whether to make such an award, the trial court:

> must consider whether: (1) plaintiffs' action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit," whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons" and (3) "the necessity and financial burden of private enforcement are such as to make the award appropriate."

(*Woodland Hills II*, 23 Cal.3d at 935.)[3]

Although the City predictably contends that the trial court's order awarding attorney fees was wrong as to all three criteria, (AOB 7-9), it is not clear which order the City is actually attacking – the City discusses only the August 2, 2002 Order Re Attorneys Fees that established the amount of the fees, an issue not even contested on this appeal, and ignores the April 19, 2002 Order establishing the entitlement to a fees award. (AOB 8-9; AA 204-05, 275-77.)[4]

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[3] The City has not, as it asserts, quoted the "seminal statement" of the appropriate criteria from *Woodland Hills II*, (AOB 10), but the Supreme Court's own quotation of *Serrano v. Priest* (1977) 20 Cal.3d 25, 44-45 ("*Serrano III*"), a decision which pre-dated section 1021.5 and was actually discussing federal precedents. (*Woodland Hills II*, 23 Cal.3d at 933-34.) In analyzing the trial court's decision, the City does not really follow either set of criteria. See Table of Contents V, AOB i.

[4] The only reference to the earlier order is the City's erroneous implication that the Clement Corporation inserted unwarranted conclusions into "the later, Corporation-prepared 'Order re Attorneys Fees' (unsigned as to form by the City's attorney)," that were not contained in the "original order of entitlement to attorneys' fees." (AOB 8.) Ironically, while Clement Corporation did prepare the original April 19, 2002 Order, which it took directly from the court's tentative ruling, (AA 203-05), the trial court itself prepared the August 2, 2002 Order Re Attorneys Fees, which the clerk then served on the parties. (AA 275-81.)

Regardless of which order this court reviews, the trial court was well within its discretion in making this award, and the court should affirm the judgment and put an end to this litigation.

A. Abuse of Discretion is the Standard of Review on This Appeal

On appeal, this court must review the lower court's "determinations regarding the presence or absence of [the section 1021.5] criteria for abuse of discretion." (*Punsly v. Ho* (2003) 105 Cal.App.4th 102, 113.) This court reviews "the trial court's actual ruling, not its reasons," and should affirm an "order correct in theory ... even where the trial court's given reasoning is erroneous." (*Punsly*, 105 Cal.App.4th at 113.)

While acknowledging that abuse of discretion is the appropriate standard, and even citing *Punsly*, the City vaguely argues – without citation to any authority – that this court should give no deference to the trial court's rulings because it was interpreting the significance of this court's ruling. (AOB 10 n.9.)

But as the City elsewhere acknowledges, (AOB 11

n.10), *Punsly* itself involved the identical situation – a party was seeking section 1021.5 fees based on the prior opinion of the same appellate court that was reviewing the trial court's order on the fee motion. (*Punsly*, 105 Cal.App.4th at 106.)

There is no special exception to the normal rules of appellate review in this case, and the trial court's decision is entitled to the normal deference afforded all such decisions in cases under section 1021.5.

B. The Prior Action Resulted In The Enforcement of An Important Right Affecting the Public Interest by Upholding the California Constitution and the Landscaping and Lighting Act

The trial court concluded that the prior action met the first criteria established by section 1021.5 and *Woodland Hills II* – the enforcement of an important right affecting the public interest – because this court had agreed with the Clement Corporation "that the disputed assessments were a 'special tax' in violation of the Landscaping and Lighting Act of 1972 (Streets & Highways Code § 22500 *et seq.*), and Article XIIIA, section 4 of the California Constitution." (AA 205; see also AA 2, 11-15, 276.)

While the City correctly notes that section 1021.5 does not authorize an award for every statutory violation, (AOB 10), it largely ignores this court's determination that the assessments were not only illegal but also unconstitutional, dismissing this as merely the trial court's "perception" or a "chimera." (AOB 13-14.)

