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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BANYAN LIMITED PARTNERSHIP
et al.,

Plaintiffs and Appellants,

v.

DAN W. BAER et al.,

Defendants and Respondents.

G051282

(Super. Ct. No. 764271)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Thierry Patrick Colaw, Judge. Affirmed.

Law Offices of Jonathan P. Chodos and Jonathan P. Chodos for Plaintiffs
and Appellants.

Enterprise Counsel Group, Benjamin P. Pugh and James S. Azadian for
Defendants and Respondents.

This is the sixth appeal to follow litigation that has spanned over two decades. The original complaint, filed in 1996, arises out of business dealings between Dan W. Baer and an attorney, David H. Tedder, during the late 1980's and early 1990's. It began as an action filed by Tedder as general partner of a multitude of Nevada limited partnerships he created for clients as part of "asset protection" services he provided for those clients. Tedder sued on behalf of the limited partnerships to recover on loans they allegedly made to Baer's corporations, IBT International, Inc. ("IBT") and Southern California Sunbelt Developers, Inc. ("SCSD") (hereafter "Defendants" unless the context indicates otherwise), to acquire real estate owned by the corporations, but in which Tedder claimed he and Baer were to be partners. Defendants and Tedder cross-complained against each other seeking to determine their respective interests in the real estate and their other business pursuits, which included Tedder's law firm from which the two men had agreed to equally split the profits. The action ended up as one asserting that Baer, as a non-lawyer partner in Tedder's law firm, was liable for Tedder's breaches of fiduciary duties to the three law firm clients who funded the limited partnerships, and who claimed they had each lost millions of dollars entrusted to Tedder as a result of Tedder making self-interested loans of their money.¹

The action was tried in four separate phases (hereafter referred to as Phases 1, 2, 3, and 4) before different judges in the superior court. It has already been the

¹ Although there were 19 named plaintiffs in the original complaint, by the end only seven (related to the three clients) remained and three are the appellants here. They include: Thomas H. Casey, Chapter 7 trustee for Banyan Limited Partnership (Banyan), Pear Tree Limited Partnership (Pear Tree), and Orange Blossom Limited Partnership (Orange Blossom). These limited partnerships were formed on behalf of Don Grammer and his family, and we collectively refer to these entities as the Grammer Limited Partnerships unless the context indicates otherwise.

subject of two writ petitions² and five prior appeals in this court (*Banyan Limited Partnership et al. v. Baer et al.* (Feb. 7, 2007, G036089) [nonpub. opn.] [affirming appointment of a receiver]; *Castlerock Limited Partnership et al. v. Baer et al.* (Dec. 12, 2001, G026308) [nonpub. opn.] [affirming dismissal of multiple plaintiffs lacking capacity to sue]; *Banyan Limited Partnership et al. v. Baer et al.* (Aug. 12, 2013, G045584) [nonpub. opn.] (*Banyan 1*) [affirming the final judgment]; *Banyan Limited Partnership et al. v. Baer et al.* (Aug. 12, 2013, G045797) [nonpub. opn.] (*Banyan 2*) [reversing postjudgment order for new trial on alter ego claims]; *Banyan Limited Partnership et al. v. Baer et al.* (Aug. 12, 2013, G046428) [nonpub. opn.] (*Banyan 3*) [affirming postjudgment order denying both sides attorney fees related to the second phase of trial]),³ not to mention the plethora of lawsuits throughout the nation in state courts and federal courts involving many of the entities and individuals connected to this action.

After trial of Phases 1 and 2, the trial court ruled IBT and SCSD were responsible for five loans made by the Grammer Limited Partnerships totaling about \$1.1 million that were evidenced by promissory notes. Following Phase 2, the trial court determined Tedder had no interest in any of the real estate owned by IBT or SCSD, and although Tedder and Baer were partners in Tedder's law firm, neither could recover anything from the other. And in the final phase, the court found the breach of fiduciary duty cause of action against Baer was time barred and the Grammer Limited Partnerships failed to prove Baer breached any fiduciary duties towards them.

² *Banyan Limited Partnership et al. v. Superior Court* (Dec. 29, 2011, G046154) [nonpub. order]; *Baer v. Superior Court* (April 3, 2006, G036616) [nonpub. order].

³ On the court's own motion, we take judicial notice of our unpublished opinions in these cases. (Evid. Code, § 452, subd. (d); Cal. Rules of Court, rule 8.1115(b)(1).)

