

**COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE**

PORFIRIO SERRANO, et al.,

Plaintiffs and Appellants,
v.

STEFAN MERLI PLASTERING
COMPANY, INC., et al.,

Defendant.

COAST COURT REPORTERS,

Real Party in Interest, Respondent.

2 Civil No. B193502

Los Angeles County Superior Court
Case No. BC324031

**AMICUS CURIAE BRIEF OF THE
CALIFORNIA COURT REPORTERS ASSOCIATION
FILED IN SUPPORT OF RESPONDENT AND
REAL PARTY IN INTEREST, COAST COURT REPORTERS**

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number B193502
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APPELLANT/PETITIONER: Porfirio v. Serrano, et al. RESPONDENT/REAL PARTY IN INTEREST: Stefan Merli Plastering Company, Inc.	FOR COURT USE ONLY
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Date: January 18, 2008

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**INTRODUCTION AND
STATEMENT OF INTEREST**

The California Court Reporters Association (CCRA) is an organization that in 2008 will celebrate its 100-year anniversary in successfully representing court reporters, deposition reporters, and hearing reporters throughout California. CCRA's mission is to advance the profession of verbatim shorthand reporting through education, research, and the use of state-of-the-art technology; to establish and maintain professional standards of practice; and to advocate before legislative and regulatory bodies on issues which impact the judicial system and others served by the court reporting profession in California.

The issues presented in the court's December 12, 2007 order potentially will have wide-ranging impact on shorthand reporters in California. If trial courts are permitted to regulate the fees of shorthand reporters acting as deposition officers in civil cases, this will profoundly impair reporters' ability to obtain timely and adequate payment for their services. Thus, CCRA has a substantial interest in this matter.

CCRA supports the position of respondent and real party in interest, Coast Court Reporters. It is CCRA's position that fees for deposition and other transcripts are a private, contractual matter between the reporter and the attorney or party who requests the transcript. This position is well supported by the statutes, legislative history, and case law.

In response to the court's specific questions, CCRA maintains that Code of Civil Procedure § 2025.510, subdivision (c), does not grant authority to trial courts to require certified shorthand reporters acting as deposition officers to provide a copy of a deposition transcript to a party for a "reasonable fee." Nothing in the statute or legislative history supports this notion, and to CCRA's knowledge, no California court has ever held that a court has authority to impose such a requirement. Nor is there any authority for trial courts to determine the amount of a "reasonable fee" in that situation.

CCRA's response to both of the court's questions is therefore "no."

ARGUMENT

I

CODE OF CIVIL PROCEDURE § 2025.510(c) DOES NOT AUTHORIZE TRIAL COURTS TO REGULATE THE FEES CHARGED BY DEPOSITION OFFICERS

- A. The language of § 2025.510, subdivision (c), does not contain any language suggesting that the court may order a deposition officer to provide a copy of a deposition transcript to a party for a "reasonable fee."**

Nothing in the language of Code of Civil Procedure § 2025.510, subdivision (c) suggests that a trial court may order a deposition officer to produce a deposition transcript for a "reasonable fee." According to well-settled principles of statutory interpretation, the courts may not supply missing terms in a statute where, as here, the language is clear and unambiguous and does not support such a construction.

When construing a statute, the appellate court should look to the intent of the Legislature so as to effectuate the purpose of the law. *People v. Jefferson*, 21 Cal.4th 86, 94 (1999). The language of the statute is the most reliable indicator of that intent, so the court should first look to the words themselves, giving them their usual and ordinary meaning. *People v. Lawrence*, 24 Cal.4th 219, 230 (2000). “If the words of a statute are reasonably free of ambiguity and uncertainty, we look no further than those words to determine the meaning.” *Greenlining Institute v. Public Utilities Comm’n*, 103 Cal.App.4th 1324, 1329 (2002), citing *Lazar v. Hertz Corp.*, 69 Cal.App.4th 1494, 1503 (1999). “Unless it can be demonstrated that there is a compelling reason why the natural and customary import of statutory language should be disregarded, courts must give effect to the statute’s plain meaning.” *Maldonado v. Superior Court*, 162 Cal.App.3d 1259, 1268 (1984).

