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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GWENDOLYN HARRIS, as Trustee, etc.,

Plaintiff and Appellant,

v.

DONALD E. BONANDER, as Co-trustee, etc.,

Defendant and Appellant.

F065732

(Super. Ct. No. 364063)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Hurl W. Johnson III, Judge.

Temmerman, Cilley & Kohlmann, James P. Cilley and Cathy E. Nelson for Plaintiff and Appellant.

Michael C. Normoyle; Crabtree, Schmidt, Robert W. Crabtree; McCormick, Barstow, Sheppard, Wayte & Carruth, Timothy J. Buchanan and Scott M. Reddie for Defendant and Appellant.

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Defendant/appellant appeals from a judgment holding him liable as trustee for acts that allegedly breached his fiduciary duties to the trust beneficiaries. We conclude the actions charged as breaches of duty were not taken in his capacity as trustee, but in his capacity as general partner of a related limited partnership. The beneficiaries had

previously released all their claims against defendant/appellant in his capacity as general partner. Because the evidence does not support a judgment against defendant/appellant on the claim litigated, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to 1991, H. Emory Bonander and Dorothy G. Bonander owned 75 percent of the shares of a corporation, Bonander Pontiac, Inc., the business of which was the sale and servicing of automobiles and trucks. The other 25 percent of the corporation was owned by their son, Donald Bonander. In 1991, Emory and Dorothy¹ created an estate plan. In addition to a will for each of them, the plan included two trusts and a partnership. The “BONANDER FAMILY 1991 TRUST” (family trust) initially included real property and all the shares of Bonander Pontiac then owned by Emory and Dorothy. Emory and Dorothy were the trustees of the family trust; their three children, Donald, Sharon Ratzlaff, and Gwendolyn Harris were named as successor co-trustees. The three children were the trustees of the second trust in their parents’ estate plan, the “BONANDER CHILDREN 1991 TRUST” (children trust). Emory and Dorothy, as trustees of the family trust, and Donald, Sharon, and Gwen, as trustees of the children trust, formed a general partnership, Bonander Properties. In 1997, the general partnership was dissolved and replaced with a limited partnership. Emory and Dorothy, as trustees of the family trust, were designated as the general partners of the Bonander Properties limited partnership; the trustees of both the family trust and the children trust were the limited partners.

In 1994, Bonander Properties purchased a parcel of real property known as the truck shop property. Bonander Pontiac began operating its truck parts and service departments on the truck shop property, added improvements, and paid rent to Bonander

¹ For purposes of clarity and convenience, we refer to members of the Bonander family by their first names. No disrespect is intended.

Properties for its use. There was no written lease for Bonander Pontiac's use of the property; Emory set the initial rent at \$9,000 per month. There was testimony at trial that the rent was set at this amount in order to create an income stream from which Bonander Properties could make payments to the lenders for the purchase of the truck shop property.

Emory died on October 10, 1998. Dorothy became the sole trustee of the family trust and the general partner of Bonander Properties. Donald became president and chief executive officer of Bonander Pontiac. At the time of his father's death, Donald owned 50 percent of Bonander Pontiac.

The rent paid by Bonander Pontiac to Bonander Properties for the use of the truck shop property was paid at the end of each month. At the end of October 1998, the month Emory died, the rent was reduced to \$8,000 per month. In January 1999, it was reduced to \$7,000; in April 2001, it was reduced to \$5,000 per month, where it remained until the time of trial. Donald testified he reduced the rent, after consultation with Dorothy. On April 23, 2001, Dorothy signed a designation of general manager, naming Donald as the general manager of Bonander Properties. On May 8, 2001, Dorothy died.

On Dorothy's death, Donald, Sharon, and Gwen became co-trustees of the family trust; as such, they believed they were also co-general partners of Bonander Properties. At that time, Bonander Pontiac was owned 55 percent by Donald and 45 percent by the family trust. Bonander Properties was owned 61.6299 percent by the children trust, 7.1267 percent each by Donald, Sharon, and Gwen, individually, and 16.99 percent by the family trust.