Thus, the final judgment, affirmed in our *Banyan I* opinion was against the corporations owned by Baer (IBT and SCSD) on the breach of contract cause of action tried in Phase 2 of the litigation and awarded the Grammer Limited Partnerships approximately \$1.1 million on five promissory notes signed by Baer on behalf of the corporations. The judgment was otherwise in favor of Defendants and against the Grammer Limited Partnerships and other plaintiffs (the non-Grammer plaintiffs), on all other causes of action and claims in the complaint.

In the *Banyan 3* opinion we considered the parties respective motions for attorney fees. The five promissory notes on which the Grammer Limited Partnerships recovered were governed by the laws of the state of Nevada, under which the trial court had discretion to award attorney fees to a prevailing party if it found an opposing party's claim or defense "was brought or maintained without reasonable ground or to harass the prevailing party." (Nev.Rev.Stats. § 18.101, subd. 2(b).) The Grammer Limited Partnerships sought attorney fees from IBT and SCSD relating to the Phase 2 trial claiming they unreasonably asserted several defenses. Baer and SCSD sought their attorney fees from the Grammer Limited Partnerships for the Phase 2 trial arguing the Grammer Limited Partnerships had no reasonable ground for suing them on promissory notes on which they were not obligors or guarantors. The trial court denied both motions. Finding no abuse of discretion, we affirmed the order. (*Banyan 3, supra*, G046428.)

In this opinion we consider the court's ruling on the Grammer Limited Partnerships' motion to strike or tax costs. They raise the following arguments: (1) the court lacked jurisdiction to amend the judgment with a cost award; (2) it was improper for the court to revisit the prevailing party issue three years after the judgment; (3) the court did not properly allocate costs. Finding these contentions lack merit, we affirm the postjudgment order.

APPEALABILITY

We begin with the issue of appealability because the Grammer Limited Partnerships failed to include a statement of appealability in their opening brief. There is a split of authority whether an order taxing costs or denying a motion to tax costs is an appealable order. “Viewed in isolation, an order taxing costs, or denying a motion to tax costs, does not literally *direct the payment of money*; for that reason, older authority holds it is not an appealable ‘collateral order.’ (*Barnes v. Litton Systems, Inc.* (1994) 28 Cal.App.4th 681, 685, fn. 4 (*Barnes*)). [¶] But a more recent case disagrees with *Barnes, supra*, at least to the extent *Barnes* would foreclose a collateral order appeal of an order *denying* a motion to tax appellate costs: ‘There is no meaningful distinction between an order *awarding* costs and an order *denying* a motion to *tax* costs. The effect of an order denying a motion to tax costs, in whole or in part, is that the moving party must pay the costs allowed.’ (*Krikorian Premiere Theatres, LLC v. Westminster Central, LLC* (2011) 193 Cal.App.4th 1075, 1083-1085 (*Krikorian*) (emphasis in original) (also finding, however, order denying motion to tax costs was alternatively appealable under [Code of Civil Procedure section] 904.1, [subdivision] (a)(2) as an order after judgment” (See Eisenberg et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2015) ¶ 2:84.1, p. 2-61 (Eisenberg et al.).)

We agree with and adopt the reasoning of the *Krikorian* case. “After the time has passed for a motion to strike or tax costs or for determination of that motion, the clerk must immediately enter the costs on the judgment.” (California Rules of Court, rule 3.1700(b)(4); Code Civ. Proc., § 685.090, subd. (a)(1).) Thus, once the court clerk performs this ministerial task of entering costs there is nothing left for the parties to do but pay the bill. We agree with the *Krikorian* court’s holding that a ruling denying a motion to tax costs is dispositive of the rights of the parties in relation to that collateral matter, and therefore, a direct appeal may be taken. (See also *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116 [enunciated the collateral order doctrine].)

FACTUAL BACKGROUND

We adopt and incorporate by reference the facts and analysis from our opinions in *Banyan 1, supra*, G045584; *Banyan 2, supra*, G045797; and *Banyan 3, supra*, G046428, and will not repeat them.

