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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANNEMEYER FAMILY PARTNERSHIP,

Plaintiff and Appellant,

v.

CITY OF FULLERTON,

Defendant and Respondent.

G043376

(Super. Ct. No. 30-2008-00107504)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

William E. Dannemeyer for Plaintiff and Appellant.

Jones & Mayer and Ivy M. Tsai for Defendant and Respondent.

The Dannemeyer Family Partnership owns real property that is the residence of its general partner, William E. Dannemeyer (for convenience the appellant is hereafter referred to in the masculine singular as "Dannemeyer"), located in the City of Fullerton (the City). Dannemeyer sued the City to compel it to pave a 700-foot unimproved portion of an alley abutting his property and to remove various obstructions from the alley. The trial court granted the City's motion for summary judgment finding as a matter of law the City had no duty to improve and/or pave the alley or to remove any obstructions therein. The court also awarded the City its defense costs under Code of Civil Procedure section 1038. On appeal Dannemeyer raises numerous contentions, none of which have merit.

Original Complaint

Dannemeyer's original complaint filed in June 2008 contained three causes of action titled as follows: (1) "petition for writ of mandate to compel construction and paving of unpaved portion of public alley . . . and for damages"; (2) "complaint for preliminary and permanent injunctions and damages . . . "; and (3) "petition for writ of prohibition to prohibit the entire staff of the City . . . from any involvement with improving and paving this 700 feet of public alley by the appointment of a private engineering firm selected by the court to supervise the work of improvement based on their numerous breaches of the law, bias, prejudice and discrimination against petitioner which prevent petitioner from enjoying equal protection of the law."

Dannemeyer's complaint alleged that in 1921, the City accepted the subdivision map for tract No. 167. The 1921 map was attached as an exhibit to the complaint. Tract No. 167 included parcel No. 24, the parcel that would eventually be further subdivided to include Dannemeyer's lot (designated parcel No. 20 on another map attached to Dannemeyer's complaint), which he bought in 1964 and on which he built his residence. The original parcel No. 24 was one of five original parcels on the east side of

north Grandview Avenue, a street that ends at West Fern Drive to the north, behind which (i.e., on the east side of the five lots) the 1921 tract map showed a 3,000 foot strip designated as "alley." The 1921 tract map showed two other lots on the opposite side of the area designated as "alley." Over the years the area designated as "alley" to the north and south of the original parcel No. 24 were improved and paved. But the 700-foot strip behind parcel No. 24 (and hence Dannemeyer's property), has always remained unimproved. (For convenience only, and to track the nomenclature used in the briefs, we will generally refer to this unimproved strip as the "unimproved alley.")

Dannemeyer alleged that upon acceptance of the tract map in 1921, the City became obligated to improve and maintain all streets and alleys shown thereon. The City failed to improve the remaining 700 feet originally designated as "alley" below his property. Dannemeyer paid $13,000 to a private engineering firm to prepare engineering specifications and a cost estimate for paving the remaining 700 feet, and the City refused to reimburse him. The private engineer estimated it would cost $252,000 to improve and pave the 700-foot alley strip; a private contractor gave Dannemeyer a bid of $288,000 for the work. (In his opposition to the City's summary judgment motion, Dannemeyer attached an estimate he obtained from the City indicating the work would cost approximately $813,000.)

Dannemeyer alleged there were now 40 parcels abutting the full 3,000 foot alley, 27 of which used the alley for daily access to their garage or home. Dannemeyer had recently constructed a 35-foot-by-35-foot asphalt parking pad adjacent to the unimproved alley to park his 28-foot recreational vehicle and his 19-foot boat. The complaint attached as exhibits various notices the City had served on Dannemeyer's contractor in early 2008 regarding damage to both the paved and unimproved portions of the alley as a result of this work, requiring the unimproved part of the alley be restored to its original slope and condition to ensure proper drainage and requiring the contractor to obtain necessary encroachment permits for the parking area. But the narrow width of the

