No. S 219 236

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAUREEN deSAULLES

Plaintiff and Respondent

vs.

COMMUNITY HOSPITAL OF THE MONTEREY PENINSULA

Defendant and Petitioner

Monterey County Superior Court
Civil Case No. M 85528
Honorable Lydia M. Villarreal, Judge
Court of Appeal of the State of California, Sixth Appellate District
Civil Case No. H 038 184

RESPONDENT'S ANSWER BRIEF

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CERTIFICATE OF INTERESTED PARTIES

Apart from Plaintiff/Appellant/Cross-Respondent MAUREEN deSAULLES, there are no interested entities of parties to list in this Certificate per California Rules of Court, Rule 8.208 and 8.490(I).

Dated: September 22, 2014 HENRY J. JOSEFSBERG, ESQ.

By_____
HENRY J. JOSEFSBERG
Attorney for Plaintiff & Respondent
MAUREEN deSAULLES

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RESPONDENT'S ANSWER BRIEF

I. PARTIES TO THIS PETITION FOR REVIEW

Plaintiff-Respondent MAUREEN deSAULLES.

Defendant-Petitioner COMMUNITY HOSPITAL OF THE MONTEREY PENINSULA ("CHOMP").

II. STANDARD OF REVIEW

deSAULLES agrees with CHOMP that the trial court's construction of the law whether to allow costs is reviewed *de novo* in this Court. Goodman v. Lozano, 47 Cal. 4th 1327, 1332 (2010); Baker v. Mulholland Security and Patrol, Inc., 204 Cal.App. 4th 776, 782 (2012).

III. SUMMARY OF ARGUMENT

Where the sole defendant paid money to the sole plaintiff in settlement of at least one cause of action, made no agreement for allocation of costs, and even where the plaintiff failed to achieve recovery on the remaining causes of action, plaintiff's right to costs is identical to cases where the plaintiff achieved a monetary verdict on some but not all causes of action: the plaintiff in each case is the party with a "net monetary recovery" entitled to cost recovery under Civil Procedure Code Section 1032(a)(4).

A. THE LINE OF AUTHORITY APPLICABLE TO THIS PETITION SUPPORTS AN AWARD OF COSTS TO deSAULLES

Since 1888, this Court has allowed costs and fees to a settling plaintiff as the prevailing party where the settlement makes no mention of costs or fees. Rapp v. Spring Valley Gold Co., 74 Cal. 532, 533; 16 P. 325 (1888) (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."). One hundred ten years later, this Court adhered to the principle that "it seems inaccurate to characterize the defendant as the 'prevailing party' if the plaintiff dismissed the action only after obtaining, by means of settlement or otherwise, all or most of the requested relief...." Santisas v. Goodin, 17 Cal. 4th 599, 621 (1998) (*dictum*). See also Graham v. DaimlerChrysler Corp., 34 Cal. 4th 553, 570 (2004) ("[A] court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise.") (quoting Santisas at 622).

In an almost unbroken line of cases, the Court of Appeal has held – with one exception – that, absent allocation of costs or fees in settlement, the plaintiff receiving settlement proceeds is generally entitled to recovery of costs and, if available, fees. E.g., Wohlgemuth v. Caterpillar Inc., 207 Cal.App. 4th 1252, 1263-64 (2012); Engle v. Copenbarger & Copenbarger, LLP, 157 Cal.App. 4th 165, 168-69 (2007); On-Line Power, Inc. v. Mazur, 149 Cal.

App.4th 1079 (2007); Ritzenthaler v Fireside Thrift Co., 93 Cal.App. 4th 986 (2001); Lanyi v. Goldblum, 177 Cal.App. 3rd 181, 185-87 (1986); Rappenecker v Sea-Land Serv., Inc., 93 Cal.App. 3rd 256 (1979).

The exception, of course, is Chinn v. KMR Property Management, 166 Cal.App. 4th 175 (2008), the sole case holding the opposite.

No published decision follows Chinn's unique notion that settlement proceeds must be disregarded in determining "prevailing party" status (including the decision in this case, which rejected Chinn). For example, Wohlgemuth v. Caterpillar Inc., 207 Cal.App. 4th 1252 (2012), refused to follow Chinn in a fee motion. The other citations to Chinn either have nothing to do with this issue or distinguish it. See Dunn v. GMAC Mortg., LLC, 2011 U.S. Dist. LEXIS 39634 (E.D. Cal. 2011) (quoting Chinn for a proposition of contract construction); Baldain v. Am. Home Mortg. Servicing, Inc., 2010 U.S. Dist. LEXIS 82876 (E.D. Cal. 2010) (distinguishing Chinn in a "private fee shifting agreement[]."); Kaufman v. Diskeeper Corp., __ Cal.App. 4th __, B248151, 2014 Cal. App. LEXIS 761 (August 21, 2014) (Chinn supports the proposition that contractual attorney fees are costs, not damages); Silverado Modjeska Recreation & Park Dist. v. County of Orange, 197 Cal.App. 4th 282, 312 (2011) (citing Chinn for whether a party must seek of attorney fees as costs in a post-judgment motion); Sacramento County Employees' Retirement System v. Superior Court, 195 Cal.App. 4th 440, 450 (2011) (citing Chinn for a procedural point); In re Tobacco Cases I, 193 Cal.App. 4th 1591, 1600 (2011) (citing Chinn for the proposition that a "consent judgment

'is regarded as a contract between the parties'"); Lockton v. O'Rourke, 184 Cal.App. 4th 1051, 1076 (2010) (citing Chinn for the breadth of a contractual fee-shifting clause). Recently, the Court of Appeal distinguished Chinn where the parties agreed that the plaintiff could file a memorandum of costs and apply for attorney fees. Khavarian Enterprises, Inc. v. Commline, Inc., 216 Cal.App. 4th 310 (2013).

B. EVEN CHOMP'S RECITATION OF LEGISLATIVE HISTORY FAILS TO SUPPORT REJECTION OF SETTLEMENT PROCEEDS AS "NET MONETARY RECOVERY"

Not only is the weight of authority to the contrary of Chinn's disregard of settlement proceeds, but the analysis in Chinn wrongly distinguishes the net monetary recovery in a settlement from that of a verdict. In fact, Chinn is internally inconsistent as to that point. Compare id. at 188 ("'It is clear from the statutory language that when there is a party with a 'net monetary recovery' (one of the four categories of prevailing party), that party is entitled to costs as a matter of right; the trial court has no discretion to order each party to bear his or her own costs.'"), and id. at 189 ("The legislative history of Senate Bill No. 654 (1985-1986 Reg. Sess.) does not indicate any change in the law to consider settlement proceeds or provide costs to a plaintiff after a dismissal."), with id. at 189-90 (jumping from Legislative history unrelated to settlement to conclude that settlement proceeds are not considered to be "net monetary recovery" within the meaning of the statutory right to costs).

Equating a settlement dismissal with all other dismissals, CHOMP errs, therefore, in urging that a dismissal purchased in a settlement is a factor in determining which is the prevailing party under Section 1032. Rather, the practical and long-standing rule is that a plaintiff who accepts a monetary settlement in exchange for dismissal of his or her lawsuit is the prevailing party, entitled to recovery of costs.