We pick up from where we left off. Based on the statements of decision prepared by Judge C. Robert Jameson (Phases 1 & 2) and Judge Thierry Patrick Colaw (Phases 3 & 4), the Grammer Limited Partnerships prepared a proposed judgment and moved for entry of judgment. Defendants opposed the motion for entry of judgment, arguing the Grammer Limited Partnerships were seeking to insulate themselves from a costs award and, specifically, Baer was a prevailing party in Phase 2 against the Grammer Limited Partnerships. Defendants argued the proposed judgment failed to list the plaintiffs responsible for Defendants' costs after their claims were dismissed without trial. They also alleged there was a problem with the calculation of interest under the terms of the promissory notes. Defendants submitted their own version of a proposed judgment.

The Grammer Limited Partnerships filed a reply, arguing Baer owned 100 percent of IBT and SCSD and, therefore, the judgment was also against him unless he prevailed on the alter ego claim. They admitted there was a miscalculation on the amount of interest owed on the notes and submitted a corrected proposed judgment. The trial court executed this corrected judgment on May 31, 2011.

The judgment contained the following findings as to the two causes of action (breach of contract & common counts) tried in Phases 1 and 2:

(1) IBT owed Banyan \$700,000 plus preverdict and postverdict interest but less a \$191,918 credit.

(2) IBT owed Orange Blossom \$175,000 plus preverdict and postverdict interest but less a \$35,300 credit.

(3) IBT owed Pear Tree \$150,000 plus preverdict and postverdict interest but less a \$12,000 credit.

(4) SCSD owed Pear Tree \$70,000 plus preverdict and postverdict interest.

The judgment calculated the amount of preverdict interest but did not specify an amount of postverdict interest and noted it would be at the legal rate. Moreover, in addition to the sums listed above, the judgment specified the Grammer Limited Partnerships would each recover on these two causes of action “costs against IBT and SCSD jointly and severally as per Memorandum of Costs and Motion for Award of Attorney Fees under Nevada Law in the additional amount of \$_____, for a total judgment of \$_____, plus additional costs and postjudgment interest as may be allowed by law.”

The judgment relating to Phase 2 of the trial also specified the Grammer Limited Partnerships would take nothing on their third cause of action (fraud and misrepresentation), and fourth cause of action (negligent misrepresentation) against IBT, SCSD, and Baer. The partnerships would also take nothing on their 10th cause of action (breach of fiduciary duty) against IBT and SCSD.

Next, the judgment discussed the findings made in trial Phases 3 and 4. It began with many findings regarding the non-Grammer plaintiffs. Simply stated, Defendants prevailed in defending against 10 causes of action brought by these entities. The judgment provided, “Defendants . . . shall recover costs jointly and severally against [p]laintiffs Birch L.P.; Slevin L.P., CTM, L.P.; and Trail’s End L.P., as per memorandum of costs in the amount of \$_____.” The final paragraph of the judgment provided Defendants would recover nothing on their cross-claim against all plaintiffs and that action was dismissed with prejudice.

Thereafter, the Grammer Limited Partnerships and other plaintiffs moved for a new trial of several issues, including the court’s finding they had abandoned their alter ego claim against Baer. On July 19, 2011, the court denied in part and granted in

part the new trial motion. It denied the motion as to the plaintiffs' request to strike from the statement of decision Baer's statute of limitation defense. It granted the request to strike the finding plaintiffs had abandoned their alter ego remedy against Baer. The court agreed to hold a trial on the alter ego issue.

Before the parties filed their appeals from the judgment and new trial order, Defendants filed a motion on July 27, 2011, to correct clerical errors in the trial court's judgment. Defendants pointed out several errors and the one relevant to this appeal is that the judgment called for recovery of costs by Banyan and Orange Blossom against SCSD, although SCSD was the prevailing party against those two parties.

After filing their appeal from the judgment, the Grammer Limited Partnerships filed an opposition to Defendants' motion to correct. They asserted the trial court lacked jurisdiction to amend the judgment being appealed from. They argued the requested change was not a clerical error but a substantive change because the issue of whether SCSD was jointly and severally liable with IBT was litigated and decided when the court executed the original judgment. They concluded the court lacked jurisdiction to reconsider the issue of SCSD's obligation to pay IBT's costs.

The trial court disagreed with the Grammer Limited Partnerships. On August 23, 2011, it granted the motion to correct the judgment and at the same hearing denied the parties respective motions for attorney fees. It ordered Baer's counsel to prepare a corrected judgment *nunc pro tunc* to reflect the court's ruling on the clerical error and denial of attorney fees.

