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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHERYL BOOKER et al., Plaintiffs and Respondents, v. IMERYS TALC AMERICA, INC. et al., Defendants and Appellants.	A153995 (Alameda County Super. Ct. No. RG15796166)

Defendant Imerys Talc America, Inc. (Imerys) appeals from a postjudgment order denying in part Imerys's motion to tax litigation costs sought by the heirs of decedent Richard Booker (Booker) after they prevailed at trial. Imerys contends the trial court erred in failing to exercise its discretion to tax costs pertaining solely to other defendants. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Booker and his wife Cheryl Booker sued more than a dozen defendants, including Imerys and Vanderbilt Minerals LLC (Vanderbilt), alleging that Booker developed mesothelioma from his exposure to defendants' asbestos-containing products, including talc manufactured by Imerys's predecessor. After Booker died from mesothelioma, Cheryl Booker, individually and as successor-in-interest, and Booker's heirs (plaintiffs) continued the litigation against seven of the defendants.

Plaintiffs eventually secured settlements with most of the defendants, and only Imerys and Vanderbilt remained in the case at the time of trial. The jury found Vanderbilt and Imerys liable for increasing Booker's risk of mesothelioma and apportioned 60 percent fault to Vanderbilt and 40 percent fault to Imerys.[1]

Plaintiffs filed a memorandum of costs in the amount of $319,549.54, and Imerys responded with a motion to tax. As relevant here, Imerys sought to reduce the complaint and complex litigation filing fees by $2,026.58 so that Imerys was only responsible for a one-seventh pro rata share, and to omit all filing and motion fees related to other defendants. Imerys also sought to tax costs in the amounts of $44,035.41 for depositions of corporate representative of defendants other than Imerys; $28,913.45 for depositions of experts designated by defendants other than Imerys; $910 for the deposition of plaintiffs' expert, William Longo; and $5,004.84 for service of process on defendants other than Imerys. Citing *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265 (*Heppler*), Imerys argued that where a plaintiff incurs costs associated with its case against numerous defendants, costs may be apportioned amongst the defendants for whom they were incurred.

The trial court partially granted the motion in the amount of $44,948.58.[2] But with regard to Imerys's request to apportion costs between it and the other defendants, the trial court found it lacked discretion to do so

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[1] We affirm the judgment in a separate opinion filed this date (*Booker v. Imerys Talc America* (A153835) [nonpub. opn.]).

[2] The taxed amounts included the costs of expert witness services incurred before plaintiffs' offers to compromise (Code Civ. Proc., § 998) and charges for photocopying and enlarged exhibits. The court also ruled it would tax an additional amount, to be determined, for electronic service costs.

because Code of Civil Procedure section 1032, subdivision (a)(4),[3] limits discretionary apportionment of costs to cases where a party recovers non-monetary relief. The trial court concluded that " ' "even if *Heppler* is treated as (unique) authority for the proposition that a California court can apportion a successful plaintiff's statutory costs between a judgment debtor and other defendants who prevailed at trial (or, by extension, who settled or were dismissed before trial)," ' " *Heppler* was distinguishable because it involved a construction defect action alleging " ' "several entirely distinct defects—e.g., soil problems and roofing problems" ' " which made it " ' "unfair to burden the roofing defendant (against whom the case was evidently simple) with extensive costs incurred to litigate the unrelated soil issues." ' " Observing that plaintiffs' claims here " ' "were based on a single injury to which all defendants' conduct allegedly contributed by the same basic mechanism (asbestos exposure)," ' " the court found " ' "*Heppler*'s unique reasoning" ' " inapplicable and declined Imerys's request to tax costs related to other defendants.

Imerys appealed.

DISCUSSION

"The right to recover costs under California law is governed by statute." (*Smock v. State of California* (2006) 138 Cal.App.4th 883, 889 (*Smock*).) "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) "Absent statutory authority, 'the court has no discretion to deny costs to the prevailing party.' " (*LAOSD Asbestos Cases* (2018) 25 Cal.App.5th 1116, 1124.)