C. CHOMP'S OWN ANALYTIC METHOD SHOULD HAVE LED IT TO A CONCLUSION ALLOWING deSAULLES HER COSTS

CHOMP urges that the mere existence of a dismissal that is part of a settlement agreement will always lead to a finding of the dismissed defendant as a prevailing party under Civil Procedure Code Section 1032. Had CHOMP considered, however, an equivalency between a monetary verdict for a plaintiff and a settlement, the falsity of its conclusion would have been obvious under the "net monetary recovery" prong of Section 1032: the plaintiff is the prevailing party.

When a case concludes with a verdict, the parties can be said to have had only persuasive control over that outcome. The law imposes rights to costs and fees in favor of the successful plaintiff flowing directly out of that verdict. See Michell v. Olick, 49 Cal.App. 4th 1194, 1198 (1996); Valentino v. Elliott Sav-On Gas, Inc., 201 Cal.App. 3rd 692, 702 (1988). No one could say that the costs and fees arising after such a verdict is a trap for the unwary. Rather it is the expected outcome of a plaintiff's monetary verdict.

But when the parties agree on a settlement, they have complete control over the outcome, including the right to costs and fees. Compare Engle v. Copenbarger & Copenbarger, LLP, 157 Cal.App. 4th 165, 168-69 (2007) (absent allocation of costs, settling plaintiff entitled to costs), with Khavarian Enterprises, Inc. v. Commline, Inc., 216 Cal.App. 4th 310 (2013) (parties' allocation of costs and fees), and Martinez v. Los Angeles County Metropolitan Transportation Authority, 195 Cal.App. 4th 1038, 1041 (2011) ("Unless the offer expressly states otherwise, an offer of a monetary compromise under section 998 that excludes "costs" also excludes attorney fees.") (distinguishing Engle). If, as here, the parties make no provision for costs or fees, their settlement is exactly like a verdict: the law provides for costs and fees depending on the outcome of the settlement, regardless whether the settlement also requires a dismissal. See On-Line Power, Inc. v. Mazur, 149 Cal. App.4th 1079 (2007).

In a verdict – however disappointing to a plaintiff who recovers less damages than anticipated -- costs may be recovered. No principled reason exists to distinguish such a verdict from a settlement that yields a monetary recovery to a plaintiff even if part of that settlement is a dismissal. The formality of the dismissal is an inadequate counterbalance to the reality that, in a monetary settlement such as here, as a pragmatic matter, a plaintiff such as deSAULLES is the prevailing party.

D. PREVAILING PARTIES UNDER SECTION 1032

The appropriate definitions of "prevailing party" under Section 1032

are based on this Court's consistent analysis and the line of Court of Appeal cases other than Chinn: "[A] court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise." Graham, 34 Cal. 4th at 570 (quoting Santisas, 17 Cal. 4th at 622). Indeed, in interpreting a statute, "[o]ur first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. 'If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.'" Goodman, 47 Cal. 4th at 1332 (citations omitted). This analysis leads to these definitions in this matter:

"Net monetary recovery" leads to "prevailing party" status when money is exchanged during litigation resulting in a net gain to a party. This definition effectuates "the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise." Graham, 34 Cal. 4th at 570 (quoting Santisas, 17 Cal. 4th at 622.). While the amount of settlement may not reach the highest goals of the recovering party, see Michell, 49 Cal.App. 4th at 1198; Valentino, 201 Cal.App. 3rd at 702, recovery of costs is not affected by settlement payments that typically recognize litigation uncertainties.

"Dismissal" leads to "prevailing party" status in exactly the same pragmatic analysis when a defendant is dismissed under circumstances that leave an opponent without a monetary recovery. For example, Chinn, 166

Cal.App. 4th at 189 cited the Legislative History of the 1986 enactment of Section 1032 that recited several types of dismissals where the plaintiffs recovered nothing, and which were properly determined to result in "prevailing party" status to a defendant. See also Wohlgemuth, 207 Cal.App. 4th at 1262 (The "definition [of judgment] focuses on the substance of the matter, not its form.") (citation omitted).

IV. NATURE OF THIS ACTION AND RELIEF SOUGHT BY APPELLANT IN THE SUPERIOR COURT

deSAULLES sought relief for disability- and medical condition-related accommodation, discrimination, breach of employment contract, and related torts. (1 Apx., 1-40.) After summary disposition of her discrimination causes of action, the Parties entered into a settlement agreement (7 Apx., 98-100) in which CHOMP paid deSAULLES the amount of $23,500 in exchange for a dismissal of the remaining contract-based causes of action (id. at 98:12-16).

The Parties each claimed "prevailing party" status for the purposes of recovery of costs (4 Apx., 49-69; 6 Apx., 82-86), moved to tax or strike each others' Cost Memoranda. (7 Apx, 87-115; 9 Apx., 119-21). The Superior Court struck deSAULLES' Memorandum and awarded CHOMP its costs (19 Apx., 377-78; Rptr.Trans. 7:6-14).

V. RELEVANT BACKGROUND

A. THE PLEADINGS

deSAULLES' *pro se* Complaint is in seven causes of action for failure

to accommodate disability and medical condition; retaliation; breach of contract and the covenant of good faith; infliction of emotional distress; punitive damages; and wrongful termination. (1 Apx., 1-40.) Counsel for deSAULLES substituted for her in this action. (1 Apx., 41.) CHOMP answered and set up several affirmative defenses. (3 Apx., 42-48.)

The Superior Court summarily adjudicated some, but not all, of deSAULLES' discrimination-based causes of action against her. (15 Apx., 264-73.) In pre-trial motions, the Superior Court dismissed the rest of the discrimination-based causes of action. (15 Apx., 275-76.)

B. SETTLEMENT

The Parties then settled the breach of contract-based causes of action. (15 Apx., 276:6-7; 7 Apx., 98:7-100:21.) The settlement required CHOMP to pay deSAULLES the amount of $23,500, and, in exchange, deSAULLES would dismiss the contract-based causes of action with prejudice, with the Superior Court retaining jurisdiction under Civil Procedure Code Section 664.6. (7 Apx. 98:12-16.) In the event that deSAULLES ended up recovering wage-loss damages on the discrimination-based causes of action, the $23,500 would offset those damages. (Id. at 98:22-100:12.)

The judgment stated that "(1) Plaintiff recover nothing from defendant; and (2) Defendant recover against plaintiff costs and attorneys fees permitted by law." (7 Apx. 103:9-10.) The Parties agreed to extend the time to move for costs (id. at 104-05), and the Superior Court entered an Amended Judgment

that read: "The Parties shall defer seeking any recovery of costs and fees on this Judgment coming final after the time for all appeals" (id. at 108:10-11).

C. APPEAL OF THE MERITS

deSAULLES appealed summary disposition of her discrimination-based causes of action. deSaulles v. Community Hospital, California Court of Appeal, Sixth Appellate District, Civil No. H 033 906. The Court of Appeal affirmed in an unpublished Opinion. (15 Apx., 277-356.)

D. COST MOTIONS

After the Court of Appeal issued its remittitur in the H 033 906 Appeal, each Party filed a Memorandum of Costs for trial-level costs, implicitly claiming "prevailing party" status for the purposes of recovery of costs. (4 Apx., 49-69; 6 Apx., 82-86.) Each Party moved to tax or strike each others' Cost Memoranda (7 Apx., 87-115; 9 Apx., 119-21), and the Superior Court struck deSAULLES' Memorandum and awarded CHOMP its costs (19 Apx., 377-78; Rptr.Trans. 7:6-14).