At this hearing the court did not consider the memorandum of costs filed one week prior by both sides. Our record on appeal only contains copies of the three separate cost memorandums, filed by Baer, SCSD, and IBT. Based on information

contained in the motion to tax, we can infer the Grammer Limited Partnerships filed one motion and did not apportion costs between those three entities.⁴

Baer sought \$42,091.48 in costs against both the Grammer Limited Partnerships and non-Grammer plaintiffs. SCSD sought \$322,014.18 against Banyan and Pear Blossom (but not Pear Tree) and several non-Grammer plaintiffs. And IBT sought \$38,064.76 against only the non-Grammer plaintiffs.

On September 15, 2011, both parties filed motions to strike or tax costs. Because this appeal concerns only the court's ruling denying part of the Grammer Limited Partnerships' motion, we will limit our discussion accordingly.

The motion raised three arguments. First, the Grammer Limited Partnerships asserted the court already decided the Defendants were not entitled to any costs. They found it significant that “[t]he proposed judgment (to be signed imminently by [the trial court]) does not provide for any cost award against any Grammer entity, and the Grammer entities were prevailing parties as against IBT and SCSD.”

Second, the Grammer Limited Partnerships argued SCSD could not recover \$281,264.94 in fees paid to the receiver. They offered several reasons to support this conclusion that we need not repeat because the court agreed and struck this cost.

Third, the Grammer Limited Partnerships and non-Grammer plaintiffs argued Defendants must allocate their cost items because in a complex case it is unfair to “saddle a losing party with a burden disproportionate to its role in the litigation.” (Citing Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2015) ¶ 17:109, p. 17-46; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1297-1298.) They argued Defendants submitted “virtually identical cost memorandums” and failed to

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In their motion to tax costs, Defendants argued the Grammer Limited Partnerships improperly filed a single memorandum of costs and did not delineate among the parties who owed what costs. Because we do not have a copy of the motion, we do not know the total amount of costs requested, however, Defendants' motion to tax/strike challenged two costs totaling \$23,910.03.

allocate expenses incurred in defeating “Tedder in the epic partnership dissolution battle” or claims brought by the Grammer Limited Partnerships and the non-Grammer plaintiffs. The motion only discussed a few specific cost items (three depositions) relating to the non-Grammer plaintiffs and suggested those costs should be paid by those plaintiffs.

On November 4, 2011, the trial court stayed the hearing on the motions to strike/tax costs until the pending appeals challenging the judgment and new trial order were resolved. It noted the motions to tax/strike costs should be stayed pending the outcome of whether there would be further litigation to decide if Baer was the alter ego of IBT “since this would affect the issue of who is the prevailing party.” For the same reason, the court stayed the hearing on the motion to amend the judgment.

Approximately two weeks later, the Grammer Limited Partnerships filed an ex parte application to enter the proposed corrected judgment. It explained IBT and SCSD were awarded approximately \$1 million from the bankruptcy court against the Grammer Limited Partnerships. In Phase 2 of the underlying litigation, the Grammer Limited Partnerships “were awarded [\$3.6 million] against IBT and SCSD.” However, IBT and SCSD initiated collection procedures against the Grammer family in Texas. The Grammer family’s attorney in Texas intended to set off the judgment against IBT and SCSD with the bankruptcy judgment, but counsel required a final version of the judgment to resolve the matter. The Grammar Limited Partnerships noted the judgment was not yet final because the court stayed the hearing on the pending motion to amend the judgment and declined to hear postjudgment cost motions and the alter ego motion due to the pending appeals. The Grammer Limited Partnership urged the trial court to execute and enter the amended judgment Baer’s counsel prepared and filed with the court on July 27, 2011.

On November 15, 2011, the court entered the corrected final judgment, as requested, even though the three pending appeals relating to the original May 2011 judgment had not been resolved. The amended judgment deleted language stating SCSD

needed to pay costs to Banyan or Orange Blossom. In addition, the judgment deleted language regarding the payment of attorney fees. In all other respects, it was essentially identical to the May 2011 judgment.

On August 12, 2013, this court filed its opinions in *Banyan 1, supra*, G045584; *Banyan 2, supra*, G045797; and *Banyan 3, supra*, G046428. As mentioned earlier, this court affirmed both the judgment and the order denying attorney fees. We reversed the court's new trial ruling on the alter ego issues.