But courts traditionally have not agreed with the City's position that a municipal entity's violation of its citizens' constitutional rights is "trivial or peripheral." (AOB 13.) While it is clear that fees may be awarded for the vindication of both constitutional and statutory rights, (*Woodland Hills II*, 23 Cal.3d at 935), a constitutional violation changes the analysis:

> "The determination that the public policy vindicated is one of constitutional stature ... establishes the first of the ... elements requisite to the award (*i.e.*, the relative societal importance of the public policy vindicated)."

(*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318, quoting *Serrano v. Priest* (1977) 20 Cal.3d 25, 46 n. 18.)

In *Rider v. County of San Diego* (1991) 1 Cal.4th 1, 16, the California Supreme Court stressed the importance placed on the specific portion of the

California Constitution that the City violated:

> Proposition 13 and its limitations on local taxation are constitutional mandates of the people which we are sworn to uphold and enforce. Any modification of these mandates must come from the people ...,

In *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, the defendant initially opposed the imposition of a levy as violating article XIII A, section 4, but eventually prevailed because the court determined the levy had violated a statute that is quite similar to the Landscaping and Lighting Act. (*City of Sacramento*, 207 Cal.App.3d at 1292-94.) The court rejected Sacramento's contention that defendant had not enforced an important public right:

> Imposition of an unlawful levy is a species of taxation without representation. The importance of avoiding that consequence carries the stamp of history.

(*City of Sacramento*, 207 Cal.App.3d at 1304-05.)

As it did below, (AA 182-87), the City completely ignores these authorities.

Instead, the City attempts to argue that this court's decision not to publish its prior opinion somehow negates any possibility that the case involved important rights. (AOB 11, 13.) As the City acknowledges, however, the criteria for determining

whether an opinion "may" be published under California Rules of Court, Rule 976(b), are necessarily quite different from those governing an award of attorney fees under section 1021.5. Three out of the four Rule 976(b) criteria have no relationship to the issues here, and even criteria 3, which allows publication if the case "involves a legal issue of continuing public interest," does not really bear on whether the Clement Corporation should recover its attorney fees.

The City's attempt to contrast this case with *Punsly v. Ho* (2003) 105 Cal.App.4th 102, actually helps to illustrate the different concerns. The court had published a prior opinion because it satisfied 3 out of the 4 criteria under Rule 976(b), including the application of a rule of law to different facts, and making a contribution to legal literature. (*Punsly*, 105 Cal.App.4th at 111.)

Although the parties agreed that the defendant had satisfied the first criteria under section 1021.5 by vindicating an important public right, the court rejected her contention that, since the prior opinion had been published, she also met the remaining criteria for an award under section 1021.5. (*Punsly*, 105

Cal.App.4th at 106, 112-13.) Contrary to the City's claim, (AOB 11 n.10), however, the case did not turn on whether a significant benefit had been conferred on the public, but on the overwhelmingly personal and individual stake the defendant had in the litigation, (*Punsly*, 105 Cal.App.4th at 114-19), an issue discussed in section II.E below.

The decision to publish has little to do with the appropriateness of an award under section 1021.5. Every year, the courts issue hundreds of unpublished opinions in criminal cases, yet presumably even the City would have to acknowledge the importance of the Bill of Rights.

A citizen's right not to have his property unconstitutionally confiscated by the government is not trivial, and easily qualifies as an important public right under section 1021.5.

C. Vindication of Constitutional Rights and Declaratory Relief Extends to All District 2A Taxpayers, Providing A Significant Benefit to the Public and to A Large Class of Persons

Addressing the second criteria, the trial court found that the action had conferred a "significant benefit on property owners as members of the general

public," (AA 205), because this court had concluded that the rights of those property owners had been "substantially and adversely affected" by the City's actions. (AA 205, see also AA 14, 276-77.) The court noted that the benefit conferred under section 1021.5 may be nonpecuniary in nature, found that the declaratory relief was not confined to the Clement Corporation or its parcel, and further found that the relief precluded similar treatment of assessments in the future. (AA 205; see also AA 15, 276-77.)