Further, “[c]ourts may not rewrite statutes to supply omitted terms or to conform to an assumed, unexpressed legislative intent.” *Western/California, Ltd. v. Dry Creek Joint Elem. School Dist.*, 50 Cal.App.4th 1461, 1488 (1996), citing *Daley v. State Dep’t of Social Welfare*, 276 Cal.App.2d 801, 804 (1969). “It is, of course, up to the Legislature, and not the courts, to rewrite statutes.” *Western/California, Ltd.*, 50 Cal.App.4th at 1488, citing *In re Christian S.*, 7 Cal.4th 768, 782 (1994). The separation of powers doctrine requires that courts limit themselves “to interpreting the

law as written and leave for the ... Legislature the task of revising it as [it] deem[s] wise.” *People v. Garcia*, 21 Cal.4th 1, 15 (1999).

Section 2025.510, subdivision (c) states, “Notwithstanding subdivision (b) of Section 2025.320, any other party or the deponent, at the expense of that party or deponent, may obtain a copy of the transcript.” This section says nothing about the amount of fees to be charged, and it says nothing about the court’s ability to regulate the amount of fees that may be charged. It merely states that other parties or the deponent may obtain a copy of the transcript, at their expense. It does not state that the fees charged must be “reasonable,” It does not state that the court has authority to determine what fees may be charged.

There is nothing ambiguous about the statute. It is therefore subject to the plain meaning rule, and the words used should be given their ordinary and usual meaning. *Greenlining Institute*, 103 Cal.App.4th at 1329; *Maldonado*, 162 Cal.App.3d at 1268.

Further, the statute must also be construed “in the context of the entire statute and the statutory scheme of which it is part.” *Greenlining Institute*, 103 Cal.App.4th at 1330, citing *Phelps v. Stostad*, 16 Cal.4th 23, 32 (1997). Section 2025.570, also part of the Civil Discovery Act, allows a member of the public at large outside the litigation to obtain a copy of a deposition transcript. *Board of Trustees v. Superior Court (The Copley Press, Inc.)*, 132 Cal.App.4th 889, 901 (2005). It provides:

Notwithstanding subdivision (b) of Section 2025.320, unless the court issues an order to the contrary, a copy of the transcript of the deposition testimony made by, or at the direction of, any party, or an audio or video recording of the deposition testimony, if still in the possession of the deposition officer, shall be made available by the deposition officer to any person requesting a copy, *on payment of a reasonable charge set by the deposition officer.* (Emphasis added).

In contrast, § 2025.510, subdivision (c), states that “any other party or the deponent” may obtain the transcript from the deposition officer. It does not state, however, anything about a “reasonable fee” as mentioned in section 2025.570. It is well settled that when the Legislature employs language in one place and excludes it in another, it should not be implied where excluded. *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711, 725 (1989). As § 2025.570 demonstrates, if the Legislature intended that the amount a shorthand reporter charges a party for a deposition be a “reasonable amount,” “it would have said so; it unquestionably knew the words to employ.” *Association for Retarded Citizens v. Department of Developmental Services*, 38 Cal.3d 384, 393 (1985)

And, even if a “reasonable fee” requirement could be read into § 2025.510, subdivision (c), § 2025.570 is clear that the amount of the fee is to be “set by the deposition officer,” not the court.

Finally, while Code of Civil Procedure § 128 grants broad authority to the court to control “the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it,” to CCRA’s knowledge, that statute has never been interpreted to grant the court the power to regulate the fees of private certified shorthand reporters acting as deposition officers. Section 128 does not give trial courts “a power without procedural limits and potentially subject to abuse.” *Baugess v. Paine*, 22 Cal.3d 626, 638 (1978) (court may not impose sanction for frivolous conduct absent specific legislation)

The only connection between a private shorthand reporter who has taken a deposition and the court is that they are in a position to produce evidence—a transcript of the deposition. *Barwis v. Superior Court*, 87 Cal.App.3d 239, 242 (1978). Any requirement that private shorthand reporters or deposition officers charge parties a reasonable fee set by the court for the value of their time and labor in preparing a deposition transcript “should be created by the legislative branch of government with appropriate safeguards and guidelines developed following a thorough in-depth investigation.” *Id.*, quoting *Young v. Redman*, 55 Cal.App.3d 827, 838-839 (1976).