The following month, on September 27, 2013, the Grammer Limited Partnerships each filed Chapter 7 bankruptcy petitions. The bankruptcy court granted Defendants' motion for relief from the automatic stay to permit a hearing on the parties' pending motions to strike or tax costs.

On November 7, 2014, Judge Colaw held a hearing on the respective motions to strike or tax costs and took the matter under submission. The court granted part of the Grammer Limited Partnerships' motion to tax costs as follows: (1) the court struck SCSD's request for the payment of receiver fees;⁵ (2) the court struck all costs claimed by IBT and SCSD against Pear Tree since Pear Tree was the prevailing party against these entities;⁶ and (3) the court reduced and limited costs payable by non-Grammer plaintiffs to \$4,364.50, against "Schoenman plaintiffs" and \$5,947.46, against "McGrath plaintiffs." The court denied the motion to tax all other challenged costs on the grounds the moving party "failed to meet their burden to effectively challenge the other costs" and "have not shown that the other costs were duplicative, are overlapping, not allowed by law, are improper on their face, are unreasonable or

⁵ This ruling is the subject of the pending appeal *Banyan Limited Partnership et al., v. Southern California Sunbelt Developers, Inc.*, G051260.

⁶ We note this ruling appears to have simply clarified the cost burdens because IBT's and SCSD's memorandum of costs did not request payment from Pear Tree.

unnecessary, or require further allocation by this court sitting in equity. This ruling is made appreciating that the burden is on the parties filing the cost bill once the costs are legitimately challenged in a motion. After reading the moving papers, the opposition, the reply and considering argument at the hearing, the balance of the attacks on the costs bill are denied.” (Citing *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774 [discussion on burdens] (*Ladas*).

The court denied in part and granted in part the Defendants’ motion to strike costs as follows: (1) the court refused to strike two deposition transcript copy charges and a document scanning cost; and (2) the court granted the request to apportion the deposition costs of Pear Tree.

The Grammer Limited Partnerships filed a motion for reconsideration of the order on their motion to strike or tax costs. After the January 9, 2015, hearing, the court took the matter under submission. It denied the motion for reconsideration, ruling the requirements of Code of Civil Procedure section 1008⁷ had not been met. In addition, the court ruled, “In the interests of justice the [c]ourt corrects the ruling nunc pro tunc in the [m]inute [o]rder of [November 13, 2014,] by changing the wording of subparagraph 1(b) to read as follows: [¶] ‘Granted as to all costs claimed by SCSD against . . . Pear Tree . . . only, since the Pear Tree [p]laintiffs were prevailing parties as against defendant SCSD[.]’” In other words, the court removed IBT from the ruling, recognizing IBT never sought costs from the Grammer Limited Partnerships. This issue was discussed at the hearing, and although SCSD did not seek costs against Pear Tree, the court determined this point should remain clarified in the order. Thus, SCSD’s cost award must be paid by Banyan and Orange Blossom but not Pear Tree.

In summary, the court determined certain parties on both sides of this multi-phase litigation were prevailing parties entitled to costs. The Grammer Limited

⁷ All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Partnerships (Banyan, Orange Blossom & Pear Tree) could recover costs as the prevailing party against IBT on two causes of action. Pear Tree alone could recover costs as the prevailing party against SCSD.

As for the Defendants, SCSD was awarded some of the costs it requested, having successfully defended itself against Banyan and Orange Blossom's claims as well as the non-Grammer plaintiffs. Similarly, Baer having conclusively defeated the alter ego allegations, was the prevailing party against all claims made by Grammer Limited Partnerships and non-Grammer plaintiffs.

IBT did not claim to be the prevailing party with respect to the Grammer Limited Partnerships. Its cost memorandum related entirely to recovery from non-Grammer plaintiffs who are not parties to this appeal.

LEGAL DISCUSSION

A. General Legal Principles

“[S]ection 1032 now declares that costs are available as ‘a matter of right’ when the prevailing party is within one of the four categories designated by statute. (§ 1032, subs. (a)(4), (b).) The allowance of costs as a matter of right no longer depends on the character of the action involved but on how the prevailing party is determined. [Citations.] The statute defines the prevailing party to include four categories of parties: the party with a net monetary recovery, the defendant in whose favor a dismissal was entered, the defendant where neither plaintiff nor defendant recovers any relief, and the defendant against whom plaintiff has not recovered any relief. (§ 1032, subd. (a)(4).) In other situations or when a party recovers other than *monetary* relief, the prevailing party is determined by the court, and the award of costs is within the court’s discretion. [Citations.] [¶] It is clear from the statutory language that when there is a party with a “net monetary recovery” (one of the four categories of prevailing party), that party is entitled to costs as a matter of right; the trial court has no discretion to order each party to bear his or her own costs.” (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1197-1198.)

