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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DAWN CHRISTIE et al., Plaintiffs, Cross-Defendants, Appellants and Cross-Respondents, v. BILLY RIDGE et al., Defendants, Cross-Complainants, Respondents and Cross-Appellants.	2d Civ. No. B259189 (Super. Ct. No. 56-2010-00386347-CU-BC-VTA) (Ventura County) OPINION FOLLOWING REHEARING

A decade ago respondent and cross-appellant Martha Vincent leased her luxury home in Westlake Village to appellants and cross-respondents Dawn Christie and Johnny Pequignot. Sixteen months later Vincent evicted Christie and Pequignot for failure to pay rent. The ensuing years have been consumed by litigation over the value of personal property that remained on the premises, claimed to be worth in excess of $4 million. The matter before us is the second appeal. It comes to us following a

29-day court trial. The parties contest the attorney fees and costs awarded to both sides which, in the aggregate, exceed $1 million.

The current litigation began when Christie, Pequignot and their production company, Togetherness Productions, LLC (Togetherness), sued Vincent, her husband, Billy Ridge, and Billie Jackson dba Sequels (Jackson) for damages based on the alleged conversion of personal property left on the premises. Vincent and Ridge cross-complained.[1] Appellants and Togetherness prevailed at trial on their negligence and conversion claims against respondents, and Vincent and Ridge prevailed on their breach of contract cause of action against appellants and Togetherness. The trial court entered judgment and awarded attorney fees to appellants and Togetherness. It also awarded attorney fees and costs to Vincent and Ridge based on settlement offers they had made under Code of Civil Procedure section 998.[2] After the various offsets were applied, only Vincent received a net recovery.

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[1] To avoid confusion, we shall refer to Christie and Pequignot as appellants throughout the opinion, even though they are also cross-respondents. We shall refer to Vincent, Ridge and Jackson as respondents, even though they also are cross-appellants. Togetherness is no longer a party to these appeals. It was dismissed due to its suspension by the Franchise Tax Board. (See *Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 245; *Laurel Crest, Inc. v. Vaughn* (1969) 272 Cal.App.2d 363, 364.)

[2] All statutory references are to the Code of Civil Procedure unless otherwise specified.

The parties raised numerous claims in their appeals and cross-appeals, many of which related to the attorney fees and costs awards. In our original opinion, we concluded the trial court erred by awarding appellants and Togetherness attorney fees on their conversion cause of action, as there is no statutory or contractual authority for the award. We also concluded the court erred by finding that the section 998 offers were valid. Thus, we reversed the portions of the trial court's April 10, 2015 fee order awarding attorney fees to appellants, Togetherness and Vincent and awarding costs to Vincent and Ridge. We also reversed the court's July 23, 2015 order awarding Vincent and Ridge attorney fees on appeal. In addition, we reversed the court's August 13, 2015 order granting respondents' motion to amend the judgment to the extent it permitted an offset of the amounts owed by the parties. We affirmed the December 1, 2014 amended judgment (first amended judgment). We dismissed as untimely the attempted appeal and cross-appeal from the August 20, 2015 amended judgment (second amended judgment).

Both sides petitioned for rehearing. We denied appellants' petition, but granted respondents' petition. The parties agree that notwithstanding our decision that respondents' section 998 offers were invalid, Vincent, as a prevailing party on the cross-complaint for breach of contract, is entitled to recover the attorney fees and costs she incurred in prosecuting that cross-complaint pursuant to Civil Code section 1717. The parties also agree the trial court should make that determination on remand. As stated by respondents, "[The trial judge] presided over all th[e] testimony and he is therefore the best arbiter of how best to allocate between the complaint and the cross-complaint the

$533,225 in fees that he awarded." Accordingly, we remand the matter to the trial court for this purpose.[3]

FACTUAL AND PROCEDURAL BACKGROUND

A. The Eviction

In December 2008, Vincent leased the subject premises to appellants for use as both a residence and a resort and spa. In December 2009, Vincent filed an unlawful detainer action to evict appellants for nonpayment of rent. Vincent obtained a judgment of possession and an award of $115,708.03 for unpaid rent. Settlement discussions and bankruptcy proceedings delayed the actual eviction until July 27, 2010.

At the time of the eviction, appellants and Togetherness left a significant amount of personal property on the premises. The property consisted of personal and business items which appellants estimated were worth over $4 million. Shortly after the eviction, appellants and Togetherness demanded the return of the personal property in accordance with Civil Code section 1965.

Appellants served a three-page handwritten list itemizing their personal property. This list was superseded first by a six-page list and later by a list of more than 75,000 items. The subsequent lists included a breakdown of every item of clothing in Christie's master suite closet which she claimed was worth $694,500.

Several months after the eviction, Ridge arranged for Jackson, who specializes in the resale of designer clothing, to sell approximately 360 items of Christie's clothing. Jackson sold

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[3] Respondents' rehearing petition also references a $29,000 attorney fees award that was not appealed. That order is not before us, and is therefore unaffected by our decision.

approximately 150 items for a total of $17,000. Jackson kept $10,000 and remitted at least a portion of the balance to Vincent and Ridge.

B. The Bankruptcy Proceedings

Christie and Pequignot each filed a Chapter 13 bankruptcy proceeding in early 2010. Their bankruptcy schedules valued their personal property at $14,100.

The bankruptcy schedules also disclosed there were no non-exempt assets from which creditors could collect outstanding debts. Vincent obtained relief from the automatic stay to proceed with the eviction. Appellants' bankruptcy proceedings were later dismissed.

C. The Instant Lawsuit

On December 3, 2010, appellants and Togetherness filed a complaint against respondents. Amongst their claims were causes of action for wrongful eviction, breach of contract, negligence, conversion, fraud and violation of Civil Code section 1965.

Appellants and Togetherness obtained a temporary restraining order (TRO) preventing respondents from transferring or reselling any of the personal property left at the subject premises. After the TRO was entered, Jackson lost some of the property in her possession.

The trial court also granted appellants and Togetherness a writ of possession.[4] Respondents subsequently moved the personal property into a storage facility. Following an inspection,

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[4] In an earlier appeal, we affirmed the order granting the application for a writ of possession. (*Pequignot v. Vincent* (June 4, 2013, B235047, B235672) [nonpub. opn.].)

appellants and Togetherness claimed that much of their property was damaged or missing.

On April 20, 2011, Vincent filed a cross-complaint seeking monetary damages against appellants and Togetherness for breach of contract and damage to the subject premises. Ridge was later joined as a cross-complainant.

