December 6, 2021

Honorable Justice Andrea L. Hoch
Honorable Justice Louis R. Mauro
Honorable Justice Peter A. Krause
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Re: Request for Publication of Unpublished Opinion (Cal. R. Ct. 8.1120)
Harrington v. County of El Dorado
Court of Appeal Case No. C092559
Super. Ct. Case No. PC20160402 (El Dorado)

Dear Honorable Justices of the Court of Appeal:

The League of California Cities ("Cal Cities") and the California State Association of Counties ("CSAC") jointly and respectfully request that the unpublished opinion in *Harrington v. County of El Dorado,* California Court of Appeal, Third District, Case No. C092559 (the "Opinion"), be ordered published in accordance with California Rules of Court, rule 8.1120.

A. Publication Requestors' Interest.

Cal Cities is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

B. Grounds for Publication of the Opinion.

For the reasons set forth below, the Opinion meets the standards for publication pursuant to California Rules of Court, rule 8.1105(c)(2), (3), and (6). The Opinion applies an existing rule of law to facts significantly different from those stated in published opinions, explains an existing rule of law, and involves a legal issue of continuing public interest.

1. <u>The Opinion Applies an Existing Rule of Law Concerning Facts Significantly Different than those Stated in Published Opinions (California Rules of Court, rule 8.1105(c)(2)).</u>

The facts of this case are remarkable. A process server essentially falsified a proof of service for a tort claim alleged to have been filed against the Defendant County of El Dorado ("County"). The process server claimed that the proof of service was executed in 2016, but the Judicial Council form was not even developed and placed into use until 2017, as noted on the face of the form. (Opinion at pp. 3, 4.) At the deposition of the process server, attended and defended by Plaintiff's attorney, the process server "affirmed that he signed the proof of service within two weeks of April 27, 2016," despite the fact that "the proof of service bears the Judicial Council revision date of February 1, 2017." (Opinion at p. 4.)

While these underlying facts are extraordinary enough on their own, the handling of these facts, once known by Plaintiff and her counsel, makes this case even more noteworthy. Rather than distance themselves from the fraud, Plaintiff and her counsel initially embraced it, claiming in response to a motion for terminating sanctions that the proof of service with the 2017 form "was merely a 'replacement proof of service,'" a contention that conflicts with the process server's deposition testimony that the process server had executed the proof of service within two weeks of April 27, 2016. (Opinion at p. 4.) Perhaps realizing the impact of furthering the process server's deception, Plaintiff's counsel then equivocates just before trial during in limine motions, claiming that he "has no idea" whether the Plaintiff's process server "did his job or not," even though Plaintiff's counsel had previously defended the process server through some unsupported theory of a "replacement" proof of service. (Opinion at p. 5.)

Upon the trial of the issue of whether a tort claim was served on the County, the jury returned a special verdict finding Plaintiff failed to do so. The trial court entered a directed verdict as to all causes of action for which a government claim is required under the Government Claims Act. (Gov. Code, § 905.) The proof of service signed by the process server was obviously fraudulent, and the trial court found the process server to be "'wholly not credible'" at trial. (Opinion at pp. 1, 8.) The trial court awarded the County $121,837.50 in attorneys' fees and $11,637.85 in costs pursuant to Code of Civil Procedure section 1038.

Review of the existing case law interpreting Section 1038 uncovers no published case with facts similar to this Opinion. *Ponte v. County of Calaveras* (2017) 14 Cal.App.5th 551, involved an award of defense costs to a public agency under Section 1038 where the plaintiff improperly attempted to rely on a void oral contract, with the court also rejecting an unsubstantiated claim

for promissory estoppel. (*Id.* at 556-557.) The appellate court in *Suarez v. City of Corona* (2014) 229 Cal.App.4th 325, affirmed an award of defense costs against the plaintiff under Section 1038 based on lack of evidence of a dangerous condition, as alleged by plaintiff, who let the case "languish" despite the lack of evidence. (*Id.* at 335-337; see also *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 887-888 [Section 1038 defense costs awarded because there was no evidence to support alleged tort].) In *Hall v. Regents of Univ. of California* (1996) 43 Cal.App.4th 1580, this Court held that the tactical decision to keep a defendant in the case to avoid an "empty chair" defense did not constitute reasonable cause under Section 1038. (*Id.* at 1586-1587.) The instant case differs factually from the body of published opinions, warranting publication of the Opinion in this case.

As a backdrop to this case, it is settled law that for claims subject to the Government Claims Act, the "failure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action." (*State v. Superior Court* (*Bodde*) (2004) 32 Cal.4th 1234, 1239; see also *Pacific Tel & Tel Co. v. County of Riverside* (1980) 106 Cal.App.3d 183, 188 [compliance with the pre-litigation claims procedure for actions covered by the Government Claim Act "is mandatory and failure to file a claim is fatal to the cause of action."].) Because the submission of a pre-litigation claim is a condition precedent to maintaining the action against the County here, it was critical for the Plaintiff to plead and prove this fact. But, under Section 1038, a plaintiff may be liable for payment of defense costs for not only filing a baseless complaint subject to the Government Claim Act, but also for *maintaining* the baseless action. (*Hall*, supra, 43 Cal.App.4th at 1587.)