Before addressing the City's refusal to acknowledge the concept of a nonpecuniary benefit, it is interesting to consider the City's apparent concession that one of its decisions did provide a benefit to its taxpayers – the City's termination of illegal "commingling" among the districts.[5] The City repeatedly contrasts the effect of this "voluntary" action with what it considers to be the negligible benefits conferred by this litigation. (AOB 3-5, 7,

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[5] As this court and the initial trial court determined, the City from 1992-1995 abused its discretion by commingling costs and funds between District 2A and other districts, resulting in District 2A taxpayers paying for improvements in other parts of the City. (AA 12-13.) Since the practice ceased in 1995, this court ordered no injunctive relief. (AA 15 n.15.)

12, 14-15, 18.)

What the City fails to acknowledge is that its cessation of this illegal practice, as well as others, was not "voluntary" but a direct result of this litigation. As the City Attorney admitted in a June 1994 memorandum to the City Council:

> The City believes that under the circumstances, commingling is authorized, and that no property owner was prejudiced. The Superior Court issued a preliminary ruling finding that this practice is not authorized.... Although the City believes that it would prevail on this issue at trial, it is committed to consolidating districts prior to the 1995-96 report.

(AA 147-48; see also AA 132, 139, 143.)

It would therefore not be "absurd" to require the City to pay attorneys fees "to be informed that its termination of an administrative procedure ("commingling") eight years earlier was appropriate," as the City argues, (AOB 15), because this litigation forced the City to stop that illegal practice. This provided an immediate, pecuniary benefit to owners of the 15,046 assessed parcels within District 2A. (AA 128.)

Regarding the nonpecuniary benefits, section 1021.5 itself states that the "significant benefit" that must be conferred by the action can be either

"pecuniary or nonpecuniary." As the Supreme Court has explained:

> [T]he fact that the chief benefits afforded by an action have no readily ascertainable or monetary value in no way forecloses an attorney fee award under the statute. This language recognizes that in many cases the important gains or contributions rendered by public interest litigation will be reflected in nonmonetary advances....
> [T]he "significant benefit" that will justify an attorney fee award need not represent a "tangible" asset or a "concrete" gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy.

(*Woodland Hills II*, 23 Cal.3d at 939.)

This litigation established that the assessments "substantially and adversely affected the rights of district 2A property owners" in violation of Streets & Highways Code section 22509, resulting in a declaration that those assessments were "a special tax imposed on property owners in violation of article XIIIA, section 4 of the California Constitution." (AA 2, 14-16, 285.) The trial court went on to declare invalid the City Council resolutions adopting the assessments for four fiscal years. (AA 285.)

The right vindicated by these declarations is not a minor right, but the historical right to be free from taxation without representation. (*City of Sacramento*,

207 Cal.App.3d at 1304-05.)

> Litigation which enforces constitutional rights necessarily affects the public interest and confers a significant benefit upon the general public.

(*City of Fresno v. Press Communications* (1994) 31 Cal.App.4th 32, 42.)

While this court's unpublished ruling does not have precedential value, the declaratory relief establishes that the City violated the constitutional rights of all property owners within District 2A. This is not a matter of mere "syntax," "a sort of procedural fluke," something the trial court "imagined," something the trial court "perceived," or a "chimera," as the City variously characterizes it. (AOB 4 n.6, 8, 13-14.) According to the City, the only "public policy" that has been "vindicated" is the reassessment this court ordered due to the "judicially-perceived 'surplus,'" or the refund. (AOB 14.)[6]

The City's shrill, repeated insistence that monetary relief is limited to the Clement Corporation not only ignores the value of nonpecuniary benefits, but also disregards the potential for other taxpayers

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[6] The City repeatedly refers to purported facts regarding the current status of District 2A which are not supported in the record on appeal and should be disregarded. (*See, e.g.,* AOB 2, 14-17.)

to obtain a refund now that the assessments have been declared illegal and the resolutions declared invalid. Under Revenue & Taxation Code section 5096, any taxes "erroneously or illegally collected" or "illegally assessed or levied" must be refunded, following notice from the tax collector to each taxpayer pursuant to sections 5096-5097.