E. APPEAL OF THE COST MOTION

The Court of Appeal reversed imposition of costs for CHOMP and remanded for a determination of costs in favor of deSAULLES. deSaulles v. Community Hospital of the Monterey Peninsula, H 038 184 (May 2, 2014) at p. 27. CHOMP successfully petitioned this Court for review.

VI. UNDER THE "PREVAILING PARTY" ANALYSIS, ONLY deSAULLES IS ENTITLED TO RECOVERY OF COSTS

In relevant part, the controlling statute, Civil Procedure Code Section 1032(a&b) reads:

> (a) As used in this section, unless the context clearly requires otherwise: . . . [¶] (4) "Prevailing party" includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.
>
> (b) Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.

Cal.Civ.Proc. Code § 1032(a&b).

CHOMP does not dispute that in a verdict, a plaintiff prevailing on some, but not all of her causes of action, is still a prevailing party for cost recovery. See Michell v. Olick, 49 Cal.App. 4th 1194, 1198 (1996). Rather, it asserts, based on (1) Chinn v. KMR Property Management, 166 Cal.App. 4th 175 (2008); (2) non-settlement dismissal cases such as Mon Chong Loong Trading Corp. v. Superior Court, 218 Cal.App. 4th 87 (2013); and (3) an inappropriate reading of this Court's decisions, that the existence of a dismissal as part of a settlement makes the settling defendant the statutory prevailing party under Civil Procedure Code Section 1032. This formulaic argument is repudiated by the purposes of Section 1032, the consistent holdings of this Court requiring a pragmatic determination of prevailing party status, the Court of Appeal decisions making similar determinations, and the policies undergirding settlement.

A. USE OF CASE AUTHORITY INVOLVING ATTORNEY FEES MAY BE APPROPRIATE IN THIS PETITION

Many cases involving attorney fees are directly analogous where costs are at issue. This is because attorney fees (under any statute) can be an element of costs under Section 1032 and 1033.5. See Chavez v. City of Los Angeles, 47 Cal. 4th 970 (2010) (analyzing whether attorney fees are recoverable under an analysis of costs under Sections 1032 and 1033.5); Martinez v. Los Angeles County Metropolitan Transportation Authority, 195 Cal.App. 4th 1038, 1041 (2011) ("[E]xclusion of costs also excludes attorney

fees . . . based on the *rapport* between sections 998, 1032 and 1033.5."); Engle v. Copenbarger & Copenbarger, LLP, 157 Cal.App. 4th 165, 168 (2007) (entitlement to costs and, if authorized, fees). Wohlgemuth v. Caterpillar Inc., 207 Cal.App. 4th 1252, 1263-64 (2012) (relying on both fee and cost cases).

B. THE PRIOR COST STATUTE SUPPORTED PREVAILING PARTY STATUS TO SETTLING PLAINTIFFS

A brief summary of the effect of the prior version of Section 1032 places into perspective the meaning of the current version.

Under the prior cost statute, "[t]he purposes of subsection 1032(d) are not served by denying costs to litigants who in good faith and with sound reasons file in superior court then suffer the surprise of an unexpectedly low jury verdict." Valentino v. Elliott Sav-On Gas, Inc., 201 Cal.App. 3rd 692, 702 (1988) (cited with approval in Chavez v. City of Los Angeles, 47 Cal. 4th 970, 984 (2010).)

By 1986 when Section 1032 was revised, the law was well-established that settlement proceeds were to be considered in determining whether costs were to be recovered by a plaintiff and the Courts routinely did so. Folsom v. County Assn. of Governments, 32 Cal. 3rd 668, 677-78 & n.15 (1982) ("[C]osts are allowed, absent the parties' express agreement to the contrary, following entry of a consent decree.") (favorably citing Rappenecker v Sea-Land Serv., Inc., 93 Cal.App. 3rd 256, 263-64 (1979)); Rapp v. Spring

Valley Gold Co., 74 Cal. 532, 533; 16 P. 325; (1888); Slater v. Superior Court, 45 Cal.App. 2nd 757 (1941); Purdy v. Johnson, 100 Cal.App. 416, 418 (1929).) See also Lanyi v. Goldblum, 177 Cal.App. 3rd 181, 185-87 (1986) (re Cal.Civ. Code § 1717 and Cal.Civ.Proc. Code § 998).

Although the cost statutes before 1986 did not refer to "prevailing party," Schrader v. Neville, 34 Cal. 2nd 112, 114 (1949) ("Unlike the statutes in many jurisdictions, our code section is not framed in the express language of the 'prevailing party' but it allows the recovery of costs upon that basis by specifying as the condition for an award of them, "a judgment in his favor."); the courts adverted to the standard of "prevailing party" even before 1986. E.g., Balfour, Guthrie & Co. v. Gourmet Farms, 108 Cal.App. 3rd 181, 191 (1980); Rappenecker at 263 ("Defendant cites us to no authority which states that in the absence of specific language contained in the contract which provides for costs in the event of suit, the *prevailing party* cannot recover costs.") (italics added).

As demonstrated immediately below, the 1986 revisions to Section 1032 did not change the prior law on whether a party receiving monetary compensation in a settlement is entitled to costs or fees.

C. AS PREVAILING PARTY STATUS DID NOT CHANGE IN THE 1986 REVISIONS TO SECTION 1032, SETTLING PLAINTIFFS REMAIN PREVAILING PARTIES

The Legislative History of Section 1032 emphasizes that "[t]he

fundamental principle of awarding costs to the prevailing party remains the same, but whether those costs are awarded as a matter of right or as a matter of the court's discretion now often depends on how the prevailing party is determined. If a party fits one of the definitions of 'prevailing' listed in C.C.P. 1032(a)(4) ... that party is entitled as a matter of right to recover costs. (C.C.P. 1032(a)(4), 1032(b).) In other situations, the prevailing party is determined by the court and the award of costs is discretionary." Acosta v. SI Corp., 129 Cal.App. 4th 1370, 1376 (2005) (citation omitted). "The relevant question on entitlement to costs is whether a party qualifies as a prevailing party under subdivision (a)(4). After the 1986 amendment to section 1032, '[t]he allowance of costs as a matter of right no longer depends on the character of the action involved but on how the prevailing party is determined.'" Id. (citing *inter alia* Michell, 49 Cal.App. 4th at 1197–98).

The innovation in the 1986 revision to Section 1032 was to use the phrase "prevailing party." As this Court has observed: "The legislative history reveals instead that at the time current section 1032 was reenacted, the "existing statutes d[id] not fully explain the concept of the 'prevailing party,' "and that a "comprehensive definition" was necessary to "further eliminate confusion." (Rep. on Sen. Bill No. 654, supra, at pp. 1, 3.)" Goodman v. Lozano, 47 Cal. 4th 1327, 1336 (2010).

Even according to the primary case upon which CHOMP relies, Chinn v. KMR Property Management, 166 Cal.App. 4th 175 (2008), "The legislative history of Senate Bill No. 654 (1985-1986 Reg. Sess.) does not indicate any

change in the law to consider settlement proceeds or provide costs to a plaintiff after a dismissal." Id. at 189. See also Michell, 49 Cal.App. 4th at 199 and n. 4 (1986 revisions to Section 1032 "do not drastically alter the definition of prevailing party"). Indeed, Chinn cites Michell – a case that did not involve a settlement – for the principle that "'[i]t is clear from the statutory language that when there is a party with a 'net monetary recovery' (one of the four categories of prevailing party), that party is entitled to costs as a matter of right; the trial court has no discretion to order each party to bear his or her own costs.'" Chinn at 188 (quoting Michell at 1198).

