

## **Goodman v Lozano**

2/8/08

### **Contribution Among Joint Tortfeasors (CCP 877); Recovery of Costs(CCP 1032)**

Goodman contracted with the Lozanos to build a home in Laguna Beach. AMPM Construction built the home. The owners of AMPM were partners with the Lozanos. After construction was completed, Goodman sued the Lozanos, AMPM, the architect, and others, based on construction defects in the home. Only the Lozanos were sued for breach of contract.

AMPM settled with Goodman for \$200,000. The other defendants paid \$30,000, except for the Lozanos who didn't settle at all. The Lozanos did offer \$35,000 by CCP section 998. It was not accepted. AMPM achieved an order its settlement was in good faith. The case against Lozano went to a court trial. The Judge was not told of the earlier settlements. After trial, the Judge found a total damage **award** of just under \$146,000.

Post-trial, the Judge was presented with evidence of the earlier settlements. The Judge determined the Lozanos were **entitled to a credit for the settlements**, and a **judgment** was entered providing that Goodman should take nothing by the action. A motion for costs and attorney fees then came before the court. Under CCP section 1032(a)(4), the Judge found the Lozanos were the prevailing party because they would pay nothing under the judgment. Fees and costs amounted to \$144,000. Goodman appeals both the net zero judgment and the award of fees and costs.

Goodman argued that the Lozanos were the only party sued for breach of contract, and the settling defendants were all sued in tort. Since the Judge divided the **judgment** into contract claims and construction defects, the court should look at only the contract side of the equation and find Goodman received a **net award**.

The Fourth DCA, Division Three, demonstrated that the Lozanos and AMPM were **partners** in the construction project, and were thus jointly and severally liable for all obligations of the partnership (Corporations Code section 16306(a)). Thus, AMPM was **jointly liable** for damages for breach of contract with the Lozanos. CCP section 877 provides:

Where a release ...is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other **co-obligors** mutually subject to contribution rights, it shall .... reduce the claims against the others in the amount stipulated by the release...or in the amount of the consideration paid for it whichever is the greater.

Since AMPM and the Lozanos were **co-obligors**, the settlement paid by AMPM goes to offset the entire court **judgment**. One of the purposes of section 877 is to avoid double recovery. Failure to offset the \$146,000 **award** against the Lozanos by at least the \$200,000 settlement of AMPM would allow just such a double recovery. Thus, the trial court exercised its discretion to find the Lozanos the prevailing party.

Unfortunately, the Sixth District in ***Wakefield v Bohlin*** (2006) 145 Cal. App. 4<sup>th</sup> 963, found that under such circumstances the plaintiff *was the prevailing party* despite a positive **award** completely offset by an earlier **judgment**. The Fourth DCA disagrees with ***Wakefield***, and analyzes its inadequacy.

**CCP section 1032** defines a prevailing party as, among others, the party with a net monetary recovery. The Fourth DCA notes that in ***Wakefield***, the word **recovery** is equated with the words **award** and **verdict**. The Justices explain that a **positive award** may still not result in a **positive judgment**, and it is only by **enforceable judgments** or orders that there can be any **meaningful recovery**.

It is a gross distortion of the word **recovery** to say that it applies in a situation where a plaintiff literally walks away with nothing by way of the **judgment**. The Legislature did not intend the statutory language of section 1032, the party with a net monetary recovery to be equated with any party who can subjectively claim moral victory. The net result of a judgment requiring the defendant to pay nothing to the plaintiff is favorable to the defendant.

Failure to respect the distinction between **verdict** or **award** and **judgment** obliterates a key policy concern set out by the Legislature in section 877 **the encouragement of settlement**. In a case like this, where the plaintiff elects to gamble in the face of settlements that already may

approach the likely award or verdict, the plaintiff faces the possibility of not being the prevailing party, and being forced to pay costs and maybe attorney fees. The statute dovetails with the good faith settlement statute to give defendants an incentive to make ball park settlements in good faith so as to prevent the prospect of being sued by remaining defendants who refuse to settle and throw their own dice gambling for a low [award](#). (CCP 877.6)

Without the operation of section 1032, following the words [judgment](#) or [recovery](#), counsel have very little reason not to roll the dice and take the case to trial against the remaining defendant or defendants. Under ***Wakefield***, even a token verdict or award would entitle the party to prevailing party status even if the token verdict or award was completely obliterated by section 877's application of prior settlements.

**When litigation results in a net zero judgment as a result of operation of section 877, the plaintiff receiving the net zero judgment does not fall into the category of the party with the net monetary judgment set out in section 1032.**

Accordingly, the trial court's exercise of discretion to declare the Lozanos the prevailing parties was a reasonable one, and therefore must be upheld under an abuse of discretion standard. This decision is not consistent with the ***Wakefield*** majority opinion and some earlier cases. There is thus some likelihood the issue may be taken to the California Supreme Court.

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