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A “Costly” Lesson

It’s a common occurrence. As part of a settlement, defendant agrees to pay plaintiff money in exchange for a dismissal of the action. But, is the settlement payment a “net monetary recovery” for plaintiff, making her a prevailing party entitled to an award of costs? The answer is yes, according to *DeSaulles v. Community Hospital of the Monterey Peninsula* (2014) 225 Cal.App.4th 1427.

Employee sued her employer for wrongful termination and related claims. By Employer’s motions, the court dismissed five causes of action. On the eve of trial the parties announced their settlement on the record: Employee agreed to dismiss two of her seven causes of action for \$23,500 and reserved the right to appeal dismissal of the other five causes of action. The parties’ settlement was silent as to costs.

Both sides filed a memorandum for costs. Henry J. Josefsberg, counsel for deSaulles, notes that since 1888, the Supreme Court has allowed costs and fees to a settling plaintiff as the prevailing party where the settlement is silent as to costs or fees. (*Rapp v. Spring Valley Gold Co.* (1888) 74 Cal. 532, 533) (attorney fee “was properly allowed for the same reason that costs were allowed, viz., that it was a necessary incident of the judgment stipulated for, and was not expressly, or by necessary implication, excluded by the stipulation.”)

Employee, relying on an almost unbroken line of cases, characterized Employer’s settlement payment to her as a net monetary recovery, while Employer asserted that settlement payments must be disregarded under *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 188-189 (*Chinn*). *Chinn* is the only case holding that settlement proceeds must be disregarded in determining “prevailing party” status.

The trial court awarded Employer its costs because it prevailed on significant causes of action. The court of appeal reversed and awarded costs to Employee, stating that though five of her causes of action were eliminated by defense motions, she was ultimately paid \$23,500 to dismiss her remaining two causes of action. Although Employer obtained a dismissal for its payment, the settlement payment gave Employee a “net monetary recovery.” Thus, Employee was entitled to mandatory costs under the statutory definition of “prevailing party.” (Code of Civil Procedure section 1032, subdivision (a)(4).)

The simple moral of this story is be sure your settlement states that each party shall bear its own attorney fees and costs. Henry J. Josefsberg warns that additional tactical issues are a trap for the unwary. For example, the value of a CCP section 998 offer to compromise changes when it is silent as to fees and costs compared to when the dollar amount includes fees and costs.

DeSaulles is on appeal before the California Supreme Court. Will the Supremes use this opportunity to correct *Chinn* to maintain consistency? Stay tuned.