Under this long-established principle, deSAULLES is still the "prevailing party" entitled to recovery of costs.

Accordingly, the general principle allowing cost recovery to the party with a "net monetary recovery" is not in dispute. The only issue in dispute is whether settlement proceeds are to be disregarded in determining whether a plaintiff has a "net monetary recovery" for purposes of cost recovery. Other than reliance on Chinn, and, unfortunately, misapplication of other authority, nothing in CHOMP's Brief supports the theory that settlement proceeds are to be disregarded.

D. CHINN ERRED IN CONCLUDING THAT THE LEGISLATIVE HISTORY OF SECTION 1032 HAD ANYTHING TO DO WITH SETTLEMENT PROCEEDS

After having observed (correctly), that the 1986 revisions to Section

1032 "does not indicate any change in the law to consider settlement proceeds or provide costs to a plaintiff after a dismissal" Chinn at 189, that court promptly cited an obscure part of the Legislative History to Section 1032 that dealt with dismissals *unrelated* to settlement to leap to the conclusion that settlement proceeds should be excluded from determining whether the party receiving those proceeds received a "net monetary recovery."

Chinn concluded that an interpretation of "net monetary recovery" as including settlement proceeds would lead to the "absurd result" that "both plaintiff and defendants would be entitled to an award of costs as a matter of right." Id. at 188. That result would be absurd, and only occurs when the "dismissal" prong of Section 1032(a)(4) is taken literally and out of context.

The Chinn result comes from its over-technical reliance on the word "dismissal" in Section 1032. As the *only reason* for the dismissal here was CHOMP's payment of money – a result sought by deSAULLES – it is absurd to consider CHOMP to be a prevailing party. Section 1032 has not been interpreted in the manner advanced by Chinn in the other cases to have considered the issue. Chinn's interpretation is wrong and should not control this matter. See generally, Commission on Peace Officer Standards & Training v. Superior Court, 42 Cal. 4th 278, 290 (2007) (language of a statute should not be given a literal meaning if doing so would result in absurd consequences the Legislature did not intend); Lampley v. Alvares, 50 Cal. App. 3rd 124, 128-29 (1975) ("Where a statute is susceptible of two constructions, one leading to mischief or absurdity, and the other consistent

with justice and common sense, the latter must be adopted.").

Supporting a *non sequitur* analysis, Chinn quoted general and unrelated provisions in the Legislative History, see id. at 189, focusing on a written response to a telephone call to a Legislative consultant:

> Senate Bill No. 654 (1985-1986 Reg. Sess.) was introduced on behalf of the California Judges Association Civil Law and Procedure Committee. On January 20, 1984, Judge Richard H. Breiner, who was the chairman of the civil law and procedure committee, responded in writing to a telephone call from Assembly Republican consultant Earl Cantos. Judge Breiner stated in pertinent part, "The proposed bill merely synthesizes and simplifies the myriad of existing statutes into language which is clear, simple, and located in one place. You expressed concern that the proposal might allow an award of costs against a plaintiff not presently permitted under current law, when an action is dismissed. Under present[] law, costs are allowed to a defendant when plaintiff's action is dismissed. City of Industry v. Gordon 29 Cal.App. 3rd 90 (1972) (whether it is a voluntary dismissal with

> prejudice), Fisher v. Eckert, 94 Cal.App. 2nd 2d 890 (1950), or without prejudice International Industries, Inc. v. Olen 21 Cal. 3rd 218 (1978). The proposed bill provides for no different result, but rather simply provides in cases of dismissal, for costs to a 'defendant on dismissal.'"

The "expressed concern" in the telephone call was "that the proposal might allow an award of costs against a plaintiff not presently permitted under current law, when an action is dismissed." As demonstrated above, at the time, settlements and stipulations for monetary recovery by plaintiffs led to recovery of costs when no mention was made of the disposition of those costs. And none of cases cited by Judge Breiner involved payment to a plaintiff, whether by settlement, compromise, verdict, or any method. International Industries at 220-21 was a unilateral voluntary dismissal in the face of several defenses; City of Industry at 92-93 dismissed for failure to prosecute; and Fisher at 891 recited a dismissal without reasons. In such cases costs would be given (under the 1986 revision or under prior law) to a defendant in whose favor a dismissal is entered because the plaintiff received nothing.

Judge Breiner reassured the telephone caller that "The proposed bill provides for no different result, but rather simply provides in cases of dismissal, for costs to a 'defendant on dismissal.'" Nothing in this History suggests that the participants in this discussion considered settlements, and Judge Breiner's conclusion is consistent with the long-established practice of

allowing settling plaintiffs recovery of costs (so long as they had a monetary recovery).

Absent the context of a dismissal purchased by settlement proceeds, these comments shed no light on whether settlement proceeds are to be considered.

E. CHINN'S ANALYSIS VIOLATES THE PURPOSES OF SETTLEMENT AND OF COST RECOVERY

The purposes of the relevant statutes are to provide costs to a genuine prevailing party and to promote settlement. Refusing to follow Chinn will promote and harmonize the policies of Sections 1032, 998, and 664.6. See generally, Smith v. Superior Court, 39 Cal. 4th 77, 83 (2006) ("No statute—and by extension, no rule—is read in isolation, but is to be considered with reference to the entire scheme of which it is a part.").

"Section 1032 is the fundamental authority for awarding costs in civil actions. It establishes the general rule that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Scott Co. v. Blount, Inc., 20 Cal. 4th 1103, 1108 (1999) (citations omitted) (verdict). For purposes of section 1032, a party with a net monetary recovery, like deSAULLES, is a "'[p]revailing party.'" So the purpose of Section 1032 is to allow a party achieving its goals his or her costs of suit. The purpose of Section 998, of course, is to encourage settlement. Bates v. Presbyterian Intercommunity Hospital, Inc., 204 Cal.App. 4th 210, 219

(2012). Section 664.6 is a mechanism for efficient enforcement of settlement. See Levy v. Superior Court, 10 Cal. 4th 578 (1995).

The policy of promoting settlement is furthered by allowing deSAULLES and not CHOMP to recover costs. The line of authority – other than Chinn at the time of settlement – held that a settling plaintiff was entitled to recovery of costs. Allowing CHOMP recovery of its costs would effectively eliminate the settlement proceeds and, had it been known at the time that the single case disallowing consideration of settlement proceeds would have that effect to the derogation of the consistent and contrary line of authority, deSAULLES would have been dis-incentivised to settle for the amount offered.

Engle offers a sound reason to allow costs to settling plaintiffs: "the bright-line rule exists precisely to avoid disputes such as this one about whether there was manipulation or misunderstanding." Id. at 169. A settling defendant can easily put a cost or fee waiver into the agreement. Id. at 170. Just as to costs, "[s]ince the offer was silent on fees, it did not bar a later fee motion." See id. In fact, CHOMP insisted that any settlement proceeds would offset wage-loss recovery if deSAULLES prevailed on other causes of action. And, as CHOMP rejected any cost waivers, this is not a case of an unwary defendant. Nor is it any different than a plaintiff's verdict on less than all causes of action.