On August 15 and 16, 2013, Vincent and Ridge made separate section 998 offers to appellants and Togetherness. The offers included a dismissal with prejudice of the cross-complaint, a release of all claims between the parties including costs and attorney fees, and an allocation of $225,000 in "new money" to Pequignot ($25,000), Christie ($125,000) and Togetherness ($75,000). The offers were not accepted.

Following trial, the trial court ruled in favor of appellants and Togetherness on their claims for negligence and conversion. On July 18, 2014, it entered judgment in the amount of $252,019.36 against Vincent and Ridge and $15,000 against Jackson. The court also awarded $25,000 to Pequignot for emotional distress damages.

On the cross-complaint, the trial court awarded Vincent $234,150 in breach of contract damages, and respondents $16,299 in consequential damages. Unaware of the section 998 offers, the court determined that "[e]ach side has achieved some measure of success in this case. As such, the court finds that there is no prevailing party, and each side shall bear their own costs of suit."

On August 12, 2014, appellants and Togetherness moved to vacate the judgment and to enter a new and different judgment. On September 17, 2014, the trial court granted the motion, vacated the July 18, 2014 judgment and awarded appellants and Togetherness prejudgment interest on their conversion claim

based on Civil Code section 3336. It determined appellants and Togetherness were "entitled to interest at the legal rate on the value of the converted property ($252,917.36) from the date of the conversion until the issuance of the writ of possession in their favor." The court ordered appellants and Togetherness to prepare an amended judgment consistent with its ruling.

Appellants and Togetherness appealed the original judgment on September 25, 2014. Vincent and Ridge filed a cross-appeal from the original judgment on October 15, 2014. We dismissed appellants and Togetherness's appeal due to their delays in pursuing the appeal. But the appeal also was subject to dismissal because the original judgment was vacated before the notice of appeal was filed. (See, e.g., *People v. Sanchez* (1950) 35 Cal.2d 522, 524-525; *Jonathan Neil & Associates, Inc. v. Jones* (2006) 138 Cal.App.4th 1481, 1491 [intervening order setting aside judgment prior to consideration of appeal renders appeal from vacated judgment moot]; *First Western Bank & Trust Co. v. Scott* (l963) 216 Cal.App.2d 414, 424 [since the judgment was vacated, "plaintiff's appeal from the judgment is moot and must be dismissed"].)

On December 1, 2014, the trial court issued the first amended judgment reiterating the terms of the original judgment and awarding appellants and Togetherness a total of $14,209 in prejudgment interest. The document left blanks for the attorney fees and costs awards. None of the parties appealed the first amended judgment.

D. Motions for Attorney Fees and Costs

Both sides moved for attorney fees and costs. Respondents claimed prevailing party fees pursuant to both section 998 and the attorney fees clause in the lease. On April 10, 2015, the court

issued a fee order awarding Vincent $533,225 in attorney fees and awarding Vincent and Ridge $214,868 in costs. The $533,225 fee award included fees for prosecuting the breach of contract cause of action in the cross-complaint, but the various orders do not clarify the specific amount allocated to the cross-complaint. The court also awarded appellants and Togetherness $220,000 in attorney fees. The fee order did not state the basis for that award. It did note, however, that the date of Vincent and Ridge's section 998 offers constituted a "watershed" event, because before the offers, appellants and Togetherness were arguably the prevailing parties, but after the offers, Vincent and Ridge were the prevailing parties.

Appellants and Togetherness appealed the April 10, 2015 fee order. Respondents filed a cross-appeal.

On July 23, 2015, the trial court issued an order granting Vincent $48,807.50 in appellate attorney fees. Appellants and Togetherness appealed that order. They also appealed an August 13, 2015 order granting respondents' motion to amend the judgment.[5] The motion sought modification of the first amended judgment to insert attorney fees and costs, and to offset the amounts owed by the parties.

In response to respondents' motion, the trial court entered the second amended judgment on August 20, 2015. That judgment included the fee and costs awards and offset the amounts owed by the parties to one another, leaving Vincent as the only party with a net monetary recovery. Her total award

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[5] The fee order, the order awarding appellate attorney fees, and the order granting the motion to amend the judgment are appealable as orders after judgment. (§ 904.1, subd. (a)(2).)

was $495,189.26. Appellants appeal the second amended judgment. Respondents cross-appeal.

II.

DISCUSSION

A. Appellants' Appeals

1. Respondents' Motion to Dismiss Appeals

Respondents move to dismiss appellants' attempted appeal from the second amended judgment. They contend the appeal is untimely because this court dismissed appellants' appeal from the original judgment. We grant the motion, but not for the reason urged by respondents.

"'The effect of an amended judgment on the appeal time period depends on whether the amendment substantially changes the judgment or, instead, simply corrects a clerical error . . . . When the trial court amends a nonfinal judgment in a manner amounting to a *substantial modification* of the judgment (e.g., on motion for new trial or motion to vacate and enter different judgment), the amended judgment supersedes the original and becomes the appealable judgment (there can be only one "final judgment" in an action . . .). Therefore, a new appeal period starts to run from notice of entry or entry of the *amended* judgment.'" (*CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1048 (*CC-California*); *Mulder v. Mendo Wood Products, Inc.* (1964) 225 Cal.App.2d 619, 635.)

"It is well settled, however, that '[w]here the judgment is modified merely to add costs, attorney fees and interest, the original judgment is not substantially changed and the time to appeal [from that judgment] is therefore not affected.'" (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222 (*Torres*); *Hjelm*

v. Prometheus Real Estate Group, Inc. (2016) 3 Cal.App.5th 1155, 1163-1164; *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583.) This rule recognizes that "postjudgment awards of attorney fees, costs and interest are separately appealable matters collateral to the actual judgment if they are not included therein." (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 504-505 (*Dakota Payphone*).)

Respondents argue that because the primary purpose of the second amended judgment was to add costs, attorney fees and interest, the original judgment was not substantially modified and a new appeal period did not begin to run from the second amended judgment. This argument ignores the fact that the trial court vacated the original judgment before any notice of appeal was filed and then entered the first amended judgment. Because the first amended judgment superseded the vacated original judgment, it became the appealable judgment.[6] (*CC-California*, *supra*, 51 Cal.App.4th at p. 1048.)