Pursuant to the terms of the estate planning instruments, after the deaths of Emory and Dorothy, Donald was to receive 100 percent ownership of Bonander Pontiac, but the distribution of assets was to be equalized, so that each of the three children received an equal share. Dorothy's will and the first codicil to it recognized that some adjustment in

allocation of estate taxes or an equalizing payment from Donald to his sisters might be required to accomplish this.

After Dorothy's death, the children were unable to agree on a distribution of the property of the estates. Sharon and Gwen sent letters to Donald, making proposals for distribution, demanding that the rent paid by Bonander Pontiac for use of the truck shop property be increased because it was below market value, and demanding payment of back rent by Bonander Pontiac, based on assertions that Donald had improperly reduced the rent.

On May 10, 2004, Sharon and Gwen, as co-trustees of the family trust, filed a petition for instructions in the probate court, alleging that the trust estate was ready to be distributed, but the beneficiaries could not agree on an equal distribution of the trust estate to the beneficiaries. They further alleged that Bonander Pontiac used property of the trust estate and paid rent at a rate unilaterally set by Donald below fair market value. In December 2005, Sharon died; her daughters, Melody Benway and Joy Sullivan, succeeded to her interest in the trust estate. On August 11, 2008, the trial court suspended Donald and Gwen as co-trustees of the family trust and appointed a third party as interim trustee.

Trial of the 2004 petition for instructions was scheduled for October 6, 2009. On October 5, 2009, the parties entered into a stipulation resolving some of the pending issues. The parties agreed to dismiss their claims without prejudice in order to mediate their disputes; they agreed to toll all statutes of limitations and other time-related bars. The mediation was unsuccessful, and, on April 12, 2011, Gwen filed a petition to surcharge trustee and recover trust assets; the petition alleged Donald reduced the rent paid by Bonander Pontiac to Bonander Properties without notifying his co-trustees; it sought to surcharge him for the underpayment of rent. It alleged claims for recovery of property pursuant to Probate Code sections 850 and 17200, and for breach of fiduciary

duty. On April 15, 2011, Donald, Gwen, Melody, and Joy entered into a settlement agreement that resolved all remaining issues, with the exception of a potential claim by Gwen, Melody, and Joy against Donald “for his alleged breach of fiduciary duty as a co-trustee of the Trust in connection with the amount of rent paid on behalf of Bonander Pontiac, Inc. for its use of” the truck shop property. This remaining “carved out” issue proceeded to court trial in July and August 2011.

At trial, evidence was presented concerning the decedents’ estate plan, including testimony of the attorney who drafted the documents concerning his understanding of the decedents’ intent. Testimony of three experts was received on the issue of the fair market rental value of the truck shop property. Donald testified that the rent reductions occurred before he became co-trustee, Emory had discussed with him a plan to reduce the rent once the cash flow was not needed to service the debt on the property, and Dorothy participated in each decision to reduce the rent while she was sole trustee of the family trust. Donald raised various procedural defenses, including the bar of the statute of limitations; he also asserted the claim was brought against him as co-trustee of the family trust, but the rent was determined by the partnership, Bonander Properties, and the corporation, Bonander Pontiac, not by the trustee.

The trial court ruled in favor of Gwen, Joy, and Melody. It rejected Donald’s statute of limitations argument, concluding the October 5, 2009, stipulation and order preserved the claim. The trial court found the rent on the truck shop property was not set at fair market value, but it was not required to be; it found the rent should not have been reduced, but should have been left at the \$9,000 per month figure set by Emory. The trial court found Donald, as trustee, breached his fiduciary duty by reducing the rent, resulting in damage to the trust beneficiaries. It concluded Donald was liable as a trustee de son tort for the reduction of rent during Dorothy’s lifetime, and as successor trustee for failing to increase the rent after her death. It awarded the difference between the rent

charged and \$9,000 per month from the date of Emory's death to the date of trial, less Donald's one-third share of that amount. The trial court declined to award double damages under Probate Code section 859, finding Donald did not act in bad faith.

Donald appeals, contending: the claim for back rent was time barred; Gwen failed to establish the family trust was damaged by the reduction of rent, because Bonander Properties owned the truck shop property and the trust was only a 16.99 percent partner in Bonander Properties; Donald could not be held liable for a reduction in rent that occurred before he became trustee; and substantial evidence does not support a finding he breached any fiduciary duty. Gwen cross-appeals, asserting the trial court erred in failing to award damages based on fair market rent and in failing to award double damages for Donald's bad faith actions.