In short, it is up to the Legislature to enact legislation regulating the business of shorthand reporters and deposition officers. The Legislature has chosen not to enact any laws granting courts the authority to regulate

the fees of private shorthand reporters. The fees charged for the services of deposition officers and other private shorthand reporters are private, contractual matters between the reporters and the parties or attorneys who retain their services. Any dispute that may arise between those persons may be resolved in a separate contract action, but not in the underlying action in which the reporter provided services.

B. An interpretation of § 2025.510(c) that would permit a court to regulate the fees of deposition officers would be contrary to the legislative history of the statute, as well as prior case law.

The legislative history of § 2025.510 also supports CCRA's interpretation of the statute. It should be noted that CCRA sponsored the recent amendments to that statute (AB 1211). The amendments were designed to assist deposition officers in obtaining timely payment of their services. *See* Stats.2007, c. 115 (AB 1211), § 1, Leg. Counsel Digest. The amendment clarified that the "obligation to timely pay the deposition officer or entity providing the services of the deposition officer for that transcription, and any other deposition products or services, as defined, that are requested, shall be the responsibility of the requesting attorney or a party representing himself or herself. . . ." *Id.*

The bill's author noted that the legislation was necessary to protect freelance deposition reporters, who "sometimes have a difficult time collecting from the attorneys who have ordered their services and instructed them when and where to show up." Assem. Bill Analysis, AB 1211,

Comments (June 2, 2007). “Many deposition reporters are women and part-time independent contractors. The failure to get paid, delay in payment, and the cost of collection imposes a unique burden on them.” *Id.*¹

The Legislature could have amended the statute to allow the court to regulate the fees of deposition reporters when this amendment was introduced, but it chose not to do so. Instead, it took steps to protect the rights of shorthand reporters to collect their fees. It would be contrary to the purposes of the statute to permit the court to intervene and impose a further “reasonable fee” requirement the Legislature did not enact. Otherwise, any attorney who wishes to delay payment could simply petition the court to intervene and hold a hearing on the matter, stalling payment for weeks or even months. That would make it far more difficult for the reporters to obtain timely payment, contrary to the stated purposes of the most recent amendments to the statute.

Case law also makes clear that courts do not have the authority to interfere with the contracts between private shorthand reporters and the parties or attorneys who request their services in pending litigation.

For example, in *Urban Pacific Equities Corporation v. Superior Court*, 59 Cal.App.4th 688, 694 (1997), Division 1 of this district held that a party could not avoid paying what the party considered to be excessive

¹ For the convenience of the court and the parties, a copy of this bill analysis is attached as an appendix.

deposition charges by using a business records subpoena to obtain a copy of the transcript. While the appellate court itself observed that the fees were “unconscionable,” nevertheless, the trial court could not order the transcript to be produced to the other party through a business records subpoena for a fraction of the cost. *Id.* “There is no statute regulating the fees charged by private reporting firms,” Justice Miriam Vogel wrote, “and deposition reporters are free to charge all the market will bear.” *Id.* at 691-692.

Likewise, in *Barwis*, the court held that the trial court lacked subject matter jurisdiction to order a private shorthand reporting firm to prepare and furnish a transcript of an administrative hearing to a party, and to fix the price for the reporter’s services in preparing the transcript. The court squarely rejected the notion that Code of Civil Procedure § 128 authorized such an order. *Id.*, 87 Cal.App.3d at 242. The court also rejected the argument that public policy “requires that a trial court have authority over shorthand reporters of administrative proceedings. . . .” *Id.* at 243.