No one appealed the first amended judgment. Consequently, the parties' challenges to the merits of the trial court's decision are not cognizable on appeal unless the second amended judgment constituted a substantial modification of the first amended judgment. (See *CC-California*, *supra*, 51 Cal.App.4th at p. 1048.) As recognized in *Torres*, when an amended judgment results in a substantial modification of a judgment, the amended judgment supersedes the original and

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[6] Vincent and Ridge conceded this point in their motion for attorney fees. After noting that appellants' motion to vacate the original judgment had been granted, they acknowledged that once a new judgment is entered, "this is the judgment that is appealable."

becomes the one final, appealable judgment in the case. (*Torres*, *supra*, 154 Cal.App.4th at p. 222.)

Appellants assert the second amended judgment substantially modified the prior judgment and is therefore appealable. They identify eight amendments they believe are substantial modifications that reset the time for appealing the merits of the first amended judgment.

FIRST, appellants claim the earlier judgment was substantially modified because the second amended judgment removed the $220,000 attorney fee award against Ridge, leaving Vincent as the only judgment debtor on that award. This, however, was a modification of the separately appealable April 10, 2015 fee order, not the first amended judgment. (See *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1080 (*Erickson*).) Thus, this issue is before us only on appeal from the fee order.

SECOND, appellants contend the second amended judgment substantially changed the earlier judgment by jointly awarding Vincent and Ridge the sum of $214,868 in costs. But the April 10, 2014 fee order awarded those costs to both parties. Noting that Vincent and Ridge each made section 998 offers, the court determined that "the plaintiffs are not entitled to recover their post-offer costs, and shall pay the defendant's costs from the time of the offer." Again, this ruling, which is appealable from the fee order, did not constitute a substantial change from the first amended judgment. (See *Torres*, *supra*, 154 Cal.App.4th at p. 222.)

THIRD, appellants maintain that appellants and Togetherness should not be jointly and severally liable for the attorney fees and costs awarded to Vincent. Once again, this

ruling, which is appealable from the fee order, did not constitute a substantial change from the first amended judgment. (See *Torres*, *supra*, 154 Cal.App.4th at p. 222.)

FOURTH, appellants note that the second amended judgment awarded them $220,000 in attorney fees against Vincent only. As we have explained above, that is a modification of the April 10, 2015 fee order and not the first amended judgment. (See *Erickson*, *supra*, 126 Cal.App.4th at p. 1080.)

FIFTH, appellants reiterate their argument that both Ridge and Vincent are not entitled to recovery of the $214,868 awarded for costs. As previously discussed, the fee order awarded costs to both parties.

SIXTH, appellants raise an issue regarding Jackson's liability for the $220,000 fee award. This is misleading because Jackson was held liable only on the theory of conversion. As discussed below, attorney fees are not available for the tort of conversion. In any event, Jackson's liability for the award is appealable from the April 10, 2015 fee order.

FINALLY, the last two alleged substantial modifications involve the offsets made by the trial court in the second amended judgment. Specifically, the $15,000 owed by Jackson to Christie and the $37,020.48 owed by Ridge to appellants and Togetherness were credited against the amounts appellants and Togetherness owe Vincent. This is not a substantial change from the first amended judgment, which expressly provided that "[t]he judgment on the complaint and cross-complaint are subject to the right of offset." The offsets at issue were authorized in the separately appealable August 13, 2015 order granting respondent's motion to amend the judgment. To the extent appellants challenge the offsets, the issue is before us on appeal

from that post-judgment order. Indeed, it makes sense to conclude that a separately appealable order after final judgment does not substantially modify the judgment itself for purposes of computing the time in which to file a notice of appeal. Any problem the parties might have with the amendment can be pursued through a separate appeal of the post-judgment order. (*Dakota Payphone*, *supra*, 192 Cal.App.4th at pp. 504-505.)

In sum, the purpose of the second amended judgment was to insert the various costs, attorney fees and offsets previously ordered by the trial court. Since the second amended judgment did not substantially modify the first amended judgment, it did not supersede the first amended judgment and become the one final, appealable judgment in the case. (*Torres*, *supra*, 154 Cal.App.4th at p. 222.) Thus, the time to appeal the merits of the underlying judgment was not extended. (*Ibid.*) The parties had 60 days from notice of entry of the first amended judgment, or 180 days from entry of that judgment, to file a notice of appeal. (Cal. Rules of Court, rule 8.104 (a)(1)-(3).)[7] They failed to do so.[8]

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[7] All subsequent rule references are to the California Rules of Court.

[8] In a supplemental brief, appellants suggest that they timely appealed the first amended judgment. They state that because no notice of entry was served, the last day to appeal from that judgment was May 30, 2015. They point to a notice of appeal filed on April 22, 2015. The problem with this argument, assuming the dates are correct, is that appellants' notice of appeal identifies the "April 10, 2015 rulings on submitted matters, and each of them," as the subject of the appeal. Certainly, we are bound to construe the notice of appeal broadly, in favor of its sufficiency. (See Rule 8.100(a)(2); *Knodel v. Knodel* (1975) 14 Cal.3d 752, 762.) But given that appellants' notice of

Consequently, their attempted appeal and cross-appeal from the second amended judgment were untimely and must be dismissed. (Rule 8.104(b) [failure to file a timely notice of appeal is jurisdictional and requires dismissal of the appeal]; see *Dakota Payphone*, *supra*, 192 Cal.App.4th at p. 509.)

With that said, we have considered the effect of Rule 8.104(d)(2), which gives us discretion to save an untimely notice of appeal by treating it as premature. That rule provides: "The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment."

It is possible, therefore, to "save" the appeal and cross-appeal from the original judgment by treating them as prematurely filed. In that case, we would have discretion to treat the premature appeals as an appeal and cross-appeal from the first amended judgment. (Rule 8.104(d)(2); *Good v. Miller* (2013) 214 Cal.App.4th 472, 475.) We decline to exercise that discretion with respect to appellants' appeal. Their appeal from the original judgment was dismissed for numerous failures to follow the rules of appellate procedure. The dismissal occurred shortly after the first amended judgment was entered. It would be inappropriate to declare the notice of appeal premature for purposes of "saving" the appeal when the appeal ultimately was dismissed. In other words, even if we treated notice of appeal from the original judgment as a timely notice of appeal from the first amended judgment, the appeal still was dismissed.

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appeal specifically limited the appeal to the April 10, 2015 fee order, we cannot reasonably construe it to include a challenge to the first amended judgment entered on December 1, 2014.

The situation is different with respect to the cross-appeal. Vincent and Ridge's notice of cross-appeal specifically stated: "To the extent that this cross-appeal is deemed to be premature, Cross-appellants request that it be deemed timely filed on the entry of judgment on the order vacating the judgment and ordering a new judgment." We grant this request and exercise our discretion to treat the notice of cross-appeal as timely filed from the first amended judgment. (Rule 8.104(d)(2).)

