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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

G.W., a Minor, etc., et al., Plaintiffs and Appellants, v. CORONADO UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	D083991 (Super. Ct. No. 37-2022-00034756-CU-NP-CTL)

APPEAL from an order of the Superior Court of San Diego County, Gregory W. Pollack, Judge. Affirmed.

Law Offices of Tracy L. Henderson, Tracy L. Henderson; The Gavel Project, and Ryan Heath for Plaintiffs and Appellants.

Winet Patrick Gayer Creighton & Hanes, Randall L. Winet, and Erin N. Taylor for Defendants and Respondents.

G.W. and her mother Nicole W. (together, plaintiffs) appeal from a fees award against them under the anti-SLAPP statute (Code Civ. Proc.,[1]

1 Further undesignated statutory references are to the Code of Civil Procedure.

§ 425.16) after the dismissal of their complaint against the Coronado Unified School District (CUSD) and associated individuals challenging the adoption and enforcement of a masking policy at Coronado High School (CHS) during the COVID-19 pandemic. In a prior appeal, we affirmed the underlying order dismissing plaintiffs' complaint in its entirety under the anti-SLAPP statute. (*G.W. v. Coronado Unified School Dist.* (Sept. 19, 2024, D082619) [nonpub. opn.].) In this appeal from the subsequent fees order, plaintiffs make no genuine challenge to the fees order itself and instead seek to relitigate the validity of the underlying anti-SLAPP ruling and the merits of their prior appeal. We conclude that this appeal is frivolous. Accordingly, we affirm the fees order and impose sanctions against appellants' counsel Tracy L. Henderson for prosecuting a frivolous appeal.[2]

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Anti-SLAPP Ruling*

G.W. was a student at CHS. In early 2022, she refused to comply with CUSD's masking policy adopted during the COVID-19 pandemic. After she was suspended twice, she continued to refuse to wear a mask at school. In March 2022, she disenrolled from CHS.

G.W. and her mother sued CUSD and 20 individual defendants, including members of the CUSD's board of trustees, administrators for CUSD and CHS, and CHS teachers. Plaintiffs were represented in the trial court by

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[2] On the court's own motion, we take judicial notice of the appellate record, briefs, opinion, petition for rehearing, and order denying rehearing in the prior appeal. (*G.W. v. Coronado Unified School Dist., supra*, D082619.) Plaintiffs' second motion to augment the record, filed February 19, 2025 is granted as to Exhibits A, B, and C. Having previously denied plaintiffs' first motion to augment the record, filed January 13, 2025, as to Exhibit C, we now deny it as moot as to Exhibits A and B because they are duplicative of Exhibits A and B to the second motion to augment.

attorney Tracy L. Henderson. Plaintiffs asserted a claim under title 42 United States Code section 1983 alleging violations of G.W.'s rights to freedom of speech and expression under the First and Fourteenth Amendments to the United States Constitution, article I, section 2(a) of the California Constitution, and Education Code section 48907, subdivision (a). Plaintiffs also alleged violations of the Bane Act (Civ. Code, § 52.1) and tort claims for negligence and intentional infliction of emotional distress.

Each of the four groups of defendants (CUSD, the administrators, the trustees, and the teachers) filed an anti-SLAPP motion, arguing that plaintiffs' complaint arose from protected activity under section 425.16, subdivisions (e)(1) through (e)(4). Defendants also argued that plaintiffs could not demonstrate a probability of prevailing because: (1) defendants were immune from liability under various state statutes, the Eleventh Amendment to the United States Constitution, and the qualified immunity doctrine; (2) requiring that students wear a mask consistent with public health orders does not violate G.W.'s constitutional rights; (3) there was no evidence any of defendants engaged in threats of violence, intimidation, or coercion; and (4) no evidence supported plaintiffs' claims for negligence or intentional infliction of emotional distress. Each of the four motions was supported by an identical set of 45 exhibits plus declarations of each of the 20 individual defendants.