unimproved alley (about eight feet) and the presence of utility poles, made it difficult to maneuver his large vehicles through the unimproved alley to park them on the pad. Additionally, the City had installed a storm drain in the unimproved alley with an intake pipe and header that further impeded Dannemeyer's passage. Dannemeyer alleged he also periodically had workers use the unimproved alley to access the lower part of his property—for example about twice a year he had a roto-rooter truck access his sewer line from the unimproved alley, and sometimes his gardeners parked in the unimproved alley to load debris from tree trimming, rather than carrying uphill and across his property to his driveway on Grandview Avenue. Dannemeyer alleged he had a legal right to use the alley "in a paved status" and the City's failure to pave the unimproved part of the alley violated equal protection clauses of the state and federal constitutions.

Dannemeyer's first cause of action sought issuance of a writ of mandate ordering the City to pave the unimproved alley. He also sought reimbursement of his engineering costs, damages for his lack of access through the unimproved alley, attorney fees, and other costs.

In his second cause of action, Dannemeyer alleged the City had placed various obstructions in the unimproved alley. The obstructions included placing a "Dead End" sign at the entrance to the paved portion of the alley off of the public street, which Dannemeyer alleged improperly told members of the public who might want to drive the entire 3,000 foot length of the alley "'you are not welcome in this City to use our Public Alleys, go some place else.'" The City had placed a chain across the unimproved portion of the alley. It had also installed flood control devices in the unimproved portion of the alley (a drain and intake pipe). Dannemeyer alleged he had a right to travel the entire length of the alley and the various obstructions violated his constitutional rights and violated Vehicle Code section 21102.1. He sought an injunction compelling the City to remove the various obstructions.

Dannemeyer's third cause of action sought a judgment declaring the City's staff be prohibited from participating in improving the alley because they had demonstrated bias against Dannemeyer. He requested the City be ordered to contract with a private contractors to improve and pave the unimproved alley.

After the City's demurrer to the original complaint was sustained with leave to amend, Dannemeyer filed an amended complaint, largely the same. The first cause of action, largely mirrored the second cause of action from the original complaint. Dannemeyer alleged obstructions placed near or in the alley encroached on the unimproved alley. He sought a mandatory injunction compelling the City to remove the obstructions. Dannemeyer's second cause of action sought issuance of a writ of mandate ordering the City to pave the unimproved alley, reimbursement to Dannemeyer of his engineering costs, damages for his lack of access through the unimproved alley, attorney fees, and other costs. The complaint's third cause of action sought an injunction prohibiting City staff from participating in improving the alley and directing the City to retain private contractors to pave the alley.

The City filed a demurrer to the first amended complaint. The court sustained the demurrer as to the first and third causes of action, concluding the second cause of action encompassed what Dannemeyer was trying to do, "pave it and have the obstructions removed."

City's Summary Judgment Motion

The City filed a motion for summary judgment on the grounds that as a matter of law it had no duty to improve the alley.[1] The City's separate statement of

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[1] California Rules of Court, rule 8.124(b), requires an appellant's appendix include any item necessary for proper consideration of the issues "including, . . . any item that the appellant should reasonably assume the respondent will rely on[.]" Inexplicably, Dannemeyer did not include any of the City's moving papers in his appellant's appendix, only his own opposition papers. Although Dannemeyer's failure to provide an adequate record arguably precludes him from meeting his appellate burden (see *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 213), the City filed a respondent's appendix,

undisputed facts was supported by a declaration from the City Engineer, Donald Hoppe. The City accepted the tract map for tract No. 167 in 1921. The tract map depicts an area marked "alley" running north south to the east of North Grandview Avenue. At the time, the entire area was largely undeveloped and the alley was completely unimproved. After acceptance of the tract map, the area was developed with residences. The northern part of the alley (i.e., north of the 700 feet Dannemeyer is complaining about) was paved by the developer, not the City, as part of the development of the homes. The properties adjacent to northern paved portion of the alley have their garages with entrances on the alley and the paving was done to permit vehicular access to the garages. The lots along the portion of the alley that remained unimproved do not have, and never have had, rear or side entrances that are accessed through the alley. Those lots (including Dannemeyer's) all took their access from the public streets.