For the foregoing reasons, respondents' motion to dismiss appellants' attempted appeal from the second amended judgment is granted. On our own motion, we dismiss as untimely respondents' attempted cross-appeal from the second amended judgment. As a result, the only issues before us are those relating to (1) Vincent and Ridge's cross-appeal from the December 1, 2014 first amended judgment, (2) the April 10, 2015 fee order,[9] (3) the July 23, 2015 order granting Vincent and Ridge's motion for appellate attorney fees, and (4) the August 13, 2015 order granting respondents' motion to amend the judgment.

2. Denial of Motion to Strike Vincent and Ridge's Memoranda of Costs

Vincent and Ridge filed two memoranda of costs (cost bills) seeking costs for defending appellants' complaint ($233,747) and for prosecuting their cross-complaint ($2,668). The cost bills were timely filed within 15 days of notice of entry of the original judgment (Rule 3.1700(a)(1)), but they were served by electronic

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[9] Respondents also move to dismiss the appellants' appeal from the April 10, 2015 fee order. They contend the appeal must be dismissed because it fails to account for the dismissal of Togetherness's appeals. We deny the motion. We also deny respondents' motion to strike portions of appellants' briefs.

service after the close of business on that date. Under former Rule 2.251(h)(4), a document that is electronically served "after the close of business is deemed to have occurred on the next court day." Appellants moved to strike the cost bills as untimely because they were served a day late.

The trial court denied appellants' motion, citing section 1010.6, subdivision (a)(4), which extended the time for filing and serving the cost bills by two days since notice of entry of the original judgment was served via electronic mail. As appellants point out, however, Vincent and Ridge relied on the two-day extension in filing their cost bills. Thus, the extension did not render service of the costs bills timely in connection with the original judgment.

But, as the trial court noted, the original judgment was vacated and superseded by the first amended judgment on December 1, 2014. The court determined this "arguably makes the filing [of the cost bills] on August [18], 2014 premature." We agree. The vacatur of the original judgment rendered it unenforceable, but the cost bills remained on file pending entry of a new judgment. Because the cost bills were filed and served *before* the first amended judgment was entered, they were prematurely served as opposed to being late.

It is well established that "time limitations pertaining to a memorandum of costs are not jurisdictional [citation], and the premature filing of a memorandum of costs is treated as 'a mere irregularity at best' that does not constitute reversible error absent a showing of prejudice. [Citations.] Rather, courts treat prematurely filed cost bills as being timely filed." (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 880; *Laurel Hills Homeowners Assn. v. City Council* (1978) 83

Cal.App.3d 515, 528; *Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556, 566.) There is no reason to deviate from this rule. Appellants do not claim they were prejudiced by the premature filing and service of the cost bills. Nor have they shown that the trial court erred by treating the premature filing as a mere irregularity.

3. Validity of the Section 998 Offers

Appellants raise several arguments in support of their claim that Vincent and Ridge's section 998 offers were invalid. Because we find the first one dispositive, we need not address the others.

a. Standard of Review

"As a general rule, the prevailing party in a civil lawsuit is entitled to recover its costs. ([§ 1032].) However, section 998 establishes a procedure for shifting the costs upon a party's refusal to settle. If the party who prevailed at trial obtained a judgment less favorable than a pretrial settlement offer submitted by the other party, then the prevailing party may not recover its own postoffer costs and, moreover, must pay its opponent's postoffer costs, including . . . expert witness costs. (§ 998, subd. (c)(1).)" (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 798 (*Barella*).)

"We independently review whether a section 998 settlement offer was valid. In our review, we interpret any ambiguity in the offer against its proponent. [Citation.] The burden is on the offering party to demonstrate that the offer is valid under section 998. [Citation.] The offer must be strictly construed in favor of the party sought to be bound by it. [Citation.]." (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 86

(*Ignacio*); see *Prince v. Invensure Ins. Brokers, Inc.* (2018) 23 Cal.App.5th 614, 622.)

b. Vincent and Ridge's Section 998 Offers Were Invalid

Appellants contend the section 998 offers to compromise were invalid because they conditioned acceptance upon the release of claims that are not part of the instant lawsuit. The trial court found that "the CCP 998 offers by Vincent and Ridge were valid," but did not elaborate on this finding.

To be valid, a section 998 offer "must not dispose of any claims beyond the claims at issue in the pending lawsuit." (*Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117, 121 (*Chen*); *McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 706 ["a section 998 offer requiring the release of claims and parties not involved in the litigation is invalid as a means of shifting litigation expenses"]; *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 700-701 [same].)

In *Ignacio*, our colleagues in Division 8 held that a section 998 offer that sought to release the defendant and others from claims outside the scope of the pending litigation was invalid. (*Ignacio*, *supra*, 2 Cal.App.5th at pp. 83, 90.) The offer in that case proposed to release the offerees "'from any and all claims, demands, liens, agreements, contracts, covenants, action, suits, causes of action, obligations, controversies, debts, costs, expenses, damages, judgments, orders, and liabilities of whatever kind and nature in law, equity, or otherwise, whether now known or unknown, suspected, or unsuspected, that have existed or may have existed or which do exist, or which hereinafter can, shall or may exist.'" (*Id.* at p. 88, italics omitted.) The offer also contained a waiver of Civil Code section 1542. (*Ignacio*, at p. 88.)

The court concluded, based on the offer's language and the waiver, that the offer "applies not just to all claims arising out of the April 10, 2013 accident, but to 'any and all claims' the releasees may have against the releasors 'whether now known or unknown, suspected or unsuspected, that have existed or may have existed or which do exist, or which herein can, shall or may exist . . . .' Such an unlimited release goes well beyond the scope of the litigation, and renders the offer invalid under section 998." (*Id.* at p. 89.)

In this case, paragraph (v) of the section 998 offers states: "The parties to this offer are to respectively bear their own costs and attorney fees incurred both in relation to the within action *and with respect to any other litigation involving any of the parties to the within action.*" (Italics added.) As respondents' counsel conceded, "there's about ten other litigations that have arisen between these parties or related to [these parties]." Thus, an acceptance of the offers would have required appellants and Togetherness to release any claims to costs and attorney fees incurred not only in the current litigation, but also in any other existing or future litigation involving the parties. Moreover, the release appears to extend to litigation involving just one of the parties, as it requires the parties to bear their own costs and attorney fees incurred "with respect to *any* other litigation involving *any* of the parties to the within action." (Italics added.) This unlimited release goes beyond the scope of this litigation, rendering the offers invalid under section 998. (See *Ignacio*, *supra*, 2 Cal.App.5th at p. 89.) Additionally, by including such a release, the offers made it impossible for appellants and Togetherness to clearly evaluate the monetary worth of the offers. (See *Barella*, *supra*, 84 Cal.App.4th at p. 801.)

