

No. S227786
(Court of Appeal No. F068477)
(Fresno County Super. Ct. No. 12CECG03718)

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

STEPHEN K. DAVIS,
Plaintiff and Appellant,

v.

FRESNO UNIFIED SCHOOL DISTRICT, ET AL.,
Defendant/Respondent and Petitioner

After a Decision By the Court of Appeal,
Fifth Appellate District

MOTION TO STRIKE

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Respondent* STEPHEN K. DAVIS

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Attorneys for *Plaintiff/Appellant and
Respondent* STEPHEN K. DAVIS

Plaintiff/Appellant and Respondent Stephen K. Davis (“Taxpayer”) respectfully moves this Court to strike the following matter from Defendant/Respondent and Petitioner Fresno Unified School District’s (“District”) Petition for Review on the basis that it improperly relies on an unpublished opinion and violates California Rules of Court (“CRC”), Rule 8.1115:

- (1) Page 9, fn. 8: “The Second District Court of Appeal expressly rejected this very same argument in *McGee v. Torrance Unified School District* (2015 Cal.App.Unpub. LEXIS 446), as an attempt by the taxpayer to “engraft additional requirements . . . not based on any statutory language.” (See discussion below, pgs. 15-16; Ex. B to Motion for Judicial Notice.)”
- (2) Page 13: “and Second District Courts of Appeal”
- (3) Page 14: “and *McGee v. Torrance Unified School District* (2015 Cal.App.Unpub. LEXIS 446).”
- (4) Page 14: “Contrary to the Court of Appeal decision here, the Fourth and Second District Courts of Appeal found the language of section 17406(a) to be “plain, clear and unambiguous,” with the Second District expressly stating in *McGee* that there was “nothing for the court to interpret or construe.” (*McGee* Opn. 10

[Ex. B to Motion for Judicial Notice]”

- (5) Page 14, fn. 10: “We recognize the opinion in *McGee v. Torrance Unified School District* is unpublished. But we cite it because it demonstrates the prevalence and statewide importance of lease-leaseback in school construction, as well as the different treatment courts have given to the issues presented in this petition.”
- (6) Page 15: “in *McGee*, the plaintiff and school -district were represented by the same attorneys who represent Taxpayer and District in this case, and the allegations and causes of action in *McGee's* first amended complaint are essentially verbatim of those in this case. (1 AA 1; Ex. C to Motion for Judicial Notice.) As in this case, the trial court sustained the school district's demurrer in *McGee*, and after plaintiff elected not to amend, entered judgment for the school district and plaintiff appealed. (Ex. E to Motion for Judicial Notice.) The plaintiff advanced every theory and argument on appeal in *McGee* as Taxpayer made in this case; indeed, the appellate briefs (including those filed by amicus) filed in *McGee* and this appeal are carbon copies of each other down to almost every last word. (Exs. F, G,

H and I to Motion for Judicial Notice.) But while the Second District Court of Appeal was not persuaded by plaintiff's arguments, the Court of Appeal here was.”


- (7) Page 15-16: “The Second District specifically rejected plaintiff's argument, accepted by the Court of Appeal in this case, regarding “genuine” lease-leaseback transactions. The Second District found “no statutory basis to distinguish between ‘genuine’ and ‘sham’ lease-leaseback transactions” and that the plaintiff's “effort to engraft additional requirements are unpersuasive because *they are not based on any statutory language.*” (*McGee* Opn. 11, italics added [Ex. B to Motion for Judicial Notice].)”
- (8) Page 16: “and *McGee*”
- (9) Page 16: “Whereas those courts relied on the “plain, clear and unambiguous” language of section 17406(a) to uphold the lease-leaseback arrangements.”

This motion is made on the grounds that the above-listed material is improper and in violation of a court rule. *See* CODE CIV. PROC. § 436(a) & (b); CRC 8.1115. District's Petition for Review improperly relies on an unpublished opinion. The motion to strike is based on this notice, the

memorandum of points and authorities, and any other contents of the Court's files for this proceeding.

DATED: August 3, 2015

Respectfully,
CARLIN LAW GROUP, APC

By: 

Kevin R. Carlin
Attorneys for
Stephen K. Davis

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff/Appellant and Respondent Stephen K. Davis (“Taxpayer”) respectfully submits this memorandum of points and authorities in support of his motion to strike portions of Defendant/Respondent and Petitioner Fresno Unified School District’s (“District”) Petition for Review on the basis that it improperly relies on an unpublished opinion, violating California Rules of Court (“CRC”), Rule 8.1115.

I. INTRODUCTION

District improperly relies on an *unpublished opinion* to support its Petition for Review (“Petition”). See Petition, pp. 9, 14, 15 & 16; *James D. McGee v. Torrance Unified School District et al.*, Second Appellate District Court of Appeal, No. B25270 (“*McGee v. TUSD*”). District relies on this unpublished opinion in an attempt to manufacture discord among the lower courts. Petition, p. 16 (“The Court of Appeal’s opinion in this case is directly at odds with the . . . *McGee* decision[.]”); Motion for Judicial Notice, p. 6 (the case “demonstrate[s] the . . . different treatment courts have given to the issues.”). District’s attempt is misguided; the *published* opinions relating to the issues examined in *McGee v. TUSD* are predominantly consistent.

