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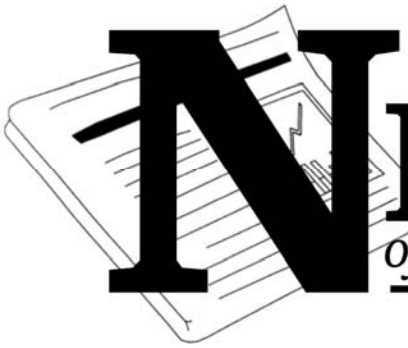

Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

*Richard A. Derevan**
*Todd E. Lundell**
Snell & Wilmer L.L.P.

STATE

Litigation—Assignment of Interest in Litigation—Adding Judgment Debtor

Under Code of Civil Procedure § 368.5, where a party transfers its interest in an action, that action "may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action . . . ." But what happens if the action continues in the name of the original party, who loses its claims and becomes subject to an adverse award of prevailing party attorneys' fees? In *Hearn Pacific Corp. v. Second Generation Roofing Inc.*, 247 Cal.App.4th 117, 201 Cal.Rptr.3d 806 (2016), the court of appeal held that the transferee should be added as a judgment debtor. Here, a general contractor assigned its interest in the action to its insurer, and the insurer prosecuted the claims and effectively conducted the litigation in the general contractor's name. Under those circumstances, the court of appeal held that the trial court abused its discretion in not amending the judgment to add the insurer as a judgment debtor to the prevailing party attorney fees award. Although section 368.5 allowed the action to continue in the name of the original party, "[t]he statute was not meant to be used as a shield."

Litigation—Attorney-Client Privilege—No Review of Communications by Court

Evidence Code section 915 generally prohibits review of information claimed to be privileged to determine if a privilege exists. A 2004 case, *OXY Resources California Ltd. v. Superior Court*, 115 Cal.App.4th 874 (2004) crafted exceptions to this rule to allow review to

* Certified Specialist, Appellate Law
The State Bar Board of Legal Specialization

determine whether there was a waiver of the privilege or whether an exception applied. In *DP Pham, LLC v. Cheadle*, 246 Cal.App.4th 653, 200 Cal.Rptr.3d 937 (2016), plaintiff sought to disqualify defendant's counsel for allegedly obtaining and using the plaintiff's lawyer-client communications (which defense counsel had obtained from plaintiff's assistant). The documents were between a lawyer and client so they were presumed privileged. In ruling on the motion, however, and relying on *OXY*, the trial court reviewed the documents, concluded that their content suggested an attorney-client relationship did not exist, and therefore the documents were not privileged. It denied the motion to disqualify. The court of appeal reversed. It found both that *OXY* was distinguishable because the trial court here was looking at the document to determine if a privilege existed, not whether it had been waived or an exception applied, and also that *OXY* had been overruled by *Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725 (2009).

Litigation—Costs—"Unity of Interest"

Based on CCP § 1032 as it read before 1986, trial courts routinely denied costs to a defendant who prevailed in an action when the defendant was jointly represented with other defendants who did not prevail. A few cases applied this exception even after the 1986 amendments to § 1032. But in *Charton v. Harkey*, 247 Cal.App.4th 730, 202 Cal.Rptr.3d 369, the court of appeal (CA 4/3) thoroughly examined the legislative change, found that the legislature had eliminated the so-called unity of interest exception, and declined to follow those post-1986 cases that applied the exception. The court held that section 1032 now expressly mandates a cost award in favor of a prevailing defendant. This case is must-reading for cases where there are multiple defendants represented by common counsel and some, but not all defendants, prevail.

Litigation—in limine orders—dismissal

Trial counsel beware. Repeated, in-court violations of in limine orders may permit a trial court to dismiss a case with prejudice. *Osborne v. Todd Farm Service*, 247 Cal.App.4th 43, 202 Cal.Rptr.3d 84 (2016).

Litigation—Peremptory Challenges—Timing

Generally, a party may file a peremptory challenge under Code of Civil Procedure section 170.6 any time before the commencement of a trial or hearing. Where the court in which the action is pending "is authorized to have no more than one judge," however, the party must file its peremptory within 30 days of making an appearance. Today, all courts "authorize" more than one judge, but some courts have only one "assigned" judge. Does the 30-day deadline apply where only one judge is assigned? In *Jones v. Superior Court*, 246 Cal.App.4th 390, 200 Cal.Rptr.3d 776 (2016), the court said "no." "We decline to conflate courts for which one judge is authorized with branches of a court in which only one judge is assigned."

Litigation—Settlement—Prevailing Party—Costs

Litigators who settle cases should take care to specify whether either side is entitled to fees and costs or if neither is. The Supreme Court held in *Desaulles v. Community Hospital of Monterey,* 62 Cal.4th 1140, 202 Cal.Rptr.3d 429 (2016), that where a defendant plays money to a plaintiff to settle a case, the plaintiff obtains a "net monetary recovery" under CCP § 1032 and such a dismissal is not a dismissal in defendant's favor. The court hastened to point out, however, that this is "a default rule" and the "settling parties are free to make their own arrangements regarding costs."

Litigation—Settlement Offers—CCP § 998

To be valid, a settlement offer under CCP § 998 must be unconditional. In *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, 201 Cal.Rptr.3d 614, a defendant's offer flunked that test by including among its terms that acceptance required "The notarized execution and transmittal of a settlement agreement and general release." Recognizing that some courts have allowed a valid § 998 offer to include the requirement of a release, the court held that requiring a "settlement agreement" was different. Adopting a practical approach, the court observed that settlement agreements can "be the subject of much negotiation" and contain "problematical terms." A plaintiff who accepted such an offer would not know what it was getting into and accordingly, the court of appeal held the offer to be invalid.

Litigation—Statement of Decision—Doctrine of Implied

When the parties do not request a statement of decision and the trial court does not issue one, the court of appeal will presume the trial court made all factual findings

Findings

necessary to support the judgment. There is currently a split among the district courts of appeal as to whether this doctrine of implied findings applies where "a settled statement is used in place of a reporter's transcript, and the settled statement contains the court's decision and the judge's factual and legal basis for the decision." In *A.G. v. C.S.*, the Third District joined what appears to be the majority position in holding that the use of a settled statement does not negate the doctrine of implied findings. A statement of decision is a formal document that is required to contain the factual and legal basis for the court's decision. By contrast, a settled statement is merely "a summarized narrative of what was *said*" and, therefore, "may not capture the judge's complete analysis of an issue of fact or law, even if the judge ruled from the bench." (Emphasis in original.) Thus, the doctrine of implied findings should still apply.

Litigation—Statement of Decision—Waiver and Implied Findings

The decision in *Almanor Lakeside Villas Owners Association v. Carson*, 246 Cal.App.4th 761, 201 Cal.Rptr.3d 268 (2016) contains an important discussion of potential pitfalls in the statement of decision process. There, appellant was challenging the trial court's findings on damages, but had failed to bring the error alleged on appeal to the trial court's attention when the court issued its statement of decision. As the court of appeal explained, generally "a litigant who fails to point the trial court to alleged deficiencies in the court's statement of decision waives the right to assert those deficiencies as errors on appeal." So, had appellant waived his damages argument on appeal? No. "Inasmuch as the trial court stated its findings on damages and did not omit the issue or treat it ambiguously, the [appellant's] failure to identify deficiencies in that aspect of the proposed statement of decision did not result in waiver . . . ." However, "[b]ecause the [appellants] never asked the trial court to make specific findings on the theory of damages they now appeal, the doctrine of implied findings remains applicable."