Finally, Chinn relied on the wisp of a notion that failure to discuss

settlement in the Legislative History means that settlement proceeds are not to be considered in the definition of "net monetary recovery." The Legislative History discusses dismissals, but *not* in the context of settlement and only in the context of not changing existing law. Not changing existing law requires allowing settling plaintiffs their costs and in non-settlement contexts allowing dismissed defendants their costs. The purposes of the relevant statutes is to promote settlement and provide prevailing parties their costs. No purpose is served to advert to the implications of the absence of a reference to settlement in the Legislative History. See generally, Windham at Carmel Mountain Ranch Assn. v. Superior Court, 109 Cal.App. 4th 1162, 1173 (2003) ("Absent relevant legislative history, we consider the statute's apparent purpose and public policy factors.").

CHOMP errs, therefore, in its uncritical reliance on the holding of Chinn. In particular, CHOMP fails to reconcile Chinn's acknowledgments that the 1986 revision to Section 1032 was not meant to change the law as to settlement or ordinary dismissal cases, with that court's leap to a conclusion to favor the technicality of a purchased dismissal over the pragmatic result that, in an ordinary settlement, the plaintiff is the party with the "net monetary recovery."

VII. EVEN CHOMP'S ANALYSIS OF CHINN DEMONSTRATES THAT, AS A MATTER OF LAW, THE SETTLEMENT PROCEEDS ARE PART OF THE "NET MONETARY RECOVERY" SUPPORTING deSAULLES AS THE "PREVAILING PARTY"

CHOMP relies on Chinn for the proposition that exclusion of settlement proceeds from the determination of "prevailing party" is necessary to avoid the "absurd result" of two prevailing parties: a prevailing defendant who purchased a dismissal and a plaintiff who had a monetary recovery in settlement. No such absurdity exists, and no reason exists to favor defendants by disregarding their settlement payments to plaintiffs. The existence of a formal "dismissal" in the settlement context does not elevate a settling defendant to the status of "prevailing party." see Wohlgemuth v. Caterpillar Inc., 207 Cal.App. 4th 1252, 1263-64 (2012); Engle v. Copenbarger & Copenbarger, LLP, 157 Cal.App. 4th 165, 168-70 (2007) ("Where a section 998 offer is silent on costs and fees, the prevailing party is entitled to costs. . . .") (citing, *inter alia* Folsom v. County Assn. of Governments, 32 Cal. 3rd 668, 678 (1982); On-Line Power, Inc. v. Mazur, 149 Cal.App. 4th 1079 (2007). So settlement does not give rise to a situation with two potentially prevailing parties.

A. CHOMP'S "PLAIN MEANING" ANALYSIS DOES NOT ASSIST IT

CHOMP urges that exceptions should not be "engrafted" onto the plain meaning of Section 1032(a)(4). deSAULLES agrees. As she is the party with

the "net monetary recovery," the plain meaning of Section 1032 is that she is the "prevailing party."

But CHOMP's "plain meaning" argument relies on ignoring the "net monetary recovery" prong of Section 1032(a)(4), and pointing only to the "dismissal" prong as embodying the "plain meaning" of Section 1032(a)(4). Supporting this myopia, CHOMP cites City of Long Beach v. Stevedoring Services of America, 157 Cal.App. 4th 672, 679-80 (2007), for the proposition that "courts must be cautious about [¶] 'engrafting exceptions onto the clear language of Civil Procedure Code section 1032. . . ." (Brief at 11.) City of Long Beach had nothing to do with settlement or monetary recovery, but, instead, considered whether a cross-complaint dismissed for mootness was or was not in the cross-defendant's favor, id. at 679-80, and concluded:

> There is no exception in the cost statute for dismissals of cross-complaints obtained on the ground that the cross-complaint has become moot. When a cross-complaint is dismissed as moot, the cross-defendant is one in whose favor the cross-complaint was dismissed and is therefore a prevailing party under Code of Civil Procedure section 1032 entitled to costs as a matter of right.

Id. at 680.

CHOMP omits the citation in the City of Long Beach case to Rappenecker v Sea-Land Serv., Inc., 93 Cal.App. 3rd 256, 263 (1979), for the quotation concerning judicial caution about engrafting "exceptions." As seen above, Rappenecker is among a line of Court of Appeal cases holding it proper to award a settling plaintiff recovery of costs or fees. Rappenecker's refusal to engraft an exception onto Section 1032 resulted in its considering the analogy that "a consent judgment is no different than any other judgment," id., and concluded that, [b]y its failure to draft with precision its compromise offer, defendant can not now be heard to claim that its language precludes the award of costs." Id. at 264. In so concluding, the Rappenecker court observed that "Defendant has filed to provide any persuasive showing of legislative intent to exclude costs in compromise settlements." See also Folsom, 32 Cal. 3rd at 677-78 & n.15 ("[C]osts are allowed, absent the parties' express agreement to the contrary, following entry of a consent decree.") (favorably citing Rappenecker, 93 Cal.App. 3rd at 263-64).

Nowhere does CHOMP show any Legislative intent to overrule Rappenecker; or to change the law of settlement; or to show that a case involving a moot cross-complaint such as City of Long Beach has any bearing on this Petition. Rather, an understanding of the "engrafting" analysis in City of Long Beach is only possible by adverting to Rappenecker, as did City of Long Beach. Rappenecker "engrafted" nothing onto Section 1032 in concluding that settlement led to recovery of costs to the plaintiff and no "engrafting" is now required to lead to the same result.

B. THE CASE LAW THAT CHOMP URGES IS "CONSISTENT" WITH CHINN DOES NOT INVOLVE MONETARY PAYMENT TO PLAINTIFFS

CHOMP points out that "[n]umerous courts" have held that defendants dismissed from their cases are held to be prevailing parties. True enough. But *none* of these authorities discuss whether, where a defendant purchases a dismissal, the dismissal itself so powerfully invests the defendant with prevailing party status that that status trumps the monetary recovery to the plaintiff. See generally Gantt v. Sentry Insurance, 1 Cal. 4th 1083, 1098 (1992) ("[A] case is not authority for a point that was not actually decided therein.") (citing Consumers Lobby Against Monopolies v. Public Utilities Commission, 25 Cal. 3rd 891, 902 (1979)).

Following the logical fallacy in Chinn, CHOMP argues that the existence of dismissal-based prevailing party status must mean that settlement proceeds are disregarded in the "prevailing party" analysis. As demonstrated above, the logical fallacy in which Chinn engaged was a simple leap of faith from faulty premises from Judge Breiner's assurance that dismissals would still lead to "prevailing party" status as to defendants – without any analysis as to the effect of a settlement. That analysis is the center of this Petition, yet CHOMP refuses to demonstrate how a Legislative History that makes no mention of settlement-induced dismissals (or settlement at all) can so powerfully change the law. Rather, this Court insists on a pragmatic analysis. Goodman, 47 Cal. 4th at 1337-38; Graham, 34 Cal. 4th at 570 ("[A] court may base its attorney fees decision on a pragmatic definition of the extent to which

each party has realized its litigation objectives, whether by judgment, settlement, or otherwise.") (quoting Santisas at 622).

Instead, CHOMP relies on the uncontroversial – and inapplicable – notion that a routine, non-settlement dismissal supports a finding that the dismissed defendant is the "prevailing party." None of the cases cited by CHOMP involve a monetary settlement leading to a dismissal. (Opening Brief at 10-11 & n. 1-3. (citing Santisas v. Goodin, 17 Cal. 4th 599 (1998) (dismissal without settlement, but *dictum* supporting "prevailing party" status for plaintiff in settlement); Mon Chong Loong Trading Corp. v. Superior Court, 218 Cal.App. 4th 87 (2013) (voluntary dismissal without settlement); Cano v. Glover, 143 Cal.App. 4th 326 (2006) (dismissal after demurrer); Great Western Bank v. Converse Consultants, Inc., 58 Cal.App. 4th 609 (1997) (multi-defendant case involving offsets under Civil Procedure Code Section 877); Crib Retaining Walls, Inc. v. NBS/Lowry, Inc., 47 Cal.App. 4th 886 (1996) (interplay of Section 998 offer and Section 877)).