DISCUSSION

I. Standard of Review

Interpretation of a will, trust instrument, or other written instrument presents a question of law, subject to de novo review, unless interpretation turns on the credibility of extrinsic evidence or a conflict therein. (*Burch v. George* (1994) 7 Cal.4th 246, 254; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Mooney v. County of Orange* (2013) 212 Cal.App.4th 865, 872.) We review findings of fact to determine whether there is any substantial evidence, contradicted or uncontradicted, to support them. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

II. Breach of Duty as Trustee

In his briefs, Donald raises numerous issues involving jurisdiction of the probate division of the trial court, expiration of the statute of limitations, and lack of evidence of damage to the trust, but we find one issue dispositive: Gwen failed to satisfy her burden of proving Donald breached a fiduciary duty as trustee to the beneficiaries of the family trust.

The only claim that was not released by the parties in their April 15, 2011, settlement agreement, and the only claim that went to trial and resulted in the judgment that is the subject of this appeal, was the claim of Gwen, Joy, and Melody against Donald as trustee of the family trust for breach of trust arising out of the reduction of rent paid by Bonander Pontiac to Bonander Properties for the use of the truck shop property during the period 1998 to the time of trial. The trustee of the family trust, as such, however, did not have the authority to change the rental agreement between Bonander Pontiac and Bonander Properties. Thus, the reduction of that rent prior to Dorothy's death or the failure to increase the rent subsequently was not a breach of any duty owed by the trustee to the family trust or its beneficiaries.

The April 13, 2011, petition to surcharge the trustee contained the following allegations. Gwen and Donald were co-trustees of the family trust from May 2001 to July 2008, and the trustee of the family trust is also the general partner of Bonander Properties. Bonander Pontiac leases the truck shop property, which is owned by Bonander Properties. After Dorothy's death, Donald unilaterally reduced the rent paid by Bonander Pontiac to Bonander Properties, without notifying the other trustees. This resulted in a substantial loss of income to Bonander Properties. Despite repeated requests, Donald, who is president of Bonander Pontiac, refused to pay fair market rental value for Bonander Pontiac's use of the property of Bonander Properties. The first two causes of action of the petition alleged a right to recover property pursuant to Probate Code sections 850 and 17200, respectively. The fourth cause of action alleged breach of fiduciary duty.² The prayer sought damages or an order declaring that Donald held "the real property and personal property, and the issues, receipts, and profits thereon," in trust for Gwen, and an order compelling him "to convey and transfer the property" to her.

² The third cause of action is captioned constructive trust, but a constructive trust is an equitable remedy, not a separate cause of action. It may be used to remedy a breach of fiduciary duty. (Civ. Code, § 2224; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600.)

Two days after the petition to surcharge was filed, the parties entered into the April 15, 2011, settlement agreement. The agreement recited that Gwen and Donald agreed to it individually, as co-trustees of the family trust and the children trust, as co-executors of Dorothy's estate, as partners in Bonander Properties, and as beneficiaries. Joy and Melody agreed to it individually, as beneficiaries of the family trust, the children trust, and Dorothy's estate, and as partners in Bonander Properties.³ After setting out provisions for distribution of various items of property, the agreement stated: "upon final execution of the Agreement, all persons executing this Agreement agree to mutually and generally waive and release all known, unknown, or suspected claims, causes of action, and charges they have, may have or believe they may have against one another, except as set forth in Paragraph 22 herein." Paragraph 22 contains the only claim the parties carved out to preserve for further litigation: "Following final execution of this Agreement, without conceding the validity or invalidity of any such claims, objections or defenses, Gwen, Joy and Melody wish to litigate a claim against Don for his alleged breach of fiduciary duty as a co-trustee of the Trust in connection with the amount of rent paid on behalf of Bonander Pontiac, Inc. for its use of the [truck shop] property for the period 1998 through the present.... The Parties further agree that Don shall be entitled to raise all possible objections and defenses to this Petition, without limitation."