Hoppe explained the City's custom and practice with respect to the improvement of rights-of-way, including alleys, was that upon acceptance of a right-of-way, it would not be improved unless needed for vehicular access by the public. Since its acceptance by the City, the unimproved portion of the alley has not been publicly maintained and open to the use of the public for purposes of vehicular travel. Since its acceptance by the City, the unimproved portion of the alley has not been improved, designed, or ordinarily used for vehicular travel. All properties abutting the 700-foot unimproved portion of the alley had their driveways with entrances from Grandview Street or another public street. Most of the abutting properties were entirely fenced off from the unimproved alley.

A few years earlier, Hoppe directed that a storm drain be placed in the unimproved portion of the alley for flood control purposes but not for purposes of vehicular travel. Area residents primarily used the unimproved alley as a walking or

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filing in the gaps.

biking trail. To prevent vehicles from mistakenly driving onto the unimproved portion of the alley and getting stuck, Hoppe directed that posts and chains be placed at each end of the unimproved portion and a sign be placed at the northern end of the alley reading "Dead End." The chain is not locked and anyone wishing to access the unimproved alley may do so by unclipping the chain. On September 4, 2007, the City Council conducted a public hearing regarding the unimproved alley and voted unanimously to keep the posts and chain at the northern end of the unimproved portion.

Dannemeyer's separate statement of material facts merely recited the allegations of his complaint as disputed facts. He nominally disputed the City's facts. For example, he disputed the City's calling the alley, "alley" asserting its proper designation was "public alley" (the City does not deny the alley is "public"). He disputed that the lots adjacent to the unimproved 700 feet of alley did not have rear or side entrances accessed through the unimproved alley or that the unimproved alley was not maintained or used for regular vehicular travel. Dannemeyer said he stored vehicles in the parking area he had constructed adjacent to the unimproved alley and occasionally had workers access his property through the unimproved alley.

Dannemeyer's opposition included three declarations. The first, from the engineer retained by Dannemeyer, stated the unimproved alley was a public alley because the City had accepted the tract map in 1921. Various obstructions in the unimproved portion of the alley (some placed by the City) made it difficult to drive through. A UPS driver declared the unimproved alley was impassable for a commercial freight delivery vehicle with a wheel base of eight feet or more. A friend of Dannemeyer's declared he had driven his car over every public street and alley in the City, had measured 28.5 miles of alleys, and this 700-foot portion of the alley was the only unimproved and unpaved alley in the City.

Ruling/Motion for Reconsideration/Award of Defense Costs

On June 17, 2009, the trial court issued its minute order granting the City's summary judgment motion. The court concluded the City had met its burden to establish it had no mandatory duty to improve the alley or remove the obstructions. The City had no duty to pave the unimproved alley because it had not accepted it into its street system. Furthermore, its maintenance obligations were to keep it safe and usable only to the extent it had already been improved and constructed. Furthermore, the unimproved alley did not meet the legal definition of an alley as it was not primarily used for access to the rear or side entrance to abutting property. The order granting summary judgment was signed and entered July 20, 2009. The City filed a motion for an award of attorney fees and other defense costs under Code of Civil Procedure section 1038.[2]

On October 20, 2009, Dannemeyer filed a motion under Code of Civil Procedure section 1008 asking the court to reconsider its "tentative ruling" granting summary judgment on the grounds of new facts. He offered the declaration of a paving contractor who built Dannemeyer's parking pad adjacent to the alley in early 2008, explaining that when he built the pad, he received a cease and desist letter from the City ordering him to obtain proper permits for the low retaining wall he built to support the parking area. The permit mandated the parking area could not "encroach onto the public right-of-way" i.e., the alley. He also included a document he had recently obtained from the City's building files. The document was a plot plan, apparently filed by the contractor who built the parking pad, showing the parking pad abutting the "dirt alley." The plot plan was signed off on by various city departments and had written on it, "public right of way shall be clearly defined. No portion of block wall and footing shall encroach into public right [of way]."