D. Where Clement Corporation's Financial Stake is Insignificant, Financial Burden of Private Enforcement Makes Award Appropriate

Finally, the trial court concluded that the "necessity and financial burden associated with this action make a fee award appropriate," noting the significant effort and money expended by both parties. (AA 206.) This finding tracks the language of section 1021.5 and *Woodland Hills II*, which explained:

> "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.'"

(*Woodland Hills II*, 23 Cal.3d at 941, quoting *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89.)

The City's seeming inability to comprehend other

aspects of the private attorney general doctrine is probably disingenuous, but it appears that the City sincerely does not understand this last criteria.

While the prevailing party must have a sufficiently concrete interest in the litigation to have standing, (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 n.11), an award of attorney fees is not appropriate if the prevailing party has a personal, nonfinancial interest. The interest must be "'specific, concrete and significant, and these attributes must be based on objective evidence.... [T]hat interest must function in the same way in the comparative analysis as a financial interest.'" (*Punsly v. Ho* (2003) 105 Cal.App.4th 102, 116, quoting *Families Unafraid to Uphold Rural El Dorado* County (2000) 79 Cal.App.4th 505, 516.)

The City acknowledges these concepts, and then adapts a quote from *Punlsy,* as follows:

> "A subjective, vaguely grounded [taxpayer] interest, even if 'heartfelt,' will not be considered sufficient; nor will a mere abstract interest in [fiscal] integrity or preservation suffice to block an award of attorney fees."

(AOB 16, adapting *Punsly,* 105 Cal.App.4th at 118, quoting *Families,* 79 Cal.App.4th at 516.)

But the City had already dismissed the Clement Corporation's concerns about the City's illegal behavior as "the Corporation's personal and subjective grievance ... against the assessments." (AOB 16.) The City does not seem to recognize that the logical import of its argument is that the Clement Corporation's subjective, abstract interest in establishing the illegality of the City's conduct is **not** sufficiently objective and concrete to block an award of attorney fees, presumably the opposite of what the City is really trying to argue.

Even though all of its attorneys agreed to reduce their fees during the pendency of the litigation, the Clement Corporation spent an enormous amount of money to stop the illegal taxation. (AA 135.) Reviewing all of the evidence, the trial court awarded attorney fees and costs of over $236,000, (AA 294), an amount which the City does not even contest, even though the Clement Corporation "had to know" that its maximum recovery was $4,632. (AOB 17.).

Considering the *de minimis* nature of the Clement Corporation's personal stake in the litigation, the huge financial burden was totally "out of proportion to

[the Corporation's] individual stake in the matter." (*Woodland Hills II*, 23 Cal.3d at 941.)

> Such a stake [$920] cannot by the wildest flight of fancy be viewed as other than grossly disproportionate to the litigation costs of opposing a validation action commenced by a municipality.

(*City of Sacramento*, 207 Cal.App.3d at 1305.)

Punsly, which involved a visitation dispute between a woman and her daughter's paternal grandparents, actually provides an excellent example of the type of personal, though nonfinancial, interest that will block an award of fees under section 1021.5. (*Punsly*, 105 Cal.App.4th at 106.) Since the woman's "parental interests in assessing and pursuing her child's best interests ... were admittedly paramount in her mind," her personal interest was sufficient to block an award of fees. (*Punsly*, 105 Cal.App.4th at 118.)

The City does not even try to argue that the Clement Corporation had any comparable, personal interest in establishing the illegality of the City's conduct, and there is none. Once again, the City simply derides the Clement Corporation for bearing the burden alone, (AOB 16-17), even though "the need for

private enforcement of statutory and public policies is often greatest when a minority position is at issue." (*California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 750.)

The Clement Corporation has been pursuing this case for over a decade. The City has litigated vigorously, bringing dispositive motion after dispositive motion, fighting its way through two separate trials, and now appealing. The case should have been over in 1996, but the City reneged on a settlement agreement, in part because it refused then, as it does now, to acknowledge that the assessments constituted a "special tax." (AA 132-33, 155-63, 170.)

The trial court was clearly within its sound discretion in awarding fees and costs under section 1021.5. This court should affirm that award.