Plaintiffs opposed the anti-SLAPP motions, contending that defendants' conduct in enforcing the mask policy did not constitute protected activity and was illegal as a matter of law. They further argued that defendants were not immunized from liability and there was sufficient evidence that, if credited, would demonstrate a probability of prevailing on the merits. In opposition to the anti-SLAPP motions, plaintiffs submitted an

11-page declaration of G.W. with three exhibits and a six-page declaration of her mother with seven exhibits.

In a 10-page written order after a hearing, the trial court granted each of defendants' anti-SLAPP motions. As to prong one (whether plaintiffs' claims arose from protected activity), the court ruled that the targeted comments and actions of the defendants constituted protected activity because they arose out of CUSD's position in formulating and enforcing a COVID-19 policy in compliance with government guidance to prevent transmission of the disease, which was undeniably an issue of public interest. The court also found that the promulgation and enforcement of masking policies for in-person learning was related to the promotion of a safe workplace, and it cited authority for the proposition that statements and conduct undertaken to promote the public interest in a safe workplace qualify for anti-SLAPP protection. (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1653.) The court further concluded that the actual casting of votes in favor of the masking policy and the surrounding discussion and statements were also protected activity under the anti-SLAPP statute. The court rejected plaintiffs' prong one argument that the defendants' enforcement of the masking policy was illegal as a matter of law. Accordingly, the court concluded that defendants had satisfied their prong one burden, shifting the burden to plaintiffs to establish a probability of prevailing.

As to prong two, the court found plaintiffs had failed to establish a probability of prevailing on any of their claims. The court ruled that several immunities barred plaintiffs' claims, specifically under Education Code section 44805, Government Code sections 818.2, 820.2, 820.4, and 855.4, Civil Code section 47, subdivision (a), and the Eleventh Amendment to the United

States Constitution. The court further concluded that CUSD's masking policy was lawful; that defendants were entitled to undertake all reasonable efforts to enforce the policy; that the measures undertaken by the defendants were reasonable and permissible; and that G.W. did not have a constitutional right to attend school unmasked.

B. *The Prior Appeal*

Plaintiffs appealed the anti-SLAPP ruling. Their trial counsel, attorney Henderson, was one of the attorneys who represented them in the prior appeal. Plaintiffs' opening brief contained no factual summary of the allegations of their own complaint and no mention of the evidence submitted by both sides in connection with the anti-SLAPP motions. The opening brief also did not identify the 20 individually named defendants or describe what role each played in the masking dispute or what the factual basis for liability was against each of them. Plaintiffs did not argue on appeal that the trial court exceeded its jurisdiction in granting the anti-SLAPP motions. Finally, the opening brief did not mention or discuss any of the immunities relied on by the trial court.

After full briefing and oral argument, we issued a 25-page opinion affirming the order. We concluded that plaintiffs had forfeited their claims of error by failing to include a factual summary of the significant facts in their opening brief and failing to address the multiple legal grounds for the trial court's ruling on the merits. We explained that we could not assess whether the claims against each of these defendants arose from protected activity without a proper factual summary of the allegations against them, including the statements each was alleged to have made regarding the mask mandate.

Despite the forfeiture, we went on to address plaintiffs' prong one and prong two arguments on the merits. As to prong one, we considered and

rejected the arguments plaintiffs made on appeal: (1) that the trial court had purportedly mischaracterized their claims by finding that they were challenging the lawfulness of CUSD's masking policy itself, rather than merely its "punitive" implementation or enforcement; and (2) that the masking policy was illegal as a matter of law for infringing on G.W.'s constitutional rights. In addressing prong two, we discussed at length G.W.'s claims that she had a constitutional right to attend school unmasked, that enforcement of the mask mandate constituted compelled speech, and that she had a First Amendment right to protest the mask mandate by violating it. We also cited cases from other jurisdictions rejecting similar constitutional challenges to mask mandates.