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[2] As with the summary judgment motion, Dannemeyer did not include the City's moving papers in his appellant's appendix, only his opposition, but the City has included its moving papers in its respondent's appendix.

On November 24, 2009, the court issued its minute order denying the motion for reconsideration and granting the City's request for defense costs under Code of Civil Procedure section 1038. Dannemeyer did not dispute the reasonableness of the City's claimed attorney fees. The court awarded the amount the City sought—$67,644.30 in attorney fees and costs. The court concluded Dannemeyer's action was subject to an award of defense costs because Dannemeyer sought monetary damages against the City including engineering expenses he incurred. The court concluded, "There was no justifiable controversy in the matter because [Dannemeyer] presented no facts to support his claims including application of Streets and Highways [Code section] 1806 and Vehicle Code section 21102. [¶] Moreover, [Dannemeyer's] request for injunctive relief was unreasonable because an injunction lies only to prevent threatened injury and has no application to wrongs which have been completed . . . . Here, [Dannemeyer] sought to have the City undertake specified actions, such as remove a dead end sign. [¶] The [third] cause of action sought to enjoin the entire staff of City employees from participating in paving the area. [Dannemeyer] cited no viable reason for this request. He then theorized that the City discriminated against him, asserting unsupportable conclusions, such as his belief that a 'dead end' sign 'tells a person' that [he or she] is 'not welcome in this City' and to 'go someplace else.' The entire cause of action was plainly without viability." The trial court went on to conclude Dannemeyer's decision to pursue his action was unreasonable as a matter of law as there was no legal basis upon which a duty to pave the alley might be owed by the City." The trial court entered judgment for the City and awarded it its defense costs.

DISCUSSION

1. Standard of Review

We review an order granting or denying summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) A defendant moving for summary judgment has the initial burden of showing that a cause of action

lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar, supra,* 25 Cal.4th at p. 850.) If the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (§ 437c, subd. (o)(2); *Aguilar,* 25 Cal.4th at p. 849.) In determining whether the parties have met their respective burdens, the court must "consider all of the evidence" and "all of the inferences reasonably drawn therefrom," and "must view such evidence [citation] and such inferences [citations] in the light most favorable to the opposing party." (*Aguilar, supra,* 25 Cal.4th. at p. 844.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850, fn. omitted.)

Although an appellant's duty on appeal is well established, in this case we feel compelled to set forth the basics. Dannemeyer's opening brief is confusing and at times completely unintelligible. His brief has 22 separate argument headings, most of which are devoid of legal analysis, citation to relevant supporting legal authority, or cogent explanation as to how he was prejudiced by the claimed error. A trial court's ruling is presumed to be correct and the burden of demonstrating error rests squarely on the appellant. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632, and cases cited therein.) When an appellant raises an issue "but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*), see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [appellate court not required to consider points not supported by citation to authorities or record].) An appellant may not simply make the assertion the ruling is erroneous and leave it to the appellate court to figure out why.

Upon close review of the opening brief, we may group Dannemeyer's points as follows: (1) whether there are triable issues of fact bearing on whether the City has a duty to improve and pave the remaining 700-foot unimproved portion of the alley; (2) whether there are triable issues of fact bearing on whether the City must remove various obstructions from the unimproved alley; (3) whether the City should be estopped to deny it has a duty to pave the unimproved alley; (4) whether the trial court erred by denying Dannemeyer's motion for reconsideration; and (5) whether the trial court erred by awarding the City its defense costs pursuant to Code of Civil Procedure section 1032.