We disagree. Public policy must also consider the rights of a shorthand reporter. Petitioners’ legal duty to produce a transcript is governed by contract law. Absent a specifically enforceable contract, petitioners are not obligated to perform the work involved in preparing a transcript; in any event, they are not required to do so at the price set by respondent court or real party is willing to pay. Respondent court’s order has de-

prived petitioners of the substantive and procedural protections of the law applicable to contract actions; it constitutes an exaction contrary to law.

Id.

In sum, the legislative history and relevant case law support CCRA's position that trial courts do not have authority under Code of Civil Procedure § 2025.510, subdivision (c) to regulate the fees that may be charged by deposition officers for their services.

C. If a party cannot afford a transcript or has objections to the deposition officer, there are other options available.

In 1981, CCRA sponsored legislation that created the Transcript Reimbursement Fund. This fund was established to provide transcript reimbursement costs to indigent civil litigants who cannot otherwise afford shorthand reporting services. Bus. & Prof. Code § 8030.2, subd. (a). It is funded through annual licensing fees paid by certified shorthand reporters. *Id.* This fund is available to cover transcript costs for indigent litigants who meet certain criteria. *See* Bus. & Prof. Code §§ 8030.4, 8030.6.²

² The general rule in California has been that “[i]ndigency does not entitle the normal civil litigant to a reporter’s transcript at public expense.” 3 Witkin, *California Procedure*, Actions, § 397 (4th ed. 1997); *see also* *City of Rohnert Park v. Superior Court*, 146 Cal.App.3d 420, 428 (1983); *Graziano v. Appellate Dept.*, 84 Cal.App.3d 799, 801 (1978). At least one court has noted that the establishment of the Transcript Reimbursement Fund supports the view that the Legislature never intended “to empower courts to order free transcripts for indigent appellants.” *Rohnert Park*, 146 Cal.App.3d at 430. The fund permits reimbursement of transcript costs to

Notably, in creating the Transcript Reimbursement Fund, the Legislature did not regulate the amount that shorthand reporters could charge for their services; the statute simply directs that the board “shall make payment” of “[r]egular customary charges” for deposition transcripts and other costs, with certain limits on the amount that may be reimbursed. *See* Bus. & Prof. Code § 8030.6, subd. (b). This further supports the view that certified shorthand reporters are free to charge what the market will bear for their services.

Finally, if a party or deponent believes that the deposition officer chosen to transcribe a deposition is not qualified, that person may state objections before the deposition begins, “or as soon thereafter as the ground for that objection becomes known or could be discovered by reasonable diligence.” Code Civ. Proc. § 2025.320, subd. (e).

D. It would be impractical for the court to determine the amount of a “reasonable fee” that may be charged by a deposition officer.

CCRA also submits that if trial courts are permitted to order shorthand reporters to provide deposition transcripts and to set the amount of fees that may be charged, this would be extremely impracticable and would result in more delay and burdensome expense for the courts, the shorthand reporters, and the litigants.

litigants who qualify as an “indigent person” and are “represented by qualified counsel” which suggests that the Legislature preferred to fund cases that “have been evaluated for merit by qualified attorneys.” *Id.* at 429-430.

As a preliminary matter, it is unclear how a “reasonable fee” would be set. Would that be based on local market rates by private reporting firms? Would there be a difference in the rates for large firms and small independent contractors? And should rates be different among different regions—in other words, would reporters in Los Angeles be able to charge a different fee than in Orange County, San Diego, San Francisco, or Sacramento? CCRA believes that this would result in widely ranging fees, depending on simply which judge is deciding the “reasonableness” of the fee.

Further, while courts may be experienced at determining, for example, reasonable attorney fees in certain cases, they are not experienced at setting fees for certified shorthand reporters. Shorthand reporters and deposition officers do more than simply take down testimony and type a transcript. They provide additional valuable services that may range from administering the deposition oath to employing state-of-the-art technology to provide high quality real-time reporting services.³ While the fees of official reporters are set by statute, those fees are not comparable and should not be used as a measure of “reasonable” fees, because official reporters are appointed by the courts and are provided with benefits and the guarantees

³ These services can include, among other things, web streaming real time; scanning exhibits into digital format; linking scanned exhibits to the transcript; videotaped depositions; video synching, which involves embedding the transcript into the video; providing transcript repositories, such as uploading transcripts and video depositions for a case onto a secure website; online deposition scheduling; telephonic depositions; and video conferencing of depositions.

of employment. *See* Gov't Code § 69941 (granting authority to the courts to appoint official reporters). They are not independent contractors who are not guaranteed regular employment and entirely dependent on the fees they charge for their labor.