Plaintiffs filed a 37-page petition for rehearing (excluding tables) asserting that our finding of forfeiture and our analysis of both prongs were erroneous. As to prong one, the petition for rehearing asserted that: (1) we had erroneously placed the burden of proof on plaintiffs; (2) we had failed to address whether defendants met their prong one burden of showing the suit arose from protected activity; (3) we had wrongly concluded that plaintiffs misstated the allegations of their own complaint; and (4) we had conflated and confused different issues.

We denied the petition for rehearing. According to the respondents' brief in this appeal, plaintiffs attempted to file a petition for review in the California Supreme Court, but it was rejected as untimely.

C. *The Fees Motion and Award*

After the trial court granted the anti-SLAPP motions, defendants filed a motion to recover their fees and costs incurred in the trial court in the total amount of $68,238.62 under the fees provision of the anti-SLAPP statute. (§ 425.16, subd. (c)(1) [prevailing anti-SLAPP defendant entitled to fees and

costs].) The motion was supported by defense counsel's detailed billing records. Plaintiffs opposed the motion on the ground that the fees requested were excessive and unreasonable. They did not argue that the trial court's anti-SLAPP ruling was constitutionally void, in excess of its jurisdiction, or violated their due process rights. In February 2024, before we decided the prior appeal, the trial court granted the motion and awarded fees and costs to defendants in the amount requested, subject to either augmentation to include appellate fees and costs if the defendants prevailed in the pending appeal or a "clawback" if the plaintiffs prevailed. Still represented by attorney Henderson, plaintiffs filed another notice of appeal from the fees order.

D. *Issues Raised in this Appeal*

After we decided the prior appeal affirming the anti-SLAPP ruling, attorney Henderson filed the opening and reply briefs as sole counsel for plaintiffs in this appeal. Aside from a single conclusory sentence in the introduction of the opening brief asserting that the amount of the fees awarded was "punitive and unreasonable," plaintiffs' briefs are devoted entirely to relitigating the underlying anti-SLAPP ruling and our prior decision affirming that ruling. Plaintiffs assert that the order dismissing their action under the anti-SLAPP statute is "constitutionally void" because both the trial court and this court purportedly gave no explanation for how the defendants met their prong one burden of demonstrating that the lawsuit arose from protected activity. They claim that this deficiency constituted a due process violation and the resulting judgment of dismissal "was issued in excess of the court's jurisdiction—because the trial court had no authority to grant the Defendants' motions (and the Court of Appeal had no authority to affirm)." The plaintiffs' opening brief concludes: "For the foregoing reasons,

this Court should find that the judgment dismissing the Plaintiffs' complaint and the Opinion [in the prior appeal] are constitutionally void, and so is the subsequent order of the trial court granting Defendants' request for attorneys' fees."

After completion of briefing, we issued an order advising that we were considering imposing sanctions against attorney Henderson and appellant Nicole W. for prosecuting a frivolous appeal. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276.) Our order noted that "[t]he issues appellants raise in this fees appeal go to the merits of the underlying anti-SLAPP order and were already resolved against them in their prior appeal from that order." We gave them an opportunity to file a written opposition to sanctions.

In their opposition, appellants and their counsel insisted that their "jurisdictional" argument challenging the underlying anti-SLAPP ruling and this court's prior decision was not only meritorious, but correct. They argued that this court's order regarding possible sanctions demonstrated "a fundamental lack of fair, unbiased review" and that the "prior rulings in this case represents [*sic*] an egregious abuse of power by the judiciary (which is exactly why this Court's prior Opinion, overruling all existing precedent on the interpretation of California's anti-SLAPP statute and unilaterally expanding its own jurisdiction thereunder, is *unpublished*)." They asserted: "Appellants are not asking for much—simply a ruling that explains which, if any, of the Appellees' statements and actions constitute 'protected activity' as is required by California's anti-SLAPP statute."