2. No Statutory or Constitutional Duty to Pave/Improve the Alley

Dannemeyer's complaint alleged a cause of action seeking a writ of mandate compelling the City to pave the alley. He sought damages for the years the alley remained unpaved and to recover the costs he incurred hiring an engineer to prepare estimates on the costs of paving the alley. He argued the City was obligated under Streets and Highways Code sections 27 and 1806, to improve and pave the 700-foot unimproved portion of the alley. There was no duty as a matter of law under either section.

Streets and Highways Code section 1806, subdivision (a), provides, "No city shall be held liable for failure to maintain any road until it has been accepted into the city street system in accordance with subdivision (b) or (c)." Streets and Highways Code, section 1806, subdivision (b), provides for acceptance by a resolution adopted by the city's governing body, and subdivision (c), allows a city to adopt an ordinance permitting a city officer to accept a street or road into the city street system. Although the alley's depiction on the subdivision tract map filed in 1921 might have constituted an offer to dedicate the alley (*Wright v. City of Morro Bay* (2006) 144 Cal.App.4th 767, 770 (*Wright*)), there is no indication the City ever accepted the alley into its street system.

Furthermore, even if the alley is deemed an accepted part of the City's street system due to public use (see *Wright, supra,* 44 Cal.App.4th at p. 770 [at common

law "[w]here a private road has been offered for public dedication, that offer may be accepted either by formal action of the public entity or by public use"]), there was no duty to pave or improve it. Streets and Highways Code section 27, subdivision (a), provides maintenance obligations encompass, "The preservation and keeping of rights-of-way, and each type of roadway, structure, safety convenience or device, planting, illumination equipment, and other facility, in the safe and usable condition *to which it has been improved or constructed, but does not include reconstruction or other improvement*." (Italics added.) Furthermore, "The degree and type of maintenance . . . shall be determined in the discretion of the authorities charged with the maintenance thereof, taking into consideration traffic requirements and moneys available therefor." (Str. & Hyws., § 27, 2d par.)

There are no disputed material facts bearing on this issue. The undisputed facts are that the 700-foot unimproved portion of the alley has never been improved or maintained by the City. Nothing in the Streets and Highways Code imposes an obligation to improve and pave the alley for Dannemeyer's convenience.

In his brief on appeal, Dannemeyer's only mention of Streets and Highways Code sections 27 and 1806, is to implicitly concede they do not impose a duty on the City to pave the alley. Dannemeyer argues in several places the City's failure to pave the unimproved part of the alley constitutes a violation of his equal protection rights under the federal and state Constitutions, and the Streets and Highways Code provisions limiting the City's obligations to improve and maintain the unimproved alley, cannot trump his constitutional rights.

Dannemeyer's constitutional rights are not implicated. He contends equal protection is denied because the City irrationally distinguishes between what parts of the alley to have paved, and what parts of the alley to leave unimproved. Nonsense. Equal protection is not denied simply because some parts of the alley are paved, and some are not. "'"Where there is no suspect classification, and purely economic interests are

involved, a municipality may impose any distinction which bears some 'rational relationship' to a legitimate public purpose. [Citation.] Courts consistently defer to legislative determinations as to the desirability of such distinctions. [Citation.] The ordinance will be upheld so long as the issue is '"at least debatable."' [Citation.]" [Citation.]' [Citation.]" (*California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1327.) Dannemeyer's reliance on *Beals v. City of Los Angeles* (1943) 23 Cal.2d 381, is misplaced. That case dealt with a city's attempt to vacate a public alley when doing so cut off the adjoining property owner's primary ingress and egress.

There are no material facts in dispute regarding why the 700-foot portion of the alley abutting Dannemeyer's property has remained unimproved in the almost 90 years since the subdivision tract map was filed. The developed properties abutting that part of the alley have their primary access from public streets—they do not have garages or entrances that are accessed through the alley. None of the facts Dannemeyer asserts are in dispute bear on this point. Dannemeyer's occasional use of the alley to access his boat and RV storage, or to provide workers a more convenient access, do not establish the unimproved alley is in regular public use or the City must pave the alley.