III. NOW THAT RECORD ON APPEAL IS COMPLETE, THIS COURT SHOULD RULE THAT IT HAS NO JURISDICTION AND DISMISS THE APPEAL

Because a party should not be penalized for filing a motion to dismiss the appeal prior to completion of the record, this court's prior denial without comment of the Clement Corporation's motion to dismiss does not

preclude a full consideration of the issue at this time. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 900.) Now that the record is complete, Clement Corporation asks this court to dismiss the appeal for lack of jurisdiction.

Reviewing courts have jurisdiction on appeal only when there is an appealable order or judgment, and California generally follows the "one final judgment" rule which "prohibits review of intermediate rulings by appeal until final resolution of the case." (*Griset v. Fair Political Practices Commission* (2001) 25 Cal.4th 688, 696-97.)

In order to qualify as an appealable "judgment," a ruling must be "the final determination of the rights of the parties." (*Griset*, 25 Cal.4th at 697.) The Supreme Court has:

> articulated the following standard to determine whether an adjudication is final and appealable: "It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, ... it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory."

(*Griset*, 25 Cal.4th at 698, quoting *Lyons v. Goss* (1942) 19 Cal.2d 659, 670.)

Griset held that a trial court's denial of a petition for writ of mandate was a final judgment – since it had resolved an allegation regarding the constitutionality of a statute that was essential to all causes of action, it "disposed of all issues in the action" between the parties. (*Griset*, 25 Cal.4th at 699.)

One of the few exceptions to the "one final judgment" rule arises where an order "may be considered a final judgment in a collateral proceeding growing out of the action." (*Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 118.)

> An appeal is allowed if the order is a final judgment against a party in a collateral proceeding growing out of the action.... It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him.

(*Sjoberg*, 33 Cal.2d at 119.)

Henneberque v. City of Culver City (1985) 172 Cal.App.3d 837, 841-42, specifically applied the collateral proceeding doctrine in allowing an appeal from the denial of a motion for attorney fees pursuant

to Code of Civil Procedure section 1021.5. The plaintiff in *Henneberque* made the motion in the trial court upon remand, after the appellate court had reversed an earlier adverse judgment.

If an order granting or denying attorney fees is filed after the entry of judgment, it is a separately appealable order pursuant to Code of Civil Procedure section 904.1, subdivision (a)(2). (*P.R. Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1052-53; *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43-44.) "If no appeal is taken from such an order, the appellate court has no jurisdiction to review it." (*Norman I. Krug Real Estate v. Praszker* (1990) 220 Cal.App.3d 35, 46.)

> "[W]here several judgments and/or orders occurring close in time are separately appealable (*e.g.*, judgment and order awarding attorney fees), each appealable judgment and order must be expressly specified – in either a single notice of appeal or multiple notices of appeal – in order to be reviewable on appeal."

(*DeZerega*, 83 Cal.App.4th at 43.)

A. As of August 5, 2002, There Was No Issue Left for Future Consideration by the Trial Court Except Compliance

Applying these rules to the instant case, on

August 2, 2002, the court entered its Order Re Attorney Fees, ordering the City to pay a total of $231,661 in fees and costs. (AA 266-72.) As of that time, there was nothing further for the trial court to do with respect to the collateral issue of attorney fees, and the only further proceedings on that issue involved a stipulated correction regarding the amount of the costs, as reflected in the September 13, 2002 Order Amending August 2, 2002 Order Re Attorneys Fee to Award $4,350.00 In Undisputed Expert Witness Fees. (AA 294-95.)

Applying the collateral proceeding doctrine of *Sjoberg*, 33 Cal.2d at 118-19, the August 2, 2002 Order was a final, appealable order. If that doctrine did not apply, then the City could either seek review by alternative writ, or await the entry of final judgment. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743-44; *Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1293-94.)

The City only had to wait a few days, because the trial court's August 5, 2002 Order Following Remittitur from Court of Appeal, (AA 284-86), resolved all remaining issues between the parties and was a final,

appealable judgment. In that August 5, 2002 Order, the trial court issued the declaratory relief that this court had directed the trial court to issue, and gave the City the option of conducting a reassessment or refunding the $4,632. The August 5, 2002 Order did not direct the parties to do anything further. Since the City had already filed its Response of City of Antioch to Oral Directive, (RA 31-33), in which it expressed its intent to "refund to plaintiff corporation the sum of $4,632.00" rather than conduct a reassessment, there was simply nothing further for the trial court or the parties to do.