Although the parties waived oral argument on the merits of the appeal, we set and heard oral argument on the sanctions issue. Before oral argument, we granted Arizona attorney Ryan Heath's application to appear

pro hac vice on behalf of appellants. With Henderson's consent, Heath represented both Nicole W. and Henderson at the oral argument.

DISCUSSION

Plaintiffs cannot dispute that this appeal is an undisguised effort to relitigate the merits of the trial court's anti-SLAPP ruling and our prior decision affirming that ruling. They insist that both the trial court and this court got it wrong and that the dismissal of their lawsuit under the anti-SLAPP statute is therefore "constitutionally void."

We have no difficulty concluding that this appeal is frivolous. We apply both an objective and subjective standard in determining whether an appeal is frivolous. Under the objective standard, an appeal is frivolous if any reasonable attorney would agree it is totally and completely without merit. Under the subjective standard, an appeal is subjectively frivolous if it is prosecuted for an improper motive. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649–650 (*Flaherty*).) A finding of frivolousness may be based on either standard by itself, but the two are often used together, with one providing evidence of the other. (*Malek Media Group, LLC v. AXQG Corp.* (2020) 58 Cal.App.5th 817, 834.)

We have already rejected plaintiffs' arguments and affirmed the trial court's anti-SLAPP ruling in the prior appeal. Although we found forfeiture based on plaintiffs' deficient briefing, we nevertheless addressed plaintiffs' claims of error on their merits. Our affirmance of the anti-SLAPP ruling in the prior appeal is conclusive and binding on the parties. Under the law of the case doctrine, " ' "[t]he decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent . . . appeal in the same case." ' " (*Leider v. Lewis* (2017) 2 Cal.5th

1121, 1127.) "[T]he law-of-the-case doctrine 'prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances.' " (*People v. Boyer* (2006) 38 Cal.4th 412, 441.) "Absent an applicable exception, the doctrine 'requir[es] both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong.' " (*People v. Barragan* (2004) 32 Cal.4th 236, 246.) The law of the case doctrine extends to questions that were implicitly determined because they were essential to the prior decision. (*Estate of Horman* (1971) 5 Cal.3d 62, 73.)

Plaintiffs assert that the law of the case doctrine does not apply because we did not explicitly or implicitly decide "the jurisdictional issue that is now raised in this appeal." But the plaintiffs have merely repackaged their attack on the trial court's prong one analysis as a "jurisdictional" issue for this appeal. Their only argument is that the trial court lacked jurisdiction to grant the anti-SLAPP motion because it purportedly failed to identify which of the defendants' statements and actions constituted protected activity. We have already rejected this argument by addressing plaintiffs' prong one arguments and affirming the trial court's anti-SLAPP ruling in the prior appeal. Moreover, plaintiffs are also trying to relitigate our forfeiture finding based on their deficient briefing in the prior appeal, asserting that it improperly shifted the burden to them under prong one of the anti-SLAPP statute. The law of the case doctrine does not permit plaintiffs to relitigate these issues already decided against them in the prior appeal.

Even without relying on the law of the case doctrine, however, we would still conclude that plaintiffs' arguments are frivolous. Plaintiffs' assertion that neither the trial court nor this court provided any explanation for their prong one analysis is without merit. As we have summarized above,

the trial court did explain why it concluded that plaintiffs' claims arose from protected activity. Plaintiffs had every opportunity to contest this ruling in the prior appeal. They did so by expressly conceding that defendants' adoption of the masking policy was "undisputedly protected activity" but claiming that: (1) they were only challenging its enforcement, not its adoption; and (2) the masking policy was illegal as a matter of law because it violated G.W.'s constitutional rights. In our prior opinion, we disagreed with both of these prong one arguments and explained why we were rejecting them on the merits, notwithstanding plaintiffs' forfeiture of the issue. Plaintiffs' refusal to accept the result of the prior appeal is not a basis for attacking the same anti-SLAPP order again in this fees appeal.