“Generally, a trial court’s determination that a litigant is a prevailing party, along with its award of fees and costs, is reviewed for abuse of discretion. [Citations.]” (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) Based on the record on appeal, and as will be discussed in more detail below, we find no abuse of discretion. Moreover, we reject the Grammer Limited Partnerships’ contention the court lacked jurisdiction to award costs to Baer and SCSD after entry of the judgment.

B. The Jurisdiction Argument

The Grammer Limited Partnerships’ primary argument on appeal is based on a faulty premise. They argue the court’s ruling on the motion to tax/strike resulted in an impermissible modification of the judgment. Because we were not provided an actual modified judgment in the appellate record, we assume the argument is based on the Grammer Limited Partnerships’ reasonable anticipation the court clerk will perform the ministerial task of “immediately enter[ing] the costs on the judgment” following the court’s ruling on the matter as *mandated* by California Rules of Court, rule 3.1700(b)(4), and section 685.090, subdivision (a)(1).

Specifically, the parties anticipate the court clerk will fill in the blank spaces currently contained in the judgment to reflect the award of costs to the Grammer Limited Partnerships against IBT as well as Pear Tree’s cost award against SCSD. The clerk can also fill in the blank spaces currently contained in the judgment to reflect the costs award to Defendants against the non-Grammer plaintiffs. The Grammer Limited Partnerships concede these additions to the judgment are permissible.

This appeal targets the anticipated insertion of SCSD’s and Baer’s cost award into the judgment when the court clerk does not have the benefit of preexisting blank spaces designated for this purpose. The Grammer Limited Partnerships argue the absence of blank lines precludes the award of any costs after entry of the judgment. Essentially, they would like this court to stop the court clerk from performing the

mandated ministerial task of adding the cost award against the Grammer Limited Partnerships.⁸ We will not. They misunderstand the applicable law.

A court may award costs only *after* notice of entry of judgment of dismissal. “Rule 870 of the California Rules of Court provides as here relevant: ‘A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after the date of mailing of the notice of *entry of judgment or dismissal* by the clerk . . . or the date of service of written notice of *entry of judgment or dismissal*, or within 180 days after *entry of judgment*, whichever is first.’ (Cal. Rules of Court, rule 870(a)(2), italics added.) Thus, rule 870 contemplates the entry of a dismissal or judgment *as a predicate* to a costs award. [Citation.]” (*Boonyarit v. Payless Shoesource, Inc.* (2006) 145 Cal.App.4th 1188, 1192, italics added.) As mentioned earlier, “because the right to costs is governed strictly by statute [citation] a court has no discretion to award costs not statutorily authorized” [citation], and lacks discretion absent statutory authority to “deny costs to the prevailing party.” [Citation.]” (*Vons Cos. Inc. v. Lyle Parks, Jr., Inc.* (2009) 177 Cal.App.4th 823, 832.)

In summary, section 1032 declares costs are “a matter of right” to the prevailing party and generally ordered postjudgment. We conclude the trial court not only had authority to add costs to the existing judgment, but was statutorily required to award costs to those meeting the prevailing party requirements of section 1032. We found no authority, and the Grammer Limited Partnerships cite to none, holding the addition of costs is an impermissible modification of the judgment.

⁸ We recognize SCSD did not prevail against one of the Grammer Limited Partnerships (Pear Tree), although it did prevail against the other two. For the sake of convenience and clarity, we will collectively discuss the cost award in favor of SCSD and Baer without continuing to point out SCSD’s award was limited to two of the three Grammer Limited Partnership entities. This factual detail is not relevant to our discussion or holding.

Further support for this conclusion is found in the well established body of case law discussing the effect of an amended judgment on the appeal time period.