A noteworthy aspect of this case is the handling of the falsified proof of service by Plaintiff and her counsel, and how the process server's misdeeds are imputed back to the Plaintiff. The trial court expressly found that Plaintiff's counsel "'*knew* plaintiff's lawsuit did not have a valid proof of service for the tort claim prior to filing the original Complaint'" and that "knowledge is imputed to" the plaintiff. (Opinion at p. 10, emphasis in original.) This Court affirmed that finding, concluding that the plaintiff "filed and maintained an action known to be barred by the failure to comply with Government Code section 905." (Opinion at p. 10.)

This case stands as a cautionary tale to plaintiffs and their counsel warning them that they cannot first defend a falsified document and the untruths of a process server, and then disavow the defense of that position claiming that they have "no idea" whether a process server "did his job," all in the face of obviously false documents and a fabricated claim of service of process. Counsel, and ultimately the plaintiffs, must take responsibility for the actions of their process servers and agents and confirm facts to ensure that an action is filed and maintained with reasonable cause. The facts of this case confirm that improper acts of the process server attach to an attorney who chooses to press the baseless claim forward, and the bad acts are ultimately imputed to the plaintiff.

2. The Opinion Explains an Existing Rule of Law (California Rules of Court, rule 8.1105(c)(3)).

The Opinion also explains an existing rule of law concerning application of Section 1038 and the applicable evidentiary standard in determining reasonable cause to pursue an action. In short, a factual dispute will not necessarily justify reasonable cause.

Here, the Court rejected Plaintiff's contention that the "'*mere existence* of the unsolved conflict on a material issue of fact establishes "reasonable" and "probable" cause as a matter of law.'" (Opinion at 9, emphasis in original.) This is significant because this holding prevents litigants from avoiding exposure to defense costs under Section 1038 simply by claiming that there was a genuine factual dispute. As this Court clarifies in the Opinion, once it is established what plaintiffs or their attorneys knew, it is for the court to decide whether or not a reasonable attorney would have found the claim to be tenable. (Opinion at 10.)

3. The Opinion Involves an Issue of Continuing Public Interest (California Rules of Court, rule 8.1105(c)(6)).

Finally, the Opinion concerns an issue of public interest. Public agencies are unfortunate targets of baseless lawsuits, the cost of which is ultimately borne by the taxpayers. The "recognized purpose of section 1038 is to discourage frivolous lawsuits by allowing blameless public entities to recover their defense costs." (*Hall*, supra, 43 Cal.App.4th at 1587 [citing *Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1250].) Any tactical reason for continuing to pursue a public agency does not make a baseless lawsuit "any less frivolous" nor "does it justify requiring the public entity to finance plaintiff's choice of litigation tactics." (*Id.*)

Publication of this Opinion will serve as a further deterrent to the filing and pursuit of meritless and unsupportable lawsuits against public agencies. This is particularly important where, as unfortunately sometimes happens, a plaintiff may attempt to generate a factual dispute in hopes that a public agency might simply settle for nuisance value and litigation cost avoidance. Publication of the Opinion will cause claimants to reconsider such a tactic for risk of exposure to payment of significant attorneys' fees and costs to the defense.

While the Defendant County secured a six-figure award of attorneys' fees and costs in this case, it should be noted that this does not necessarily eliminate the financial impact on the County here, or on public agencies generally. The County had to finance the litigation at considerable public expense, without any guarantee of an award of defense costs upon prevailing. Furthermore, the economic reality is that many individual plaintiffs will lack the financial resources to pay the award of defense costs, and awards such as this are likely to go wholly or partially uncollected. This again becomes a further financial burden borne by the public, meriting publication of this Opinion as a deterrent to groundless lawsuits.

C. Conclusion.

The Opinion meets the criteria for publication. For all the foregoing reasons, Cal Cities and CSAC respectfully request that this Court order the Opinion published in the Official Reports. Thank you for your consideration of this request.

LEAGUE OF CALIFORNIA CITIES

Corrie Manning

Corrie Manning,
General Counsel

CALIFORNIA STATE ASSOCIATION OF COUNTIES

Jennifer B. Henning

Jennifer B. Henning,
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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 8401 Laguna Palms Way, Elk Grove, California, 95758.

On December 6, 2021, I served the following document

REQUEST FOR PUBLICATION

☒ **VIA TRUE FILING:** I electronically filed the above document using the Truefiling system, which automatically served all the parties to this action, 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.

Executed on December 6, 2021, at Elk Grove, California.

Julie Andersen

JULIE ANDERSEN