Finally, allowing trial courts to regulate the amount of fees that may be charged by shorthand reporters would result in further delays, burdens and expense to all parties involved. It would risk having a "mini-trial" on the reasonableness of the reporter's fee, and would end up delaying payment for weeks or even months to the reporter. The courts would be burdened with additional hearings and briefing on this issue, and a shorthand reporter whose ability to recover fees is at risk may need to hire his or her own counsel to represent his or her interests at the hearing. The court and the reporter would have to suffer that burden and expense in disputes that would have to be litigated in a limited jurisdiction proceeding if the dispute were brought to court in a separate proceeding. Indeed, the superior court could find itself saddled with full-blown trials over amounts within the jurisdiction of the small claims court.

Unless the Legislature enacts specific legislation authorizing courts to regulate the fees charged by private, certified shorthand reporters acting as deposition officers, the courts have no authority to do so. Allowing courts to interfere in these matters would cause delays and burdensome expense to the courts, the shorthand reporters, and the parties. CCRA there-

fore urges the court to hold that trial courts do not have such authority under Code of Civil Procedure § 2025.510, subdivision (c).

CONCLUSION

It is CCRA's position that trial courts are not permitted to order certified shorthand reporters acting as deposition officers to provide a transcript for a "reasonable" fee. Fees for such transcripts are not regulated by statute, and are based on private contracts between the reporter and the attorney or party who requests the transcript. CCRA's position is supported by the language of the relevant statutes, legislative history, and case law.

Litigants who cannot afford transcript costs may apply for reimbursement under the Transcript Reimbursement Fund. Moreover, a party may state objections to the qualifications of the deposition officer if he or she has any such objections.

Finally, allowing the regulation of fees in such situations would be extremely difficult and would likely result in unfair, inconsistent results. It would also create more burdens and expense on the courts, the parties, and shorthand reporters who will be further delayed in obtaining payment for their services.

CCRA therefore respectfully requests that the court answer both of the questions in its December 12, 2007 order in the negative, and hold that trial courts do not have authority to regulate the fees of private certified shorthand reporters.

DATED: January 17, 2008

JAY-ALLEN EISEN LAW ORPORATION

By: 

C. ATHENA ROUSSOS,
Attorneys for Amicus Curiae,
California Court Reporters Association

CERTIFICATION

I certify, pursuant to rule 8.204, Subdivision (c)(1), California Rules of Court, that the attached **Amicus Curiae Brief of the California Court Reporters Association filed in Support of Respondent and Real Party in Interest, Coast Court Reporters** contains 3,405 words, as measured by the word count of the computer program used to prepare this brief.

Dated: January 17, 2008

JAY-ALLEN EISEN LAW CORPORATION

By: 

C. ATHENA ROUSSOS

**PROOF OF SERVICE
(CCP Sections 1013a, 2015.5)**

I, Michelle L. Micciche, declare:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 2431 Capitol Avenue, Sacramento, California 95816.

On January 18, 2008, I served the within **AMICUS CURIAE BRIEF OF THE CALIFORNIA COURT REPORTERS ASSOCIATION FILED IN SUPPORT OF RESPONDENT AND REAL PARTY IN INTEREST, COAST COURT REPORTERS** on the interested parties in said action by depositing true copies, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed as follows:

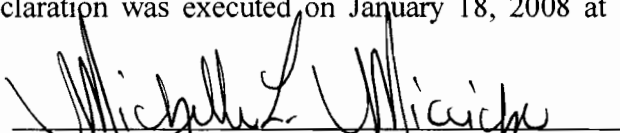
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There is delivery by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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 18, 2008 at Sacramento, California.


 MICHELLE L. MICCICHE