We recognize that other language in the offers appears to attempt to limit the release to the instant litigation. Paragraph (iii) states: "Pursuant to section 998 and *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 272 [(*Linthicum*)], [Vincent and Ridge offer] mutual and general releases with the waiver of all claims raised in the instant action by and/or against the parties to this offer, all claims which could have been raised in the instant action by or against any party." This same paragraph, however, also provides for "a waiver of the protections afforded by Civil Code section 1542." That section states that "[a] general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release, and that if known by him or her, would have materially affected his or her settlement with the debtor or released party."

While it is true that "a release of unknown claims arising only from the claim underlying the litigation itself does not invalidate the offer," (*Ignacio*, *supra*, 2 Cal.App.5th at p. 89), it is also true that "an unlimited release [which] goes well beyond the scope of the litigation . . . renders the offer invalid under section 998." (*Ibid.*) If Vincent and Ridge's section 998 offers were limited only to the causes of action actually filed in this litigation, why did they require a general Civil Code section 1542 waiver? No language in this statute limits unknown claims only to those arising from the lawsuit at issue. Indeed, during the hearing on Vincent and Ridge's motion for section 998 attorney fees and costs, respondents' counsel conceded their intent was "to fashion an offer that ended the litigation in all forums between all parties forever." (See *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, 1131 ["[S]ettlement agreements typically contain a waiver of all

claims 'known and unknown,' a provision that has been held to invalidate a section 998 offer"].)

We are not persuaded by Vincent and Ridge's reliance upon our decision in *Linthicum*. In that case, we recognized that a section 998 offer that includes a release of claims outside the scope of the litigation is invalid. (*Linthicum*, *supra*, 175 Cal.App.4th at p. 271.) We concluded, however, that the release at issue was limited to the instant lawsuit. (*Id.* at p. 272.) The release required "'each side to bear [its] own costs and fees, with a mutual release of all current claims against one another and a mutual dismissal with prejudice of the parties' lawsuits against one another.'" (*Ibid.*) We noted that "[t]he terms costs, fees and 'mutual dismissal' are obviously limited to the instant lawsuit. There is no reason to interpret the term 'all current claims' found in the same sentence as referring to anything other than the same lawsuit." (*Ibid.*)

Here, in contrast, the section 998 offers required appellants and Togetherness to forego any claims to attorney fees and costs "with respect to *any other litigation* involving any of the parties to the within action." (Italics added.) This language necessarily contemplates the release of claims outside the scope of the instant lawsuit. (See *Ignacio*, *supra*, 2 Cal.App.5th at pp. 83, 90.)

At best, Vincent and Ridge's section 998 offers, by their terms, were ambiguous. "Indeed, because the proponent of the offer has the burden of establishing its validity, ambiguity as to whether the offer encompasses claims beyond the current litigation is sufficient to render the offer invalid under section 998." (*Ignacio*, *supra*, 2 Cal.App.5th at pp. 87-88, citing *Chen*, *supra*, 164 Cal.App.4th at p. 122, fn. 5, italics omitted.) We conclude the offers in this case were invalid.

c. Effect of Our Ruling on Togetherness

As previously discussed, Togetherness is not a party to these appeals. It was dismissed due to its suspension by the Franchise Tax Board. "As a general rule, where only one of several parties appeals from a judgment, the appeal includes only that portion of the judgment adverse to the appealing party's interest, and the judgment is considered final as to the nonappealing parties." (*Estate of McDill* (1975) 14 Cal.3d 831, 840.) "The exception to this general rule is where the part of the judgment appealed from is so interwoven and connected with the remainder on appeal the court must consider the whole case; and if a reversal is ordered it should extend to the entire judgment as deemed necessary to accomplish justice." (*Warren v. Merrill* (2006) 143 Cal.App.4th 96, 108, fn. 3; *Estate of McDill*, at p. 840; see *Eby v. Chaskin* (1996) 47 Cal.App.4th 1045, 1049 [sanctions award reversed as to appealing and nonappealing parties].)

In this case, the issues regarding the section 998 offers are connected and intertwined. Given that the offers were invalid, it would be unjust not to extend to Togetherness the reversal of both the April 10, 2014 order awarding attorney fees to Vincent and costs to Vincent and Ridge, and the July 23, 2015 order awarding attorney fees on appeal to Vincent and Ridge. We express no opinion, however, regarding whether Togetherness has any liability to Vincent for attorney fees and costs on the cross-complaint.

4. Appellate Attorney Fees

Appellants raise two issues regarding the parties' rights to attorney fees on appeal. First, appellants contend the trial court erred by denying their motion for $17,220.30 in appellate attorney fees. Appellants sought the fees against Vincent and

Ridge for time spent defending the prior appeal before this court. (See *Pequignot v. Vincent*, *supra*, B235047, B235672.) On September 17, 2014, the trial court issued a minute order denying the motion. It found "that there was no prevailing party, and that prevailing party status applies to the litigation as a whole, and not to discreet portions." Appellants did not appeal the order, which was entered before entry of the appealable judgment, i.e., the first amended judgment.

Although a prejudgment order denying a motion for attorney fees is not appealable (*Meyers v. Guarantee Sav. & Loan Assn.* (1978) 79 Cal.App.3d 307, 313), appellate courts typically will treat an appeal from the prejudgment order as being taken from the subsequently entered final judgment. (§ 904.1, subd. (a)(1); see *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 997.) The problem here is that appellants appealed neither the minute order nor the first amended judgment. Consequently, we lack jurisdiction to consider their challenge to the denial of the fee motion. (See § 906; *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119.)

Second, appellants contest the trial court's award of $48,807.50 in appellate attorney fees to Vincent and Ridge. That award was issued in a minute order dated July 23, 2015. Appellants timely appealed that post-judgment order.

Vincent and Ridge sought $61,806.50 for successfully defending appellants' appeal from the original judgment. We ultimately dismissed that appeal because of appellants' chronic delays in acquiring the record on appeal. The attorney fees were incurred to defend appellants' "repeated attempts to resurrect their dismissed appeal and/to delay procuring the record on appeal."