“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 only be *one* “final judgment” in an action . . .). Therefore, a new appeal period starts to run from notice of entry or entry of the *amended* judgment.’ [Citation.] ‘For example, an order amending a judgment to reflect the *correct name of a party* . . . substantially changes the judgment and therefore starts a new appeal time period (for an appeal from the amended judgment).’ [Citation.] . . . ¶ 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 it is therefore not affected.’ [Citations.] ‘When a party wishes to challenge both a final judgment *and* a postjudgment costs/attorney fee order, the normal procedure is to file *two separate appeals*: one from the final judgment, and a second from the postjudgment order.’ [Citation.]” (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222, italics added.)

C. No Prejudgment Decision on the Prevailing Party

Alternatively, the Grammer Limited Partnerships argue the cost award to Baer and SCSD is improper because the court determined they were not prevailing parties *before* entering the judgment. They explain this is the only reasonable inference to be drawn from the fact there were blank lines in the judgment to add costs in their favors but no blank lines to add costs against them. This inference is not reasonable in light of other documents in the record.

First, we find telling the Grammer Limited Partnerships’ reply brief submitted in response to Defendants’ objection to the original proposed judgment drafted by the Grammer Limited Partnerships in 2011. In response to Defendants’ argument the

proposed judgment failed to list the plaintiffs responsible for Defendants' costs, the Grammer Limited Partnerships asserted Baer was not a prevailing party unless he prevailed on the alter ego claims. It is reasonable to infer from this argument the Grammer Limited Partnerships knew the prevailing party issue would not be determined until after the alter ego claim was resolved. Because they anticipated future litigation on the alter ego claim, they also knew the prevailing party designation was not final.

As it turned out, Baer successfully defeated the alter ego allegations in his appeal. In *Banyan 1, supra*, G045584, we affirmed the trial court's ruling the alter ego claim was abandoned, and, in *Banyan 2, supra*, G045797, we reversed the court's new trial order on alter ego because the court lost jurisdiction by failing to timely rule on the motion. Thus, Baer was ultimately a prevailing party. It would have been improper for the court to have decided the prevailing party issue before entry of the judgment without knowing the outcome of the alter ego claim.

That the prevailing party issue was not determined before entry of the judgment is further supported by the trial court's decision on August 23, 2011, to correct the judgment, deleting language calling for recovery of costs by Banyan and Orange Blossom against SCSD. In Phase 2, SCSD prevailed against these entities and was only found liable for breaching its contract with Pear Tree. In correcting the judgment, the trial court rejected the Grammer Limited Partnerships' argument the prevailing party issue had been fully litigated and wished to clarify it was undecided whether SCSD was jointly and severally liable with IBT.

Similarly, the trial court's November 4, 2011, order staying the motions to strike costs and the motion to amend the judgment was based on the trial court's recognition there were issues being appealed that could change the prevailing party determination and cost award. In staying the motions, the court explained the issue of whether Baer was the alter ego of the other defendants would "affect the issue of who is

the prevailing party.” This ruling defeats the Grammer Limited Partnerships’ argument costs were fully litigated and decided before entry of judgment in May 2011.

Further support is found in the reporter’s transcript of the hearing on the motion for reconsideration. Baer’s counsel refuted the theory the May 2011 judgment was a final determination of the prevailing party issue. Counsel stated that when the motion to strike was stayed pending the outcome of the three appeals, the court “tabl[ed] the discussion of who’s entitled to costs. Because who’s entitled to costs depends on who the prevailing parties are. And because your honor had granted a motion for new trial, with respect to the alter ego issue, that could potentially make . . . Baer not a prevailing party, and maybe SCSD not a prevailing party, there wasn’t anything in the judgment setting for that . . . Baer would be entitled to cost . . . [b]ecause that issue [was] still open.” Counsel concluded, “That’s why it’s not in the judgment. It’s not because this court made an affirmative finding after Phase [2] that somehow . . . Baer shouldn’t or wasn’t a prevailing party or shouldn’t be entitled to cost[s].” The court replied, “That’s my recollection.”

And finally we note the judgment’s cost award to the Grammer Limited Partnerships was not drafted to suggest it was exclusive, and the judgment did not contain language stating Baer and SCSD were *not* the prevailing parties. The May 2011 judgment simply stated, “costs against IBT and SCSD jointly and severally as per Memorandum of Costs and Motion for Award of Attorney Fees under Nevada Law in the additional amount of \$_____, for a total judgment of \$_____, plus additional costs and [postjudgment] interest as may be allowed by law.”