The carved out claim and Donald's defenses to it were tried before the court in July and August 2011. In its ruling, the trial court found title to the truck shop property was taken by Bonander Properties. The purchase price was paid by Bonander Properties, with the exception of \$200,000, which was allocated to a covenant not to compete; the covenant not to compete was transferred to Bonander Pontiac, which paid the \$200,000

³ Although the petition named only Gwen as petitioner, the settlement agreement contained a stipulation that "Joy and Melody are properly before the court in these proceedings and will be bound by any rulings affecting Sharon's interest" in the family trust, the children trust, or Bonander Properties.

for it. The trial court found Emory set the rent for the truck shop property in 1994 at \$9,000 per month, which was not based on fair market rental value. It concluded that, while a trustee is required to make the property of the trust productive (Prob. Code, § 16007), the trustee is not required to set rents at fair market value. While fair market rental value might be appropriate in some cases, in this case it was neither appropriate nor equitable, where Bonander Pontiac had rented the property since its purchase, had made substantial improvements to it, and had always paid its rent. The trial court found not credible Donald's claim that he and Emory had implemented a plan to reduce the rent on the truck shop property gradually, as cash flow permitted, to \$5,000 per month. It concluded the rent should not have been reduced from \$9,000 per month, and awarded damages based on that level of rent.

The trial court noted a trustee has an obligation to manage and control the trust property in the interest of the beneficiaries, to treat all the beneficiaries fairly and impartially, and to avoid conflicts of interest; a trustee cannot further his or her own interests at the expense of the other beneficiaries. The trial court found the rent reduction conferred a direct benefit on Bonander Pontiac and Donald as its controlling owner. The reduction resulted in a loss to the other beneficiaries. Accordingly, the trial court concluded Donald breached his obligations as trustee and surcharge was an appropriate remedy.

Substantial evidence supports the trial court's finding that Bonander Properties, a partnership, owned the truck shop property during the time period in issue. Bonander Properties rented the truck shop property to Bonander Pontiac. In 1994, when the truck shop property was first acquired by Bonander Properties, the partnership agreement provided that Emory and Dorothy, as trustees of the family trust, were the general partners of the partnership. As general partners, they had "exclusive control over the business of the Partnership, including the power to assign duties, to sign deeds, notes,

deeds of trust, contracts and leases; and to assume direction of business operations, and shall have all rights, power and authority generally conferred by law or necessary, advisable or consistent with accomplishing the purpose of the Partnership.” One stated purpose of the partnership was to “[o]wn, operate, lease and hold for investment the Business.” Thus, Bonander Properties owned the truck shop property, and its general partners had the power and authority to manage the property and to enter into leases with Bonander Pontiac for the use of that property. It was undisputed that the oral lease or rental agreement pursuant to which Bonander Pontiac occupied the truck shop property was an agreement between Bonander Properties and Bonander Pontiac.

A partnership, general or limited, is an entity distinct from its partners. (Corp. Code, §§ 15901.04, 16201.) Bonander Properties, the partnership, not its partners (the trustees of the family and children trusts), owned the truck shop property. The partnership, through its general partner, had the authority to negotiate leases and establish rents for the properties it owned, including the truck shop property. Emory initially established the rent to be paid by Bonander Pontiac to Bonander Properties for the use of the truck shop property. The rent remained at \$9,000 during his lifetime. After Emory’s death, Dorothy, the remaining original general partner, continued as general partner of Bonander Properties, although Gwen contended Donald actually managed the businesses on Dorothy’s behalf. Prior to Dorothy’s death, the rent Bonander Pontiac paid to the partnership for use of the truck shop property was reduced in stages from \$9,000 per month to \$5,000 per month.

After Dorothy’s death, the parties believed or assumed that Donald, Sharon, and Gwen succeeded Dorothy as both co-trustees of the family trust and general partners of Bonander Properties. Although Sharon and Gwen requested that Donald increase the monthly rent being paid by Bonander Pontiac to Bonander Properties for use of the truck shop property, Donald did not do so.