Previously, it had appeared that further proceedings would be required, because the City in its response to the motion for attorney fees, (AA 181 n.4, 185 n.7, 186 n.8), in the City of Antioch's Response to Order of Declaratory Relief to Conduct a Reassessment of Plaintiff's Property, (RA 4-17), and at the June 3, 2002 hearing, (6/3/02 RT 22-26), had always insisted that it owed little or no money to the Clement Corporation despite this court's opinion. But the City's decision simply to refund the money obviated the need for any further proceedings.

This conclusion is reinforced by the document

which the City ultimately succeeded in having filed on December 19, 2002. The "Order of Judgment and Judgment," (AA 300-01), did not contain any new orders or rulings, but simply referred to the court's earlier orders, and directed that judgment be entered pursuant to those prior orders in favor of plaintiff for $4,632.00 and $236,011.00 in attorneys' fees and costs. (AA 300-01.)

B. City's Appeal from Belated "Judgment" must Be Dismissed, as Filing of That Document Did Not Reopen its Right to Appeal

The Clement Corporation promptly served notice of entry of both the Order Re Attorney Fees, and the Order Following Remittitur, on August 7, 2002. (AA 274-82, 288-92.) Rule 2(a)(2) requires a party to file notice of appeal within 60 days of being served with notice of entry of a judgment or an appealable order, giving the City up to and including October 7, 2002 (October 6, 2002 falling on Sunday), in which to file an appeal. If the September 13, 2002 Order Amending August 2, 2002 Order Re Attorneys Fee to Award $4,350.00 In Undisputed Expert Witness Fees, could be construed as a separately appealable postjudgment order, the City had 60 days

from notice of its entry on September 16, 2002, or until November 15, 2002, to appeal from that Order. (AA 296-98.)

The City filed its Notice of Appeal on January 24, 2003, **more than 2 months after the last possible date for filing.**

A reviewing court must dismiss an appeal if the notice of appeal is filed late. (Cal. Rules of Court, rule 2(e).) The court cannot entertain a late-filed appeal even in the absence of objection by respondent, because "subject matter jurisdiction can never be created by consent, waiver or estoppel." (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47.)

> The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal.

(*Van Beurden Insurance Services, Inc. v. Customized Worldwide Weather Insurance Agency, Inc.* (1997) 15 Cal.4th 51, 56.)

Presumably, the City will contend that its January 24, 2003 filing was timely, because it fell within 60 days of notice of entry of the "Order of Judgment and Judgment." But that "judgment" added nothing to the case, and had no effect on the City's right to appeal -

- there is simply no reason to allow parties to undermine the jurisdictional rules governing appeal by simply filing an additional piece of paper.

Laraway v. Pasadena Unified School District (2002) 98 Cal.App.4th 579, 581-83, rejected a remarkably similar attempt to reinstate appellate rights after the time to appeal had elapsed. The trial court in *Laraway* had entered an order denying a petition for writ of mandamus and other relief which "completely resolved all issues between all parties [and] did not contemplate nor direct the preparation of any further order or judgment." (*Laraway* 98 Cal.App.4th at 581-82.)

Five months later, the trial court filed a "judgment" which:

> simply reiterated that the court had "ruled by Order dated August 23, 2000" on the petition, set forth the same rulings as contained in the order denying the petition, added a provision that judgment was entered in favor of respondent and against petitioner, and awarded respondent $0 in costs against petitioner.

(*Laraway*, 98 Cal.App.4th at 582.)

The court of appeal held that the earlier order was the final, appealable judgment, and the subsequent judgment "simply a repetition of the August 23, 2000

order," which had absolutely no effect. (*Laraway*, 98 Cal.App.4th at 583.)

> The Rules of Court do not provide, once a judgment or appealable order has been entered, that the time to appeal can be restarted or extended by the filing of a subsequent judgment or appealable order making the same decision.