Consequently, in the event that the literal "dismissal" provision of Section 1032(a) causes some analytical difficulty in determining "prevailing party" status, the "pragmatic definition" approach suggested in Santisas resolves the issue. Even where the litigation result is not optimal, costs to a plaintiff are routine. Michell, 49 Cal.App. 4th at 1198; Valentino, 201 Cal.App. 3rd at 702. See generally, Commission on Peace Officer Standards & Training v. Superior Court, 42 Cal. 4th 278, 290 (2007) (language of a statute should not be given a literal meaning if doing so would result in absurd

consequences the Legislature did not intend); Lampley v. Alvares, 50 Cal. App. 3rd 124, 128-29 (1975) ("Where a statute is susceptible of two constructions, one leading to mischief or absurdity, and the other consistent with justice and common sense, the latter must be adopted."); Bob Jones University v. United States, 461 U.S. 574, 586, 76 L.Ed. 2nd 157, 103 S.Ct. 2017 (1983) (well-established canon of statutory construction provides that literal language should not defeat the plain purpose of the statute). Resolution of this issue by ignoring "net monetary recovery" or by making an unguided guess or an overly literal view of one status to the disadvantage of another is a resolution in Chinn and no other case.

Using CHOMP's mode of analysis – relying on non-settlement "prevailing party" cases – properly leads to the conclusion opposite to the one it advocates: any plaintiff could (and has here) cite reported decisions that show that a partial victory even with a loss of the major part of the case still leads to a "prevailing party" determination in plaintiff's favor. Chinn cites one such case at p. 188: Michell, 49 Cal.App. 4th at 1198, but fails to analyze why its holding does not apply. This Court in Chavez, 47 Cal. 4th at 984 cited another with approval: Valentino, 201 Cal.App. 3rd at 702. While these cases are analytically the same as settlement cases, CHOMP ignores them even while advocating an analytical method that demands their consideration.

C. "STREAMLINING" THE RULES IS AN INSUFFICIENT BASIS TO CHANGE THE LAW TO FAVOR SETTLING DEFENDANTS WITH A WINDFALL

CHOMP correctly, but misleadingly, quotes a section of Goodman v. Lozano, 47 Cal. 4th 1327, 1335 (2010), that "The purpose of the 1986 legislation, which was sponsored by the California Judges Association (CJA), was to streamline the rules and procedures on the award of litigation costs, which were deemed 'hard to find and hard to follow.' (Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 654 (1985-1986 Reg. Sess.) as amended July 8, 1986, p. 3 (Report on Senate Bill No. 654).)" CHOMP leaves unexplained why "streamlining" the statute should result in ignoring the "net monetary recovery" of a settlement in favor of the literalism of favoring defendants who purchase a dismissal and leave open the issue of costs. In addition to that, CHOMP fails to quote this Court's explanation why "streamlining" was important:

> The CJA's statement above refers to the then existing law regarding "which costs are, and are not, allowable." (Rep. on Sen. Bill No. 654, supra, at p. 3 [legislation necessary to avoid having "to search through myriad statutes, cases and treatises in order to determine whether a particular cost item is allowable"]; Assem. Com. on Judiciary, Rep. on Sen. Bill No. 654 (1985-1986 Reg. Sess.) as amended Mar. 31,

> 1986, p. 1 [lists of costs "are essentially restatements of existing law, and to a large extent are codifications of case law"].) It did not refer to the definition of a "prevailing party." The legislative history reveals instead that at the time current section 1032 was reenacted, the "existing statutes d[id] not fully explain the concept of the 'prevailing party,' " and that a "comprehensive definition" was necessary to "further eliminate confusion." (Rep. on Sen. Bill No. 654, supra, at pp. 1, 3.)

Goodman, 47 Cal. 4th at 1336.

Hence we know that the "streamlining" of Section 1032 was not to create a literalism unknown before 1986, but, instead, to combine various statutes into a single place based on the concept of "prevailing party." And this Court concluded in Goodman that, under the "prevailing party" concept, the courts were to examine whether a plaintiff's recovery (subject to offsets) was in fact a "net monetary recovery." Id. at 1336-37. (As no offset by one defendant against another exists here, the holding of Goodman is inapplicable, but its analysis of the net recovery does apply.)

Regardless whether deSAULLES obtained the right to proceed on the other causes of action (she did not), the settlement terms unequivocally

demonstrate that she is the prevailing party (including, *inter alia* CHOMP's insistence that the settlement proceeds offset any future wage loss recovery). As the Court of Appeal in Michell observed:

> The allowance of costs as a matter of right no longer depends on the character of the action involved but on how the prevailing party is determined. . . . [¶] It is clear from the statutory language that when there is a party with a "net monetary recovery" (one of the four categories of prevailing party), that party is entitled to costs as a matter of right; the trial court has no discretion to order each party to bear his or her own costs.

Id. at 1197-98 (citations omitted).

Thus "streamlined," Section 1032 must be analyzed for its fundamental purposes, not some sense of expediency advocated by CHOMP. Streamlining more powerfully indicates rejection of the pretense of "absurdity" raised by the formalism of dismissal in the settlement context and looking to whether a settlement resulted in a "net monetary recovery."

D. "GOOD FAITH SETTLEMENT" CASES SUCH AS GOODMAN V. LOZANO DEMONSTRATE THAT SETTLEMENT AMOUNTS ARE TO BE CONSIDERED IN DETERMINATION OF "PREVAILING PARTY" STATUS IN SINGLE PLAINTIFF VS. SINGLE DEFENDANT CASES

CHOMP errs in claiming that this Court's decision resolving a conflict among the Courts of Appeal on the proper treatment of settlement proceeds in the context of a good faith settlement, Goodman v. Lozano, 47 Cal. 4th 1327 (2010), "implicitly" recognizes the "procedural framework created by the Chinn ruling." (Brief at 11.) As does any case holding on good faith settlements under Civil Procedure Code Section 877, Goodman looks to the actual monetary value of the judgment of a non-settling party; Goodman held the value of the judgment offset by the good faith settlement determined the net monetary recovery as to the nonsettling defendant. While such cases are instructive as to the role of settlement proceeds, their actual holdings do not concern the situation here, involving a single Plaintiff and a single Defendant.

To be clear: the "good faith" cases do not hold on the situation here, where there are only two settling adverse parties. Rather, these cases hold on the effect of a "good faith" settlement on a non-settling defendant's rights. As the cases after Goodman must consider the effect of the settlement proceeds for that purpose concerning the right to cost recovery, it follows that settlement proceeds are to be considered for cost recovery between the settling parties. CHOMP errs in arguing, however, that procedure has direct

application here, when its application is tangential, and shows that a practical recognition of settlement proceeds is consistent with all cases involving settlement.

1. CHOMP Errs in its Overly Technical Reading of the Meaning of the Word "Recovery"

CHOMP mixes up its own technical reading of the word "recovery" with the holding of Goodman to conclude that this Court's Goodman decision supports the notion that a "recovery" can only be recognized if by an "order or judgment." (Brief at 13-14.) CHOMP then claims that the settlement here cannot be such a "recovery" eligible for "net monetary recovery" status.