Gwen's claim against Donald for the allegedly improper reduction of or failure to increase the rent being charged for Bonander Pontiac's use of the truck shop property implicated his duties as general partner or as general manager appointed by the general partner. On behalf of the lessor, the rent could only be set or negotiated by Bonander Properties, the property owner, through its general partner. Thus, if Gwen had any claim against Donald for improper reduction of the rent, her claim was against him as a general partner, for breach of the partnership agreement or violation of some duty he owed her in his capacity as a general partner.

The petition to surcharge was not brought against Donald as general partner of Bonander Properties for violation of his duties as a general partner. It was alleged against Donald as trustee of the family trust for breach of his fiduciary duties as trustee. This was the only claim against Donald that Gwen could have pursued based on the reduction of rent, because she released all other claims, including claims against Donald as a partner in Bonander Properties, in the April 15, 2011, settlement agreement.

In response to Donald's argument that Gwen had no claim against him as trustee because the trustees of the family trust did not control the rents charged by the partnership, Gwen asserts that, pursuant to the partnership agreement, only the trustee could serve as general partner; therefore her claim was against Donald as trustee/general partner. Gwen's attempt to conflate the two capacities in which Donald acted is unavailing.

Factually, the evidence does not support Gwen's argument. Both Gwen and Donald seem to assume that, after Dorothy's death, Donald, Sharon, and Gwen automatically succeeded to Dorothy's position as general partner, because they succeeded her as trustee of the family trust. While the trust instrument named Donald, Sharon, and Gwen as successor trustees, the partnership agreement contains no provision making the successor trustee of the family trust the successor general partner. Section 1.10 of the

partnership agreement defines “general partner” as: “H. Emory Bonander and Dorothy G. Bonander, as Trustees of the Bonander Family 1991 Trust, or any person or entity succeeding it as a general partner.” (Some capitalization omitted.) By this definition, the successor general partner is any person succeeding Emory and Dorothy *as general partner*, not any person or entity succeeding them *as trustee of the family trust*.

Regarding a successor general partner, section 11.2 of the partnership agreement provides: “Limited Partners shall have the right, by vote of a Majority, to approve or disapprove the following matters affecting the basic structure of the Partnership: [¶] a. Election of a successor General Partner.” Thus, the agreement contemplates that a successor general partner will be chosen by election of the partners.

Consistent with this interpretation, Ronald Hillberg, the attorney who drafted the trust instrument and partnership agreement, testified that, after Dorothy’s death, a new general partner was needed. “The idea was that, since Dorothy was the successor general partner ... we needed a new general partner and we didn’t want to have any of the children to have any personal liability. So the safest was to create a new limited liability company to be the general partner.” He drafted a proposal for a limited liability company and presented it to Donald, Sharon, and Gwen, but it was never finalized. Thus, the attorney who drafted the partnership agreement did not interpret it to provide that the successor trustee of the family trust would automatically become the successor general partner in Bonander Properties. Consequently, the evidence does not support Gwen’s contention that the successor trustees automatically became the general partner, and this somehow imposed the duties of the general partner on the trustee.

Further, the obligations of the different capacities in which a party acts must be kept separate and distinct. In *Estate of Beach* (1975) 15 Cal.3d 623, the decedent left the bulk of his estate in a testamentary trust for his four children, and named a bank as both executor of his will and trustee of the trust. Three of the four beneficiaries sued the bank

as executor, asserting it was negligent in failing to sell certain stock while the price was high. The trial court found the bank, as executor, acted with due care in retaining the stock. The appellate court affirmed, rejecting the beneficiaries' "contention that the bank can be called to account for performance of its duties as *trustee* in the present proceeding for settlement of its account as *executor*." (*Id.* at p. 630.)

The court noted the differing standards of conduct and authority applicable to the two positions, and concluded the issue of the bank's liability had to be determined based on the duties, obligations, and standards applicable to it in its capacity as executor.

"Contestants claim that the trial court erred in determining the bank's liability according to its exercise of care as an executor rather than as a testamentary trustee. They contend that because the bank received title to the trust assets upon the decedent's death by operation of his will, subject only to probate administration [citations], the bank acted during probate administration in a dual capacity as executor and trustee, and that its supposed capacity as trustee subjected the bank's decisions concerning the retention or disposition of the Reserve stock in the probate estate to the 'prudent investor' rule of Civil Code section 2261....