Equally devoid of merit is plaintiffs' argument that the dismissal of their case under the anti-SLAPP statute is constitutionally void because the trial court and this court purportedly acted in excess of jurisdiction. This jurisdictional argument is based entirely on the false premise that the trial court and this court failed to explain the basis for the prong one rulings. A court acts in excess of jurisdiction where, though it has jurisdiction over the subject matter and the parties in a fundamental sense, it has no jurisdiction (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624.) At most, plaintiffs' argument amounts to an assertion that the trial court was mistaken in its prong one analysis and we were mistaken in affirming its anti-SLAPP ruling. Even if we were to accept this premise, "ordinary mistakes of law or procedure do not constitute acts in excess of jurisdiction." (*LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 870–871.) The trial court had jurisdiction and power to grant the anti-SLAPP motions and we had jurisdiction and power to decide

the appeal from that ruling. If parties could relitigate final judicial decisions merely by claiming they were erroneous, litigation would be never-ending.

Plaintiffs' claim of a due process violation is also specious. Due process requires notice and an opportunity to be heard. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 927.) Plaintiffs had ample notice and opportunity to be heard on the anti-SLAPP motions. They were afforded an opportunity to present evidence in opposition to the motions, and they did so. There was full briefing and oral argument on both the motion and the prior appeal. In a detailed written order, the trial court rendered its ruling based on its evaluation of the evidence presented, and we affirmed the ruling in a reasoned opinion after oral argument. Although plaintiffs may be dissatisfied with the outcome, there was no conceivable due process violation.

Finally, plaintiffs' argument that our forfeiture finding in the prior appeal improperly shifted the burden to them is meritless. On appeal, a judgment is presumed correct and the appellant bears the burden of affirmatively demonstrating error. (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2023) 94 Cal.App.5th 764, 776–777.) "The appellant bears this burden of rebutting the presumption of correctness accorded to the trial court's decision, regardless of the applicable standard of review." (*Id*. at p. 777.) To meet this burden, the appellant must comply with the applicable appellate rules, including the rule requiring a factual summary of the significant facts with citations to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C), (a)(2)(C).) As we explained in the prior appeal, plaintiffs failed to do so. In finding forfeiture, we merely held the plaintiffs to

their ordinary burden of affirmatively demonstrating error on appeal; we did not shift the burden of proof under the anti-SLAPP statute.[3]

For all these reasons, plaintiffs' attempt to relitigate the trial court's anti-SLAPP ruling and the prior appeal is frivolous. Any reasonable attorney would agree that this appeal is totally and completely without merit. (*Flaherty, supra*, 31 Cal.3d at p. 650; see also *Pollock v. University of Southern California* (2003)112 Cal.App.4th 1416, 1433–1444 (*Pollock*) [imposing sanctions for frivolous appeal where the same attorney represented appellant in two appeals; by the time of the second appeal she knew that many of her arguments were unmeritorious; and yet she "persist[ed] in pursuing the same arguments" in the second appeal]; *Beckstead v. International Industries, Inc.* (1982) 127 Cal.App.3d 927, 933–935 [imposing sanctions for frivolous appeal raising issue already decided in prior appeal].)

We further conclude that the appeal was brought for an improper purpose. (*Flaherty, supra*, 31 Cal.3d at p. 650.) "Appellant's brief is largely