Section 998, subdivision (c)(1) allows for prevailing party attorney fees when the parties' contract includes an attorney fees provision. (*Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125, 140.) Vincent and Ridge's fee request was based upon their section 998 offers and the attorney fees clause in the lease. They noted that "[t]he court has already decided that [appellants] failed to obtain a more favorable result at trial as compared to what now, in retrospect, appears to be very reasonable and generous 998 settlement offers." As previously discussed, the section 998 offers were invalid because they sought to release claims outside the scope of the instant litigation. (*Ignacio*, *supra*, 2 Cal.App.5th at p. 89.) For that reason, the award of appellate attorney fees to Vincent and Ridge must be reversed.

5. On Remand, the Trial Court Should Clarify the Amount of Attorney Fees and Costs Awarded to Vincent on the Cross-Complaint

In their petition for rehearing, respondents argue that notwithstanding our conclusion that the section 998 offers are invalid, Vincent is entitled to her attorney fees and costs in prosecuting the breach of contract claim in the cross-complaint. Appellants concede this issue, but argue that the trial court improperly allowed attorney fees claimed by attorney David Cohen based upon a declaration submitted by attorney Barry E. Cohen. They argue the matter should be remanded to the trial court to decide the amount of attorney fees and costs that should be awarded to Vincent on the cross-complaint. Respondents also support a remand for this purpose.

Because the matter must be remanded, we conclude the trial court is in the best position to decide the issue of David

Cohen's fees. It is not clear from the record how much of the total $533,225 fee award was allocated to the prosecution of the cross-complaint. We only know that Vincent requested $92,209 in fees in that regard. It is possible the court awarded less than $92,209 on the cross-complaint and that none of David Cohen's fees were included in the sum that was awarded. The trial court must clarify this point on remand.

6. Challenges to the Second Amended Judgment

Appellants argue the trial court (1) lacked authority to alter the presumed measure of damages for the converted chattel, (2) erred by reducing the amount of prejudgment interest, (3) improperly awarded rent to Vincent, (4) failed to award damages for the loss of jewelry and French beauty products, (5) improperly used Good Will and Salvation Army donation guides to value the converted high fashion items, (6) abused its discretion by excluding the testimony of appellants' property appraisal expert, and (7) abused its discretion by excluding the audio portion of a video. Because the appeal from the second amended judgment has been dismissed, these arguments are not properly before us. They should have been raised in an appeal from the first amended judgment. (See § 906; *In re Marriage of Weiss*, *supra*, 42 Cal.App.4th at p. 119.)

7. Offsets

Appellants contend in their opposition to respondents' motion to dismiss that the trial court erred by offsetting the amounts owed to them by Ridge and Jackson against the amounts owed to Vincent by appellants and Togetherness. We agree this was improper. We accordingly reverse the August 13, 2015 order granting the motion to amend the judgment to the extent it permitted the offsets.

B. Respondents' Cross-Appeals

1. Judicial Estoppel

Respondents contend the trial court abused its discretion by rejecting their judicial estoppel defense. They maintain appellants' damages should have been limited to $14,100 -- the personal property valuation set forth in their 2010 bankruptcy schedules. As the trial court observed, "nowhere in . . . the bankruptcy filings is an acknowledgment of ownership of anything approaching even 1% of what [appellants] are seeking to recover in this lawsuit."[10]

Judicial estoppel prevents a party from asserting a position in a legal proceeding contrary to a position the party previously adopted in that or another earlier proceeding. It is an extraordinary remedy invoked only when a party's inconsistent behavior would otherwise result in a miscarriage of justice, and only after a very high threshold is cleared. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 130-131 (*Gottlieb*); *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 (*Jackson*).)

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[10] This judicial estoppel issue is cognizable from Vincent and Ridge's cross-appeal from the first amended judgment. Appellants move to dismiss this portion of the cross-appeal, claiming the trial court's decision to reject the judicial estoppel defense is a nonappealable order. The case relied upon by appellants, *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422, reiterates the rule that application of the judicial estoppel doctrine is discretionary, but does not suggest that a decision to invoke or reject the doctrine is nonappealable. Indeed, the Supreme Court upheld the Court of Appeal's determination that judicial estoppel did not apply. (*Id.* at pp. 421, 425.) We deny appellants' motion to dismiss.

The doctrine of judicial estoppel applies "when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson*, *supra*, 60 Cal.App.4th at p. 183.) Because it is an equitable doctrine, "'its application, even where all necessary elements are present, is discretionary.'" (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 132.)

"The third *Jackson* factor requires that the party to be estopped was successful in asserting the first position. [Citation.]." (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 845.) As explained by the United States Supreme Court, "[a]bsent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations' [citation], and thus poses little threat to judicial integrity." (*New Hampshire v. Maine* (2001) 532 U.S. 742, 750-751 [149 L.Ed.2d 968, 978].) In contrast, when a party succeeds in persuading a court to accept that party's earlier position, "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled' [citation.]." (*Id.* at p. 750 [*Id.* at p. 978].)

In *Gottlieb*, the trial court granted summary judgment in the defendant's favor on the ground of judicial estoppel. (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 120.) In an earlier bankruptcy proceeding, the plaintiff had failed to list an asset it was required to disclose. (*Id.* at pp. 120, 136.) The bankruptcy

court issued a stipulated order, but then dismissed the case two months later. (*Id.* at p. 146.) The Court of Appeal reversed the summary judgment (*id.* at p. 147), explaining the plaintiff did not "successfully assert[] an inconsistent position in a prior case." (*Id.* at p. 130, italics omitted.) The court stated: "[T]he bankruptcy court did not adopt or accept the truth of [the plaintiff's] position that [his company] did not have any legal claims. Neither the automatic stay nor the stipulated order constituted prior success. And the bankruptcy case was dismissed without confirmation of a plan of reorganization. In these circumstances, the trial court erred in barring the complaint under principles of judicial estoppel." (*Ibid.*)

Here, there is no evidence that the bankruptcy court adopted appellants' earlier position regarding the value of their personal property or that it "'accepted [their position] as true and granted relief on that basis.'" (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 137, italics omitted.) Nothing in the record suggests the bankruptcy court confirmed a payment plan or discharged any of appellants' debts. To the contrary, the record reveals appellants filed their bankruptcy petitions in early 2010 and the proceedings were subsequently dismissed. "Such a dismissal is intended to "'undo the bankruptcy case, as far as practicable, and restore all property rights to the position in which they were found at the commencement of the case.'"" (*Id.* at p. 141.)