3. No Duty to Remove "Obstructions"

Dannemeyer also sought to compel the City to remove "obstructions" from the unimproved alley including: a dead end sign placed at in the paved part of the alley; posts and chains erected at either end of the unimproved part of the alley; and a storm drain and its attendant intake pipe. He argued Vehicle Code section 21102.1 precludes placing any such obstructions. His argument is without merit.

Vehicle Code section 21102.1 has no application here. That section permits a city "by ordinance or resolution" to restrict "vehicular or pedestrian traffic through any alley by means of gates, barriers, or other control devices," if it finds "the restriction is necessary for the protection or preservation of the public peace, safety,

health, or welfare" provided, as pertinent here the restriction does not impede maintenance access by utilities, commercial freight delivery, emergency vehicles, and does not "restrict the access of certain members of the public to the alley, while permitting others unrestricted access to the alley." (Veh. Code, § 21102.1.) But the Vehicle Code defines an "alley" as "any *highway* having a *roadway* not exceeding 25 feet in width which is primarily used for access to the rear or side entrances of abutting property . . . ." (Veh. Code, § 110, italics added.) It defines a "highway" as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." (Veh. Code, § 360.) And it defines a "roadway" as "that portion of a highway improved, designed, or ordinarily used for vehicular travel." (Veh. Code, § 530.) The undisputed facts are the 700-foot unimproved alley has never been improved or designed for vehicular travel, or publicly maintained and open to use for vehicular travel. It has always been a narrow unimproved strip of land. That Dannemeyer occasionally used the alley to access the back of his property does not establish a material issue of fact as to whether it met the definition of alley subject to any of the restrictions of Vehicle Code section 21102.1.

4. Estoppel Argument is Waived

Dannemeyer argues the City is estopped to deny it has a duty to pave the unimproved alley because it reprimanded his contractor for a prohibited discharge of wastewater into the alley, built a storm drain in the alley, and removed some obstructions from the unimproved alley (a neighbors encroaching fence), while placing others (the dead end sign, posts and chains, and storm drain intake pipe). The estoppel argument was not raised in Dannemeyer's opposition below. "It is well settled that '"issues not raised in the trial court cannot be raised for the first time on appeal."' [Citations.] This rule is especially applicable to the doctrine of estoppel, which includes factual elements that must be established in the trial court. [Citation.]" (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 530.) Furthermore, his argument is completely

unsupported by legal analysis or citations to supporting authorities, and for that reason we decline to consider it further. (*Badie, supra,* 67 Cal.App.4th at pp. 784-785.)[3]

5. Motion for Reconsideration

Dannemeyer contends the trial court erred by denying his motion for reconsideration. We disagree.

"When, as here, a party files a motion under [Code of Civil Procedure] section 1008 for reconsideration of a ruling on a summary judgment motion, the trial court may not grant the motion unless it satisfies the requirements of [Code of Civil Procedure] section 1008. [Citations.] . . . '[Code of Civil Procedure] section 1008, subdivision (a) requires that a motion for reconsideration be based on new or different facts, circumstances, or law. A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time. [Citation.]' [Citation.] The trial court's ruling on a motion for reconsideration under [Code of Civil Procedure] section 1008 is reviewed for an abuse of discretion. [Citation.]" (*Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 723-724, disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7.)

Dannemeyer argues the trial court erroneously concluded his motion for reconsideration, filed on October 20, 2009, was untimely. A motion for reconsideration must be filed within 10 days after a party has been served with written notice of the entry of the order. (Code Civ. Proc., § 1008, subd. (a).) Here, the trial court issued its minute order granting the City's motion for summary judgment on June 17, 2009, and the minute order was served on Dannemeyer by the court clerk. But the formal order granting the City's summary judgment motion was not signed and entered until July 20, 2009, and

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[3] For the same reason we decline to further consider Dannemeyer's contention the City's failure to pave the alley constitutes an unconstitutional taking of his property, or his one sentence argument at the conclusion of his brief that the summary judgment statute, Code of Civil Procedure section 437c, is unconstitutional because it does not provide a mechanism for cross-examination of declarants.

although there is a proof of service of the *proposed* order on Dannemeyer prior to entry of the order, it does not appear Dannemeyer received written notice of entry of the order.

