

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEE GALE,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

LAURA GALE,

Real Party In Interest.

G033968

(Super. Ct. No. 02D002693)

ORDER DENYING REHEARING AND  
MODIFYING OPINION; NO CHANGE  
IN JUDGMENT

1. The petition for rehearing of Lee Gale is DENIED.  
2. The opinion filed in this case on October 6, 2004, is hereby modified as follows:

3. On page 11 of the slip opinion, at the very end (i.e., after the words “costs in this proceeding”) insert the following new footnote 7:

In a petition for rehearing (albeit really only a request for modification), Husband requests that we clarify our intentions regarding this cost award. He anticipates that, when he seeks fees in the wake of this court’s granting of his petition seeking a writ ordering the expungement of the notice of lis pendens (see Code Civ. Proc., § 405.38), he will encounter the argument that by not including an award of attorney fees, somehow our opinion will be construed to *preclude* them. Let us simply take this opportunity to

reiterate the applicable rules: Appellate decisions are not authority for propositions not considered therein. (E.g., *People v. Scheid* (1997) 16 Cal.4th 1, 17; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) Hence no rule of “expressio unius” is available to say that just because we left an issue out of the opinion we necessarily decided that issue by silence. On top of that, the relevant authority fee statute (Code Civ. Proc., § 405.38) contemplates “finding[s]” on issues of “substantial justification” or “other circumstances [that] make imposition of attorney’s fees and costs unjust,” which points in the direction of proceedings in the trial court, not the appellate court. Strictly speaking, appellate courts do not “find” things: We reason, hold, deduce, conclude or otherwise rule. With very rare exceptions we leave all the “finding” to trial courts. (Accord, *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1024 [fees not automatically awarded when lis pendens was withdrawn].) Hence our opinion is without prejudice to *either* party on the question of attorney fees. All we are awarding is costs pursuant to rule 27 of the California Rules of Court.

Husband also requests that we “make reference” to a third ground for expungement advanced in his petition (lack of probable validity). Husband’s theory is that, should future proceedings result in the reversal of this court’s own judgment granting his petition, Husband will have preserved his second and third grounds as alternative bases for seeking expungement. Obviously we have just granted this request. However, again the same rule applies. The fact that an appellate court doesn’t mention that a litigant didn’t raise an argument doesn’t mean it wasn’t raised, and can’t be asserted later if the procedural circumstances warrant.

SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.  
IKOLA, J.