Goodman's analysis of a zero recovery is applicable only to the situation in that decision where, under Section 877, "a plaintiff's settlement completely offsets a damage award against a nonsettling joint tortfeasor." Id. at 1333. Section 877 is not limited to situations where a settlement is an order or judgment, but applies to "a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment." Yet, under Goodman, such a settlement is part of the analysis, which does not depend on the lock-step "order or judgment" CHOMP claims is a requirement.

Explaining the Section 877 process, Goodman agreed with the dissent in an earlier Court of Appeal decision:

> The Court of Appeal here followed the

Wakefield dissent, which explained: "The common meaning of the word 'net' is 'free from all charges or deductions' or 'to get possession of: GAIN.' (Webster's Collegiate Dict. (10th ed. 1993) p. 780.) The word 'monetary' obviously means 'relating to money.' (Webster's Collegiate Dict. (10th ed. 1993) p. 750.) The word 'recover' means 'to gain by legal process' or 'to obtain a final legal judgment in one's favor.' (Webster's Collegiate Dict. (10th ed. 1993), p. 977.) Thus, the common meaning of the phrase 'the party with a net monetary recovery' is the party who gains money that is 'free from ... *all* deductions.' ... [¶] A plaintiff who obtains a verdict against a defendant that is offset to zero by settlements with other defendants does not gain any money free from deductions. Such a plaintiff *gains nothing* because the deductions reduce the verdict to zero." Wakefield, 145 Cal.App. 4th 963, 992 (dis. opn. of Mihara, J.).)

We agree with the instant Court of Appeal and the Wakefield dissent that the term "net monetary recovery" is clear and that we must give effect to it " 'according to the usual,

ordinary import of the language employed ... .' "

[Citations.]

Goodman, 47 Cal. 4th at 1333-34 (italics in original; some citations omitted).

On this point, it is without dispute that deSAULLES' settlement was offset by nothing so she gained something against CHOMP – the monetary settlement itself. It is also without dispute that the defendant in Goodman challenging the cost award was not a settling party, id. at 1330, and by operation of Section 877, its obligation to plaintiff was reduced to zero. Id. at 1338-39. The only reasonable conclusion is that, with the resulting dismissal of the settled causes of action here and a judgment concluding litigation in the Superior Court, deSAULLES received an "order or judgment" that resulted in a "net monetary recovery" to her. See also Boeken v. Philip Morris USA, Inc., 48 Cal. 4th 788, 793 (2010) ("dismissal with prejudice is the equivalent of a final judgment on the merits") (citation omitted); Wohlgemuth, 207 Cal.App. 4th at 1260 ("The acceptance of the instant compromise agreement calling for a voluntary dismissal with prejudice would have finally disposed of the complaint as effectively as one calling for entry of judgment in favor of plaintiff.") (citations and footnote omitted); On-Line Power, Inc. v. Mazur, 149 Cal. App.4th 1079, 1085 (2007) (dismissal is tantamount to judgment) (citations omitted).

Even authority upon which CHOMP places reliance for its "dismissal" argument concerning prevailing parties holds that, for the purposes of

imposition of costs, no distinction exists between a judgment or a voluntary dismissal. Mon Chong Loong, 218 Cal.App. 4th at 93 ("The appropriate moment for a court to assess whether a more favorable judgment or award has been obtained is at the conclusion of the lawsuit. In many cases, the conclusion of the lawsuit is synonymous and contemporaneous with the entry of judgment, and thus the distinction is irrelevant. Here, however, the action ended with a voluntary dismissal.") (footnote omitted).

Factually, Superior Court entered judgment against deSAULLES. (15 Apx., 275-76.) In the Judgment, the Superior Court observed the settlement as to the contract claims (id. at 276:6-7), which required CHOMP to pay deSAULLES the amount of $23,500, in exchange for which she dismissed the contract-based causes of action (7Apx.at 98:12-16; 15 Apx. at 274). Even under CHOMP's strained analysis, therefore, deSAULLES recovered something sufficient to warrant "net monetary recovery" status under the "usual, ordinary import of the language employed" by Section 1032. See Goodman at 1334 (citation omitted).

CHOMP urges that *dictum* noted in Goodman supports their notion that the trial court had "discretion" to deny costs to deSAULLES. (Brief at 16, n.4.) The Opening Brief makes no reference to the discretionary standard of review. (Brief at 6-7 (Standard of Review is *de novo*.).) The note in Goodman in relevant part is: "Our holding today is simply that a plaintiff whose damage award is offset to zero by a prior settlement does not *categorically* qualify as a prevailing party ("the party with a net monetary

recovery") as a matter of law. Unless a party otherwise fits into one of the remaining three categories of prevailing party under *section 1032(a)(4)*, a trial court will have the *discretion* to make the determination as to a prevailing party under the section." Id. at 1338, n.4 (italics in original). CHOMP takes that to mean that "[i]f settlement sums did qualify as a net monetary recovery, then the settling party would be entitled to costs *as a matter of right* under Section 1032." (Brief at 16, n.4 (italics in original).)

CHOMP's conclusion betrays its misunderstanding of Goodman. First, the net recovery in Goodman as to the nonsettling defendant was zero. In contrast, deSAULLES' recovery against CHOMP was far in excess of zero. Second, the *dictum* noted in Goodman is more reasonably understood as allowing a plaintiff whose net monetary recovery was offset to zero to demonstrate that it had other grounds for recovery, perhaps in equitable remedies or some other form of relief.

Consequently, the "amorphous concept of 'success'" that so concerned this Court in Goodman is absent entirely here.

2. CHOMP Errs in its Reliance on Out-of-state Cases

Nor does CHOMP's reliance on out-of-State authority change this. For example, the Appellate Court of Illinois in Gebelein v. Blumfield, 231 Ill.App. 3rd 1011, 1014 (1992), refused to award costs in circumstances similar to those here, relying on a dictionary definition of the word "recover" that was the "narrower" definition. CHOMP's quotation of that language

omits that the Gebelein court cited it as the "narrower" definition.

Even more significant to this case, the Gebelein court simply assumed the opposite construction that this Court and the line of cases from Rappenecker has given silence as to costs: that, in Illinois, it is the fault of the plaintiff. In California, the defendant is tasked with watching out for itself. Compare Folsom, 32 Cal. 3rd at 678 (citing both Rapp and Rappenecker); Rapp, 74 Cal. at 533 (absent provision for fees in stipulation they are properly awarded); Engle, 157 Cal.App. 4th at 169; Rappenecker at 264 ("By its failure to draft with precision kits compromise offer, defendant can not now be heard to claim that its language precludes the award of costs."); with Gebelein at 1014 ("While the plaintiff has no right to recover costs when the underlying case is settled, the parties can obviously negotiate for the payment if they choose to do so."). In California, a defendant that takes care to include costs in a settlement is likewise given the benefit of settling all "costs," including fees. Martinez, 195 Cal.App. 4th at 1041 ("Unless the offer expressly states otherwise, an offer of a monetary compromise under section 998 that excludes "costs" also excludes attorney fees.") (distinguishing Engle).