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3 Nor have plaintiffs asserted any proper challenge to the amount of the fees awarded by the trial court. As noted, their opening brief includes only a single sentence in the introduction asserting that the amount of the fees was "punitive and unreasonable." But they did not develop this argument under a proper argument heading with meaningful analysis, citation to the record, or citation to authority. Accordingly, this issue is forfeited. (Cal. Rules of Court, rules 8.204(a)(1); see *BBBB Bonding Corp. v. Caldwell* (2021) 73 Cal.App.5th 349, 375, fn. 8 [argument made in single sentence without reasoned analysis was forfeited]; *Hollingsworth v. Heavy Transport, Inc.* (2021) 66 Cal.App.5th 1157, 1172, fn. 3 [arguments mentioned in introduction of opening brief but not included in argument section under appropriate headings were forfeited]; *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 146 [assertions of error made without cogent argument supported by legal analysis and citation to record were forfeited]; *City of Tracy v. Cohen* (2016) 3 Cal.App.5th 852, 857, fn. 6 [issue mentioned in passing but not developed in argument was forfeited].)

devoted to rehashing issues raised and decided in the prior appeal, a totally inappropriate exercise." (*Hummel v. First Nat'l Bank* (1987) 191 Cal.App.3d 489, 495.) "Repeated litigation of matters previously determined by final judgment constitutes harassment and should be penalized." (*Weber v. Willard* (1989) 207 Cal.App.3d 1006, 1010; see also *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 193 ["Where, as here, a party appeals and merely repeats an argument that was soundly rejected by another appellate panel, we have little difficulty concluding that the party lacked good faith in pursuing the appeal"].)

"An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process." (*Flaherty, supra*, 31 Cal.3d at p. 650.) "Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts." (*Ibid.*)

We will therefore impose sanctions against appellants' counsel Tracy L. Henderson for prosecuting a frivolous appeal. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276.) After careful consideration, we elect not to impose sanctions against appellants G.W. and Nicole W. They already face substantial fees awards under the anti-SLAPP statute, which we believe are sufficient to deter them from similar frivolous filings in the future.[4] (See *Pollock, supra*, 112 Cal.App.4th at p. 1434 ["One goal of sanctions is to deter future frivolous litigation"].)

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4 Our award of sanctions against plaintiffs' appellate counsel does not preclude defendants from seeking to recover additional fees for this appeal under the anti-SLAPP statute by motion in the trial court after issuance of the remittitur. (Cal. Rules of Court, rule 3.1702(c).)

Defendants have not requested an award of sanctions payable to them, but we will impose sanctions payable to the clerk of this court to compensate the state for the cost to the taxpayers of processing a frivolous appeal. (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 520.) A cost analysis undertaken by the clerk's office for the Second District estimated that the cost of processing an appeal resulting in an opinion was approximately $8,500 in 2008, while another calculation made in 1992 gave a conservative estimate of $5,900 to $6,000. (*Ibid.*) According to the United States Bureau of Labor Statistics inflation calculator, these figures are equivalent to approximately $13,000 in today's dollars. (CPI Inflation Calculator, U.S. Bureau of Labor Statistics (2025) <https://www.bls.gov/data/inflation_calculator.htm> [as of September 18, 2025], archived at <https://perma.cc/PCB6-MQSZ>.) We will therefore impose sanctions against appellants' counsel Tracy L. Henderson in the amount of $13,000, payable to the clerk of this court. This opinion shall serve as a written statement of reasons for imposing the sanctions.

DISPOSITION

The fees order is affirmed. As sanctions for prosecuting this frivolous appeal, appellants' counsel Tracy L. Henderson is ordered to pay $13,000 in sanctions payable to the clerk of this court no later than 30 days after the remittitur issues. As required by Business and Professions Code section 6086.7, subdivision (a)(3), the clerk of this court is directed to forward a copy of this opinion to the State Bar of California upon issuance of the remittitur. This disposition serves as notice to counsel that the imposition of sanctions will be reported to the State Bar of California. (Bus. & Prof. Code, § 6086.7, subd. (b).) Attorney Tracy L. Henderson is also ordered to personally report

the sanctions to the State Bar of California. (Bus. & Prof. Code, § 6068, subd. (o)(3).) Respondents are entitled to recover their costs on appeal.

BUCHANAN, J.

WE CONCUR:

DO, Acting P. J.

RUBIN, J.