(*Laraway*, 98 Cal.App.4th at 583.)

As in *Laraway*, 98 Cal.App.4th at 582, the December 19, 2002 "Order of Judgment and Judgment" in this case made the same decisions that the court had already made, and "added a provision that judgment was entered in favor of respondent and against" the City. (AA 300-01.) In contrast to the "judgment" in *Laraway*, which at least made a cost award, the "Order of Judgment and Judgment" simply reiterated the award of costs and attorney fees from the earlier orders.

IV. ON CROSS-APPEAL, THIS COURT SHOULD AWARD THE CLEMENT CORPORATION AN ADDITIONAL $125,643.76 TO COMPENSATE IT FOR INVALUABLE PARALEGAL SERVICES

Finally, if the court declines to dismiss the appeal, the Clement Corporation requests the court to consider its cross-appeal, which challenges the trial court's decision to award only $7,000 out of the

$132,643.76 in paralegal fees sought. (AA 277-78.) The court reasoned that the Clement Corporation would receive a "windfall" if it recovered the normal $70 per hour rate for paralegals because Ms. Yu was an employee of the Clement Corporation whose normal rate of compensation was only $7 per hour. (AA 277-78.)

The trial court's conclusion is inconsistent with the California Supreme Court's holding in *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096, which held that the proper measure of the cost of in-house attorney fees is the "prevailing market rate for comparable legal services" in the area.

The court rejected the "cost-plus approach," which looked at the actual salary and overhead, as "cumbersome, intrusive and costly to apply," and specifically rejected the losing party's contention that an award based on the prevailing market rate would constitute an "'unjustified windfall.'" (*PLCM*, 22 Cal.4th at 1096-98.)

There is no reason to distinguish the holding in *PLCM* simply because this case involves paralegal, rather than attorney's services. The time expended by paralegals is compensable, as long as the local

practice in a given area is to charge separately for paralegal services. (*Guinn v. Dotson* (1994) 23 Cal.App.4th 262, 268-69.) In reversing an order denying compensation for paralegal services under section 1021.5, *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 274-75, noted that in California:

> In recent years, awards of attorneys' fees for paralegal time have become commonplace, largely without protest.... Moreover, it is now clear that the fact that services were volunteered is not a ground for diminishing an award of attorneys' fees.

Jeanette Yu performed exemplary paralegal services on this case from the outset, not only saving the Clement Corporation the considerable cost of hiring an outside paralegal, but also providing tremendous aid to all of the attorneys who worked on the case. She displayed an encyclopedic knowledge of the documentation, exceptional research skills, and her understanding of the City's cryptic bookkeeping was instrumental in helping appellate counsel convince this court that the City had spent $1.3 million of District 2A's money elsewhere. (AA 13-14, 89-90; RA 1-3.)

Even if $7 per hour were reasonable compensation for Ms. Yu's services, that amount would not adequately reimburse the Clement Corporation for her salary and

overhead, much less the loss of her normal services on behalf of the Corporation. The City did not dispute that a reasonable hourly rate for paralegals in this area is $70 per hour, and the court should add that amount to the total fees awarded.

CONCLUSION

While the court may have discretion to relieve a party from its failure to comply with other deadlines, rule 45(e) specifically provides:

> The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal.

In this case, there is no good cause for the City's failure, and respondent Clement Corporation asks the court to dismiss this appeal in its entirety.

If the court addresses the merits of the appeal, it should conclude that the trial court was well within its discretion in awarding these attorney fees for the Clement Corporation's efforts to vindicate the taxpayers's constitutional and statutory rights.

The City's near-pathological refusal to admit that it did anything wrong has made this litigation enormously expensive. Even now, it dismisses the

Clement Corporation as some type of lunatic entity, despite this court's determination that the City had imposed illegal and unconstitutional taxes on its citizens.

The Clement Corporation has pursued this case for many years, at a huge cost, despite knowing that the potential for monetary recovery was minimal, and is fully entitled to the trial court's award of attorney fees and costs.

DATED: October 1, 2003

LAW OFFICE OF PAUL KLEVEN

by:_____
PAUL KLEVEN