We find it interesting that the Grammer Limited Partnerships do not argue the court lacked jurisdiction when it modified this sentence of the judgment to delete the reference to an attorney fee award after their motion was denied in a postjudgment hearing. The anticipated award of attorney fees, like the anticipated cost award, were both mentioned in one sentence of the judgment—next to a blank line—awaiting a

calculation of the total sum. It is the Grammer Limited Partnerships' theory that the blank line signified the basis for the award was already decided in their favor but the court merely needed to calculate the amount postjudgment. This theory is debunked by the court's modification of the judgment to delete the anticipated attorney fee award. The issue had not been predetermined before entry of the judgment. The blank line signified nothing other than the hope of prevailing in the postjudgment hearings where the court would consider attorney fees and costs in the first instance.

We conclude the trial court properly waited to rule on costs until after we resolved appeals from the judgment and several posttrial rulings. Having no alter ego claim to contend with, the trial court properly considered and determined the prevailing parties in this complex litigation statutorily were entitled to costs. Adding costs to the judgment was not an unauthorized modification because it did not change the judgment in any substantive way.

D. Court's Allocation of Costs

“‘[S]ection 1033.5, enacted in 1986, codified existing case law and set forth the items of costs which may or may not be recoverable in a civil action. [Citation.]’ [Citation.] An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if ‘reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.’ (§ 1033.5, subd. (c)(2).)” (*Ladas, supra*, 19 Cal.App.4th at pp. 773-774.)

“If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. [Citations.]” (*Ladas, supra*, 19 Cal.App.4th at p. 774.)

The Grammer Limited Partnerships' arguments on appeal are premised on the conclusion the burden shifted to Defendants to prove their costs were reasonable and necessary. They fail to recognize the basis for the trial court's ruling was that the burden never shifted to Defendants. As the above-cited authority makes clear, burden-shifting occurs only when cost items have been "properly objected to." (*Ladas, supra*, 19 Cal.App.4th at p. 774.)

In its ruling, the trial court clearly and plainly explained the Grammer Limited Partnerships failed to "meet their burden to effectively challenge the other costs" identified in Defendants' cost memorandum (referring to those costs other than receiver fees and costs payable by non-Grammer plaintiffs). The court, citing to the burdens of proof discussed in the *Ladas* case, explained the Grammer Limited Partnerships failed to show "the other costs were duplicative, are overlapping, not allowed by law, are improper on their face, are unreasonable or unnecessary, or require further allocation by this court sitting in equity." We agree with the court's decision in this regard.

Very telling is that appellants' opening brief includes a list of five arguments as to why the allocation of costs was improper, but none of these arguments were presented in the original motion to tax. Indeed, in a footnote, the Grammer Limited Partnerships admit they raised the five arguments as part of their motion for reconsideration.⁹ Noticeably absent from the briefing is any reasoned legal argument asserting the original motion was sufficient to shift the burden to Defendants. Instead, the briefing presumes the burden shifted and there are five arguments (that were not actually before the trial court until the reconsideration motion) warranting reversal.

Moreover, their unity of interest argument on appeal appears to be simply another attempt to revive their failed alter ego claim, i.e., that Bear did not have separate

⁹ We note the denial of that motion was not challenged in this appeal, i.e., the Grammer Limited Partnerships do not dispute the court's ruling the motion did not meet the requirements of section 1008.

and distinct defenses to the lawsuit. As this court recently pronounced in *Charton v. Harkey* (2016) 247 Cal.App.4th 730, 744-745, “[T]he trial court may not make an across-the-board reduction based on the number of jointly represented parties because such an allocation fails to consider the necessity or reasonableness of the costs as required by section 1033.5, subdivision (c). [Citation.]” Because the trial court determined the Grammer Limited Partnerships failed their burden of showing the requested costs were unreasonable, unnecessary, or required further allocation, and because it would be error for the court to make an across-the-board reduction simply because the entities were jointly represented, we find no reason to disturb the court’s ruling.

It cannot be said the court abused its discretion in deciding the Grammer Limited Partnerships failed to meet their burden of proof in the motion to strike costs in this highly complex 20-plus year multi-phase litigation. We have no reason to doubt the court’s judgment on the issue of costs was based on a much more complete understanding of the litigation than this court is able to have with our limited record.

DISPOSITION

The postjudgment order is affirmed. Respondents shall recover their costs on appeal.

O’LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.