Respondents cite *Billmeyer v. Plaza Bank of Commerce* (1995) 42 Cal.App.4th 1086, for the proposition that the bankruptcy court's order granting Vincent relief from the automatic stay was sufficient to satisfy the success requirement. In *Billmeyer*, however, the order terminating the automatic stay was a comprehensive order, which included a determination of

dollar amounts owing, lender liability claims, and future use and ownership of the property at issue. (*Id.* at p. 1093.) In contrast, the order in this case did nothing more than allow Vincent to proceed with the eviction for nonpayment of rent. It contains no findings or determinations regarding appellants' personal property valuation. (See *Gottlieb*, *supra*, 141 Cal.App.4th at p. 137.)

Having failed to satisfy the third *Jackson* factor, respondents did not meet their burden of establishing their judicial estoppel defense. Moreover, even if all the necessary elements were present, application of the doctrine still would have been discretionary. (*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc.*, *supra*, 36 Cal.4th at p. 422; *Gottlieb*, *supra*, 141 Cal.App.4th at p. 132.) We conclude respondents have not demonstrated an abuse of the trial court's discretion.

2. Award of Attorney Fees to Appellants and Togetherness

The trial court awarded appellants and Togetherness $220,000 in attorney fees for the period preceding service of Vincent and Ridge's section 998 offers. Although the fee order did not specify the basis for the award, it presumably was made under Civil Code section 1965, which provides that "[a]ny landlord who retains personal property in violation of this chapter shall be liable to the tenant in a civil action for [actual damages]." (*Id.,* subd. (e)(1).) Subdivision (e)(3) allows the court discretion to "award reasonable attorney's fees and cost[s] to the prevailing party." (*Id.*, subd. (e)(3).)

Respondents contend the trial court erred by awarding appellants and Togetherness their attorney fees because they did not prevail on their Civil Code section 1965 cause of action.

Appellants respond that because their conversion cause of action was premised on Vincent's violation of Civil Code section 1965, the court appropriately awarded the fees. Neither the record nor the law supports appellants' position.

a. Standard of Review

We review an order granting or denying attorney fees for an abuse of discretion. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 148 (*Graciano*).) "Because the 'experienced trial judge is the best judge of the value of professional services rendered in his [or her] court,' we will not disturb the trial court's decision unless convinced that it is clearly wrong, meaning that it is an abuse of discretion. [Citations.] However, "'[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action. . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion . . . .'" [Citations.]" (*In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1052.)

b. The Trial Court Abused Its Discretion by Awarding Attorney Fees to Appellants and Togetherness

Plaintiffs typically plead violations of Civil Code section 1965 and conversion as separate causes of action. (See, e.g., *Rie v. Los Angeles Police Dept.* (C.D. Cal. Apr. 30, 2009, No. CV 08-0097-CAS (JTL) 2009 WL 1181622, *4.) In this case, the operative fourth amended complaint alleged four distinct causes of action: (1) violation of Civil Code section 1965, (2) conversion, (3) negligence and (4) promissory estoppel. Appellants and Togetherness requested attorney fees in conjunction with the Civil Code section 1965 claim, and "damages other than value, as set forth in Civ. Code, § 3336" on the conversion claim. They did

not allege a violation of Civil Code section 1965 as a basis for their conversion cause of action.

"'Conversion is generally described as the wrongful exercise of dominion over the personal property of another. [Citation.] The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property, (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages. [Citation.]'" (*Regent Alliance Ltd. v. Rabizadeh* (2014) 231 Cal.App.4th 1177, 1181.)

Section 1174 and Civil Code section 1965 govern how a landlord may lawfully exercise dominion over the personal property of a tenant who is evicted. Under section 1174, subdivision (g), the landlord may store the personal property until it is released under Civil Code section 1965. Although a landlord who stores a former tenant's personal property exercises control and possession over the property (the first element of conversion), this is not wrongful if the landlord complies with the statutes. Under Civil Code section 1965, the tenant must make a written request for return of the property, and if the landlord makes a written, itemized demand for the costs of storage, the tenant must pay the costs of storage before the landlord must surrender the property. (*Id.*, subds. (a)(1)-(3).) If the tenant fully complies with the statute, and the landlord does not, the landlord will be subject to civil suit under the statute *or* any other legal remedy, such as conversion. (*Id.*, subds. (e), (f).)

The first amended judgment awarded appellants and Togetherness "[t]he sum of $252,019.36 on the causes of action for conversion and negligence." Judgment was entered for respondents "on all other claims and causes of action," which

necessarily included the causes of action for promissory estoppel and violation of Civil Code section 1965. This is consistent with the trial court's pronouncement in its statement of decision that "defendants Ridge and Vincent are culpable under theories of negligence and conversion. Defendants Jackson and Sequels are culpable only under a theory of conversion. *Defendants are not responsible under any other theories aside from conversion and negligence*." (Italics added.)

Appellants and Togetherness did not appeal the first amended judgment. Although they did file 74 pages of objections to the trial court's nine-page statement of intended decision, at no point did they seek a clarification or modification of the statement to reflect that they prevailed on their Civil Code section 1965 cause of action. Specifically, they posed no objection to the sentence stating "[d]efendants are not responsible under any theories aside from conversion and negligence."

"As stated in *Russell v. United Pacific Ins. Co.* (1963) 214 Cal.App.2d 78 . . . , 'The general rule is that attorneys' fees are not a proper item of recovery from the adverse party, either as costs, damages or otherwise, unless there is express statutory authority or contractual liability therefor [citations]. Section 3336 of the Civil Code, which sets out the measure of damages in conversion actions, does not expressly provide for attorneys' fees for the converting of property. It has long been held that such fees are not within the rule of damages provided for by that section [citations].' (*Id.* at p. 91. . . .)" (*Haines v. Parra* (1987) 193 Cal.App.3d 1553, 1559 (*Haines*); accord *Viner v. Untrecht* (1945) 26 Cal.2d 261, 272 ["Attorney's fees are not recoverable under [Civil Code section 3336]"]; G*ladstone v. Hillel* (1988) 203 Cal.App.3d 977, 991 [same]; *W. & P. Nicholls v. Mapes* (1905)

1 Cal.App. 349, 356 [same]; see *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1986) 185 Cal.App.3d 1149, 1157-1158 [reversing award of attorney fees on conversion claim].)

Here, there was no basis, statutory or contractual, for appellants and Togetherness to recover prevailing party attorney fees on their conversion claim. (See Civ. Code, § 3336; *Haines*, *supra*, 193 Cal.App.3d at p. 1559; *Viner v. Untrecht*, *supra*, 26 Cal.2d at p. 272.) The result would have been different had they prevailed on their Civil Code section 1965 cause of action, but the first amended judgment, which appellants did not appeal, adjudicated that claim in respondents' favor. Hence, the propriety of that adjudication is not before us on appeal. (See *CC-California*, *supra*, 51 Cal.App.4th at p. 1047; *Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 436; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 ["'If a judgment or order is appealable, an aggrieved party must file a timely appeal or forever lose the opportunity to obtain appellate review'" (italics omitted)].)