"In making this argument contestants overlook or misconceive basic distinctions between the bank's duties as executor and its duties as trustee. In the first place, the fact that the same bank was named as both executor and trustee in the will is immaterial. Even though the executor in handling estate assets may sometimes be required to take into account the fact that all or part of the net estate will be distributed to a testamentary trust with particular terms and beneficiaries, the executor's duty in this regard does not vary according to whether the executor and trustee are the same or different entities. *The present bank's powers and duties as executor were just as distinct from its powers and duties as trustee as if the will had named another bank as trustee.*" (*Estate of Beach, supra*, 15 Cal.3d at pp. 636-638, italics added, fns. omitted.)

Similarly, the obligations of the two capacities in which Donald acted—trustee of the family trust and general partner of Bonander Properties—are separate and distinct. A trustee has a duty to administer the trust according to the trust instrument and, except as provided otherwise in the trust instrument, the trust law found in Division 9 of the

Probate Code. (Prob. Code, § 16000.) The statutory duties and powers of a trustee are set out in Probate Code sections 16000 through 16249. The statutes provide, for example, that the “trustee owes a duty to administer the trust solely in the interest of the beneficiaries” (*id.*, § 16002, subd. (a)), and must do so “with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.” (*Id.*, § 16040, subd. (a).)

Under current law, the limited partnership agreement and the statutes relating to limited partnerships govern relations among the partners and between the partners and the limited partnership. (Corp. Code, §§ 15901.06, 15901.10.) The statutory rights and duties of a general partner in a limited partnership are set out in Corporations Code sections 15904.01 through 15904.09. Section 15904.08, sets out the fiduciary duties of a general partner, which include a duty of loyalty and a duty of care. It lists three duties that comprise the general partner’s duty of loyalty. (*Id.*, subd. (b).) It provides that the general partner’s duty of care “is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law” (*id.*, subd. (c)), although the general partner must “discharge the duties to the partnership and the other partners ... and exercise any rights consistent[] with the obligation of good faith and fair dealing.” (*Id.*, subd. (d).) Additionally, “[a] general partner does not violate a duty or obligation ... merely because the general partner’s conduct furthers the general partner’s own interest.” (*Id.*, subd. (e).)⁴

Thus, the obligations of a trustee of an express trust and those of a general partner in a limited partnership may be similar, but they are not identical. The conduct of a

⁴ The same provisions applied prior to the January 1, 2008, operative date of section 15904.08. (Former Corp. Code, § 15643, Stats. 1994, ch. 1010, § 80; Corp. Code, § 16404, subd. (e).)

trustee and the conduct of a general partner are governed by different written instruments and different statutory schemes. In setting the rents, Donald was not acting as trustee of the family trust; the truck shop property was not an asset of the family trust. The claim pursued by Gwen, Joy, and Melody is not based on actions Donald took as trustee; to the extent Donald set the rents for the truck shop property, he did so as general partner of the Bonander Properties limited partnership, which was the owner and lessor of the property. We may not hold Donald to a different standard than that applicable to a general partner simply because, at the time he acted, he also held the position of co-trustee of a related trust.

Donald, as co-trustee of the family trust, had no obligation or authority to set the rents charged by Bonander Properties for the use of its property. The only claim Gwen, Joy, and Melody preserved for further litigation at the time they entered into the April 15, 2011, settlement agreement was “a claim against Don for his alleged breach of fiduciary duty as a co-trustee of the Trust in connection with the amount of rent paid” by Bonander Pontiac to Bonander Properties for use of the truck shop property. Because Donald was not acting as trustee at the time he reduced or failed to increase the rent on the truck shop property, his reduction of or failure to increase the rent was not a breach of his fiduciary duties as trustee. Consequently, the trial court’s finding that Donald breached his duties as trustee is not supported by substantial evidence or applicable law.

DISPOSITION

The judgment is reversed. The trial court is directed to enter judgment in favor of Donald. Donald is awarded his costs on appeal.

HILL, P. J.

WE CONCUR:

PEÑA, J.

SARKISIAN, J.*

* Judge of the Superior Court of Fresno County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.