Even were we to agree Dannemeyer's motion was timely, the trial court also denied the motion on its merits, ruling the motion did not establish any new or different facts, circumstances or law. The court observed, "not only do the facts presented by [Dannemeyer] pre-date the filing of this action, the argument is unintelligible."

We cannot say the trial court abused its discretion by denying the motion on its merits. "[F]acts of which the party seeking reconsideration was aware at the time of the original ruling are not 'new or different.' [Citation.]" (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468.) Dannemeyer's motion was based on a declaration from the paving contractor who built the parking area adjacent to the alley in early 2008, and his own declaration attaching public records he just recently obtained from the City, including a plot plan showing the pad abutted the alley with words written on it warning there could be no obstruction or encroachment on the "public right of way." There was nothing new about the facts—Dannemeyer's complaint alleged facts concerning construction of the parking area and attached letters from the City to his contractor concerning the construction. He offered no explanation for not obtaining the plot plan earlier, and in any event the plot plan does not create a material fact as to whether the City had a legal duty to pave the alley.

6. Defense Costs

Dannemeyer contends the trial court improperly awarded the City its defense costs, including its attorney fees, under Code of Civil Procedure section 1038. We reject his contention.

Code of Civil Procedure section 1038, subdivision (a), provides in relevant part that in any civil proceeding under the California Tort Claims Act (Gov. Code, § 900 et seq, "Claims Act"), "the court, upon motion of the defendant . . . , shall, at the time of

the granting of any summary judgment . . . determine whether or not the plaintiff . . . brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint . . . . If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party." The statute "provides public entities . . . with a way to recover the costs of defending against unmeritorious and frivolous litigation. [Citations.]" (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 857 (*Kobzoff*).)

Dannemeyer first contends his action was not subject to an award of defense costs under Code of Civil Procedure section 1038 because it was not an action under the Claims Act. "An appellate court reviews a determination of the legal basis for an award of attorney fees independently as a question of law. [Citation.]" (*Leamon v. Krajkiewcz* (2003) 107 Cal.App.4th 424, 431.) "Under the Claims Act, no suit for 'money or damages' may be brought against a public entity until a written claim has been presented to the public entity and the claim either has been acted upon or is deemed to have been rejected. (Gov. Code, §§ 905, 945.4.)

A suit for 'money or damages' includes all actions where the plaintiff is seeking monetary relief, regardless whether the action is founded in "'tort, contract or some other theory."' [Citations.]" (*Hart v. County of Alameda* (1999) 76 Cal.App.4th 766, 778.) Dannemeyer's complaint specifically sought as damages the money he spent on engineering studies. Dannemeyer even attempted to establish his compliance with the Claims Act by alleging he had filed a written claim with the City seeking reimbursement of the $13,700, and the City "in writing falsely claimed that the time to file the

claim . . . had expired which is absurd." For all these reasons, the trial court correctly concluded Code of Civil Procedure section 1038 applied.[4]

Dannemeyer also contends the trial court erred in concluding his action warranted an award of attorney fees. Under Code of Civil Procedure section 1038, "defendants may recover defense costs . . . if the trial court finds the plaintiffs lacked *either* reasonable cause or good faith in filing and maintaining the lawsuit." (*Kobzoff, supra,* 19 Cal.4th at p. 853.) In other words, "before denying a [Code of Civil Procedure] section 1038 motion, a court must find the plaintiff brought or maintained an action in the good faith belief in the action's justifiability *and* with objective reasonable cause. [Citations.]" (*Kobzoff, supra,* 19 Cal.4th at p. 862, italics added.)