Appellants maintain that comments in the trial court's statement of decision suggest that appellants and Togetherness did prevail on their Civil Code section 1965 claim. The statement of decision, however, makes only two references to Civil Code section 1965. It states that "[t]he form of the landlord's notice of storage expenses as stated in Civil Code section 1965 (a)(3) shall '. . . itemize all charges, specifying the nature and amount of each item of cost.'" The court determined "this [notice] should be a separate and stand alone document containing the itemization required by Civil Code section 1965." It found that respondents "did not give the tenants a clear and concise notice of what they needed to pay to retrieve their belongings. As an extension of

this, when Ridge prevented [appellants and Togetherness] from retrieving their property on the day of the lockout (July 27, 2010), and then put it into storage, he accomplished a *conversion* of [the] property." (Italics added.) Nothing in this language implies that appellants and Togetherness prevailed on their separate cause of action for violation of Civil Code section 1965. To the contrary, the court made it clear that it was awarding damages based on theories of negligence and conversion, neither of which entitles the prevailing party to attorney fees.

In any event, the trial court's comments can be reconciled with its decision to award damages based only on the conversion and negligence claims. A landlord is immunized from liability for the tort of conversion if he or she follows the mandates in section 1174 and Civil Code section 1965 for disposing of the personal property. Here, the court clarified that those mandates were not satisfied and, as an extension of that, respondents were liable for conversion. (See Civ. Code, § 1965, subd. (f).)

During the hearing on the motion for attorney fees, appellants' counsel argued that our opinion in the prior appeal confirms that "pragmatically commonsensibly [*sic*] plaintiffs have won the 1965 claim." Not so. We upheld the trial court's decision to issue a writ of possession based, in part, on the court's finding that Vincent and Ridge had not complied with the requirements of Civil Code section 1965. (*Pequignot v. Vincent*, *supra*, B235047, B235672.) We expressed no opinion on whether this finding justified entering judgment in appellants' favor on their cause of action for violation of that statute. That was the purpose of the 29-day court trial.

Additionally, it is undisputed that appellants' recovery of prejudgment interest was based on Civil Code section 3336,

which contains a statutory presumption that damages for conversion include interest. In their opening brief, appellants argue the trial court erred by declining to award them additional prejudgment interest pursuant to that statute. This argument is consistent with our conclusion that appellants' claim for conversion is governed by Civil Code section 3336 and not by Civil Code section 1965. Notably, appellants cite no authority suggesting that the successful prosecution of their conversion cause of action entitled them to recoveries under both statutes.

In the absence of a statutory or contractual basis for awarding appellants and Togetherness attorney fees on the conversion claim, the trial court abused its discretion by awarding such fees. We reverse that award.[11]

3. Award of Prejudgment Interest

Respondents challenge the $14,209 award of prejudgment interest to appellants and Togetherness. They assert that the prejudgment interest, which was awarded under Civil Code section 3336, was improper based on Civil Code section 3287. We disagree.

Civil Code section 3336 states, in part: "The detriment caused by the wrongful conversion of personal property is presumed to be: [¶] . . . [t]he value of the property at the time of the conversion, with the interest from that time . . . ." Thus, a "successful plaintiff in an action for conversion is entitled to recover prejudgment interest from the time of the conversion . . . ." (*Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 Cal.App.4th 692, 694, 702.)

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[11] Because we reverse the award of attorney fees, we need not reach respondents' other arguments relating to the award.

Respondents argue interest is not appropriate here because the value of the converted personal property was uncertain. This argument lacks merit because Civil Code section 3336 does not require that damages be capable of ascertainment before prejudgment interest can be awarded. (*Minor v. Christie's Inc.* (N.D. Cal. July 12, 2010, No. C08-05445 WHA) 2010 WL 2735040, *6, fn. 3.) Unlike Civil Code section 3287, subdivision (a), which limits prejudgment interest in noncontractual tort actions to ascertainable damages (see *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1997) 60 Cal.App.4th 13, 21), section 3336 contains no such restriction. We will not read into the statute a requirement that is not there. (*Minor*, at p. *6, fn. 3; see *San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn.* (1990) 222 Cal.App.3d 146, 149 ["a court engaged in statutory construction cannot create exceptions, contravene plain meaning, insert what is omitted, omit what is inserted, or rewrite the statute"].) We therefore affirm the award of prejudgment interest.

4. Denial of Pre-trial Discovery

Respondents contend the trial court abused its discretion by declining to allow discovery into the financial records corroborating appellants' acquisition of their converted personal property. Noting that this is a protective cross-appeal, respondents state that "[i]f there is a new trial . . . the discovery denied in the first instance should be ordered. . . . If the trial court orders are all affirmed, [respondents] will withdraw their appeal of the discovery order."

Although the attorney fees and costs awards are being reversed to the extent Vincent is entitled to fees and costs on the cross-complaint, we are not ordering a retrial. Given that we are

affirming the underlying first amended judgment on the merits, the protective cross-appeal concerning the discovery order is moot. (See *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 510, 546, superseded by statute on another ground as stated in *United Farm Workers of America v. Dutra Farms* (2000) 83 Cal.App.4th 1146, 1163-1164.)

III.

DISPOSITION

The December 1, 2014 first amended judgment is affirmed.

The attempted appeal and cross-appeal from the August 30, 2015 second amended judgment are dismissed as untimely.

The trial court's April 10, 2015 post-judgment order awarding appellants and Togetherness $220,000 in attorney fees is reversed. The April 10, 2015 order awarding Vincent $533,225 in attorney fees and Vincent and Ridge $214,868 in costs also is reversed, except to the extent that Vincent is entitled to recover attorney fees and costs as the prevailing party on the breach of contract claim in the cross-complaint. As suggested by the parties, the matter is remanded to the trial court to determine the amount of such attorney fees and costs.

The trial court's July 23, 2015 post-judgment order awarding Vincent and Ridge $48,807.50 in appellate attorney fees is reversed.

The trial court's August 13, 2015 post-judgment order granting respondents' motion to amend the judgment is reversed to the extent it authorized an offset of the amounts owed by the parties.

In the interests of justice, the parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Henry J. Walsh, Judge
Superior Court County of Ventura

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