The later Holtz v. Waggoner, 377 Ill.App. 3rd 598 (2007), decision, also cited by CHOMP, confirms the narrow approach taken in Illinois when denying costs overall where the plaintiff's "mandamus" relief was dismissed. Nothing in Holtz speaks to settlement except its citation to Gebelein as hewing to a restrictive approach. And that is an approach not used in California.

Nor does CHOMP's reliance on a Florida case assist its cause. Gallagher v. Manatee, 927 So. 2nd 914 (Fla.App. 2006), involved a cap on damages against a governmental agency. (re: Fla. Stat. § 760.11 ("The total amount of recovery against the state and its agencies and subdivisions shall not exceed the limitation as set forth in § 768.28(5))."). The Florida court interpreted the phrase "total amount of recovery" to include costs and fees, in a strict construction of the statute meant to limit the dollar amount of claims against governmental agencies. Gallagher at 917-18. While that analysis may have some relevancy to specific Florida law, CHOMP makes no effort to explain why it affects settlement proceeds here.

And other out-of-California cases do hold that fees or costs after settlement are proper. E.g., Allison v. Board of County Comm'rs, 241 Kan. 266, 273; 737 P.2d 6 (1987) ("For a party to "prevail," a judicial determination is not necessary. Parties are considered to have prevailed when they vindicate a right through a consent judgment, a settlement, or without formally obtaining relief.") (citation omitted); Johnson v. G.D.F., Inc. D/b/a Domino's Pizza, 2014 U.S. Dist. LEXIS 14446 (N.D. Ill. February 5, 2014) at *24. Evaluating these standards, whether textual, formalistic, based on policy, or otherwise is not a particularly enlightening experiment: the law in California is consistent, supportive of allowing costs to a settling plaintiff, and needs neither support nor challenge from the way other States consider this issue.

E. CHOMP ERRS IN DISTINGUISHING SECTION 998 CASES

CHOMP errs in its assertion that Rappenecker can be distinguished as a case involving Section 998. Chinn – upon which CHOMP places great reliance – is a case under Section 998. Id. at 179; 188 ("The statutory scheme governing costs and section 998 offers allows parties to allocate costs and attorney fees in their compromise agreement. (§§ 998, 1032, subd. (c).)"). CHOMP offers no reason not to allow the Section 998 cases to assist in construing "prevailing party" status in all cases. E.g., Engle, 157 Cal.App. 4th at 168-69 (following Folsom); On-Line Power, 149 Cal. App.4th 1079 (allowing fees in a settlement that required a dismissal); Ritzenthaler, 93 Cal.App. 4th 986 (costs & fees); Lanyi, 177 Cal.App. 3rd at 185-87 (costs and fees); Rappenecker, 93 Cal.App. 3rd 256 (costs) (cited by Folsom, 32 Cal. 3rd at 677-78). Folsom, of course, did not involve Section 998, but an informal settlement, and favorably examined Rappenecker, which did involve a Section 998 offer. Folsom at 677-78 & n.15.

While the settlement here was under Section 664.6 (7 Apx. 98:12-16), CHOMP does not discuss the cases under Section 664.6 that are directly analogous to Section 998 cases. E.g., Saba v. Crater, 62 Cal.App. 4th 150 (1998) ("We fail to find a reason to interpret the requirement there be a writing under section 998 differently from the same requirement under section 664.6 and therefore hold the statement placed orally on the record does not satisfy the requirement that a section 998 demand be in writing."). The purposes of settlement are, on the issues presented in this Petition, the

same whether under Section 1032, 998, or 664.6. See Chavez v. City of Los Angeles, 47 Cal. 4th 970 (2010) (whether attorney fees are recoverable under Sections 1032 and 1033.5); Martinez, 195 Cal.App. 4th at 1041 ("[E]xclusion of costs also excludes attorney fees . . . based on the *rapport* between sections 998, 1032 and 1033.5."); Engle,157 Cal.App. 4th at 168 (entitlement to costs and, if authorized, fees). The Court of Appeal has noted that "section 664.6 should be construed as authorizing a procedure *not only for the entry of judgment pursuant to the settlement agreement but for the adjudication of matters incidental to the judgment, such as attorney's fees,* that come within the established compass of post judgment motions." Alioto Fish Co. v. Alioto, 27 Cal.App. 4th 1669, 1687, n.11 (1994) (italics in footnote). The attention to specific terms in settlement is no different here, where counsel assisted the parties in crafting a settlement that was meant to be enforced under Civil Procedure Code Section 664.6.

This is the same standard as applicable to a Section 998 settlement. See Engle, 157 Cal.App. 4th at 168-69 (collecting Section 998 cases); Linthicum v. Butterfield, 175 Cal.App. 4th 259, 272 (2009) ("One of the cardinal rules of contract construction is that, if possible, the contract should be construed to render it valid and enforceable.") (citing Cal.Civ. Code §§ 1643, 3541) (re Section 998 offer). Regardless whether the settlement was under Section 998, Section 664.6, or an informal agreement, a settlement agreement is a contract, governed by the same legal principles which apply to contracts generally. Folsom, 32 Cal.3d at 677; Weddington Productions, Inc. v. Flick, 60 Cal.App. 4th 793, 810 (1998).

VIII. CONCLUSION

CHOMP mistakenly urges that the "streamlining" that the 1986 revisions imparted to Section 1032 means that a technicality –all dismissals– are legally the same whether an expedient part of settlement, or as a dismissal on the merits, or for a procedural default by a plaintiff. The pragmatic approach consistently required by this Court, however, results in an unmistakable "net monetary recovery" in settlement as would a money verdict. Chinn's opposite conclusion is unsupported by the very Legislative History upon which it purports to rely, and is to the contrary of the consistent history of awarding costs to plaintiffs who accept monetary settlements.

Accordingly, deSAULLES respectfully requests that this Court affirm the decision of the Court of Appeal with instructions to deny costs to CHOMP and to grant costs to her.

Dated: September 22, 2014 HENRY J. JOSEFSBERG, ESQ.

By _____
HENRY J. JOSEFSBERG
Attorney for Plaintiff & Respondent
MAUREEN deSAULLES

CERTIFICATE OF LENGTH - Rule 8.520(c)(1)

I am the counsel of record for Respondent. This brief was produced on a computer and does not exceed 14,000 words, including footnotes. I used the word counting function on the WordPerfect program to determine that this brief contains 9,757 words, excluding tables.

Dated: September 22, 2014

HENRY J. JOSEFSBERG, ESQ.

By _____
HENRY J. JOSEFSBERG
Attorney for Plaintiff & Respondent
MAUREEN deSAULLES

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California and I am over the age of 18 and not a party to the within action. My business address is One Ten West Ocean Boulevard, Suite 611, Long Beach, California 90802.

On **September 23, 2014,** I served the document(s) entitled:

RESPONDENT'S ANSWER BRIEF

on the interested parties in this action by placing a true and correct copy of such document(s) in a sealed envelope(s) addressed as follows:

Monterey County Superior Court
Hon. Lydia M. Villarreal
1200 Aguajito Road
Monterey, California 93940

Christopher E. Panetta, Esq.
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California Court of Appeal
Sixth Appellate District
333 West Santa Clara Street
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San Jose, California 95113

(the "Addressee") and serving such document(s) as follows:

X REGULAR MAIL. On the service date set forth hereinabove in the County of Los Angeles, I deposited such envelope(s) with postage thereon fully prepaid in the United States mail.

Executed on **September 23, 2014,** at Long Beach, California.

X (State) I declare under penalty of perjury that the above is true and correct.

Henry J. Josefsberg