"'*Good faith*, or its absence, involves a factual inquiry into the plaintiff's subjective state of mind [citations] . . . . [T]he question on appeal [is] whether the evidence of record was sufficient to sustain the trial court's finding. [¶] *Reasonable cause* is to be determined objectively, as a matter of law, on the basis of the facts known to the plaintiff when he or she filed or maintained the action. Once what the plaintiff (or his or her attorney) knew has been determined, or found to be undisputed, it is for the court to decide "'whether any reasonable attorney would have thought the claim tenable . . . .'" [Citations.] . . . [R]easonable cause is subject to de novo review on appeal.'" (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 183.)

Dannemeyer argues he had a reasonable belief the City's failure to pave the remaining unimproved alley violated his equal protection rights and that not paving the

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[4] Dannemeyer does not challenge the amount of fees awarded. Nor does he contend the fees should have been apportioned between the cause of action in which he sought damages and the others. In any event, apportionment is not required where, as here, "the claims for which fees are recoverable are those that have common issues, common operative facts, related legal theories, or require the presentation of virtually identical evidence. [Citations.]" (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1072, citing *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.)

alley, and permitting obstructions in the alley, to remain constitutes an unconstitutional unlawful taking of his property. As already discussed above, Dannemeyer has not set forth any plausible equal protection claim. There is no irrational distinction here—private developers paved the parts of the alley where residences took their primary vehicular access from the alley; they left unpaved the portion of the alley that abutted houses that took their primary vehicular access from the street. His takings claim is raised for the first time on appeal and is completely unsupported by any analysis. We need not address it further.

The trial court correctly found Dannemeyer's action was filed and/or maintained without reasonable cause. Dannemeyer had no factual basis to assert a duty on the part of the City to pave the historically unimproved alley behind his house. The statutes he relied upon, on their face, simply do not support any claim. Streets and Highways Code section 1806 imposes no duty to maintain unless the alley was accepted into the City's street system, which is was not. Furthermore, even if an accepted part of the City's street system, Streets and Highways Code section 27 requires maintenance of the alley only to the extent it was already improved—it does not require improvement. Nor could Dannemeyer establish the City had a duty to remove the storm drain, intake pipe, dead end signs, or *unlocked* protective posts and chains. Dannemeyer had no plausible reason to believe Vehicle Code section 21102.1 precluded the City's actions. The unimproved alley did not meet the definition of alley subject to that section because it was not primarily used for access to the rear or side entrances of abutting property (Veh. Code, § 110), was not designed and improved for vehicular travel (Veh. Code, § 530), and was not publicly maintained and open to the public for vehicular travel (Veh. Code, § 360). The trial court correctly concluded the action was filed and/or maintained without reasonable cause.

We further note Dannemeyer's subjective good faith in pursuing this action is also in doubt. The reason for his pursuit of this action is clear. As he has repeatedly

acknowledged, he bought his residential property in 1964 and has lived there for over 45 years, with the subject portion of the alley at all times being in a completely unimproved state. When Dannemeyer decided the back part of his property would serve well as a parking/storage area for his RV and boat, he sought to compel the City to bear the cost of improving and paving the alley for better access—at a cost of between about $300,000, as claimed by Dannemeyer, and $800,000, as estimated by the City. The trial court properly awarded the City its costs and attorney fees under Code of Civil Procedure section 1038. We note additionally that, "Awards of costs and attorney fees under Code of Civil Procedure section 1038 include costs and fees incurred defending the judgment on appeal, even when the appeal was not frivolous. [Citation.]" (*Bosetti v. U.S. Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1226.)

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal. The matter is remanded to the trial court to consider and decide any motion that might be made by Respondent to recover any further appellate costs (including attorney fees) to which it may be entitled under Code of Civil Procedure section 1038.

O'LEARY, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.