Regardless of the arguments made by District in reliance on *McGee v. TUSD*, it is an unpublished case and cannot be cited. As such, all references

to *McGee v. TUSD* should be stricken from the Petition.

II. STANDARD OF REVIEW

Code of Civil Procedure Section 435 provides that a party, within the time allotted to respond to a pleading, may serve and file a motion to strike all or any part of a complaint.¹ The grounds for such motion are set forth in Code of Civil Procedure Section 436, which states that the Court may, “upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms that it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading,” or “any part of any pleading not drawn or filed in conformity with . . . a court rule.” As explained in detail below, the Petition has improper matter and violates a court rule.

III. ARGUMENT

The CRC prohibits citation to unpublished appellate decisions. CRC, Rule 8.1115. In fact, Rule 8.1115 prohibits unpublished opinions from being “cited or relied on” in any way. In other words, unpublished opinions cannot be considered even persuasive authority. *Id.*

Despite this clear authority, District spends approximately four pages of its Petition citing and discussing an unpublished opinion. *See* Petition, pp.

¹Taxpayer acknowledges the pleading at issue is a petition for review, not a complaint. However, it operates as a complaint by initiating these proceedings before this Court and the same standards apply. Further, the CRC appear to anticipate motions to strike portions of petitions for review, expressly vesting the power to strike the petition in its entirety in the Court. *See* CRC 8.204(e)(2)(B) (noncomplying briefs may be stricken by the Court).


9, 14, 15 & 16. District's reliance on *McGee v. TUSD* throughout the Petition is improper and violates California Code of Civil Procedure Section 436, subsections (a) and (b). Consequently, all references to the unpublished case should be stricken from the Petition.

IV. CONCLUSION

For the foregoing reasons, this Court should grant this motion to strike and strike any and all references to the unpublished case of *McGee v. TUSD*.

DATED: August.3, 2015

CARLIN LAW GROUP, APC

By: 

Kevin R. Carlin
Attorneys for
Stephen K. Davis

**CERTIFICATE OF COMPLIANCE PURSUANT TO
CAL. R. CT. 504(d)(1)**

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used to prepare this document. I certify that the foregoing Motion to Strike contains 1,184 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: August 3, 2015.

A handwritten signature in black ink, appearing to read "K R Carlin", written over a horizontal line.

KEVIN R. CARLIN

ORDER

For good cause shown, Respondent Stephen K. Davis' motion to strike relative to Fresno Unified School District's Petition is granted.

DATED: _____, 2015.

By: _____

Chief Justice

<p>Hon. Donald S. Black Fresno County Superior Court Department 502 1130 O Street Fresno, CA 93724</p>	<p>Clerk of the Court Fresno County Superior Court Department 502 1130 O Street Fresno, CA 93724</p>
<p>Philip J. Henderson Orbach Huff Suarez & Henderson 1901 Harrison St Ste 1630 Oakland, CA 94612 (510) 999-7908</p> <p>Attorneys for California's Coalition for Adequate School Housing: Amicus Curiae for Respondent</p>	<p>Fred Fenster Greenberg Glusker 1900 Avenue of the Stars, 21st Fl. Los Angeles, CA 90067 (310) 785-6866</p> <p>Attorneys for Beverly Hills Unified School District as Amicus Curiae on behalf of Plaintiff and Appellant</p>
<p>James Richard Traber Fagen Friedman & Fulfroost 520 Capitol Mall, Suite 400 Sacramento, CA 95814 (916) 443-0000</p> <p>Attorneys for California's Coalition for Adequate School Housing: Amicus Curiae for Respondent</p>	<p>Anthony N. Kim Cory J. Briggs Mekaela M. Gladden Briggs Law Corporation 99 East C Street, Suite 111 Upland, CA 91786 (909) 949-7115</p> <p>Attorneys for Kern County Taxpayers Association as Amicus Curiae on behalf of Plaintiff and Appellant</p>
<p>Lawrence H. Kay Law Office of Lawrence H. Kay 7801 Folsom Blvd., #101 Sacramento, CA 95826 (916) 381-7868</p> <p>Attorneys for Construction Employers Association: Amicus Curiae for Respondent</p>	<p>Court of Appeal Fifth Appellate District</p> <p><i>(Via e-service pursuant to California Rules of Court, Rule 8.212 by e-submission to Court of Appeal, Fifth District)</i></p>

I am readily familiar with the firm's practices of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 3, 2015, at San Diego, California.

A handwritten signature in cursive script that reads "Duane Besse". The signature is written in black ink and is positioned above a horizontal line.

Duane Besse