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[3] Further statutory references are to the Code of Civil Procedure unless specified otherwise.

In this case, section 1032 affords plaintiffs the right to recover costs as prevailing parties in an action. "[P]revailing party" is defined by statute to include "the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. If any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (§ 1032, subd. (a)(4).)

Section 1033.5 enumerates various categories of allowable and not allowable costs (§ 1033.5, subds. (a), (b)), and provides that "[a]llowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" (§ 1033.5, subd. (c)(2)). "Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion." (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) "Discretion is abused only when, in its exercise, the court 'exceeds the bounds of reason, all of the circumstances being considered.' " (*River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154, 181 (*River Valley*).)

There is no doubt that plaintiffs were prevailing parties in this case, as they obtained a net monetary recovery after trial. (§ 1032, subd. (a)(4).)[4] Nor

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[4] Imerys and Vanderbilt were the two remaining defendants out of the original seven named defendants that proceeded to trial. Imerys does not contend that any of the other five defendants "prevailed" against plaintiffs within the meaning of section 1032, subdivision (a)(4).

is there a question that the general categories of challenged costs (e.g., filing and motion fees, deposition costs, service of process costs) were expressly allowable under section 1033.5. (§ 1033.5, subd. (a)(1), (a)(3), (a)(4).)[5] The dispute here centers around whether the trial court had discretion to apportion costs among the original seven defendants named in the case in order to reduce plaintiffs' total recovery of costs by the amounts attributable to the defendants other than Imerys, and if so, whether discretion was abused.

In *Smock*, this Division rejected a similar request to apportion costs between two co-defendants. The State of California was found 90 percent liable for a motor vehicle accident due to a dangerous condition of public property, while the defendant driver was found 10 percent liable. (*Smock*, *supra*, 138 Cal.App.4th at p. 885.) The State argued that the plaintiff's cost award should be allocated between the defendants based on their proportion of fault, but *Smock* found no authority for this position. (*Id.* at pp. 888–889.) Citing section 1032, subdivision (a)(4), *Smock* held that "[a]pportionment of

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[5] For the first time in its reply brief, Imerys argues that plaintiffs improperly sought $11,156.25 for the costs of "transcripts." We generally do not consider points raised for the first time in the reply brief, and Imerys does not show good cause for its belated presentation. (*Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066.) In any event, we find no merit in the new reply argument. The challenged costs were listed as "Court reporter fees," which are statutorily allowed. (§ 1033.5, subd. (a)(11).) Imerys contends the costs were actually for hearing transcripts expressly disallowed by section 1033.5, subdivision (b)(5). The trial court, however, found that plaintiffs submitted documentation establishing that the challenged costs "were for fees rather than transcripts [citation], and Imerys's reply does not challenge this showing." (See *Chaaban v. Wet Seal* (2012) 203 Cal.App.4th 49, 58 [court reporter fees are "an entirely different expense" from transcripts].) Imerys fails to explain how the trial court's finding was erroneous.

costs is authorized, at the court's discretion, only under those comparatively unusual circumstances when the court must determine which party prevailed. [Citation.] Smock clearly prevailed below, and the State has cited no authority that would permit, much less compel, the trial court to apportion costs under these circumstances." (*Id.* at p. 889.) Likewise, plaintiffs here clearly prevailed in obtaining monetary relief and were therefore entitled to recover their litigation costs as a matter of right. (§ 1032, subds. (a), (b).)

Imerys nevertheless contends the weight of authorities supports its contrary position that trial courts have discretionary authority in all cases to reduce costs against a defendant based on amounts apportionable to other defendants that are no longer in the case. (E.g., *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154 (*Howell*), *Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306 (*Ducoing*), *Charton v. Harkey* (2016) 247 Cal.App.4th 730 (*Charton*); *Heppler*, *supra*, 73 Cal.App.4th 1265.)

We find the cited cases distinguishable, as they all involved situations where some but not all of the parties on the same side of the litigation *prevailed against the party seeking costs*. In this context, the appellate courts observed that the lack of cost apportionment below required that a determination be made on remand. (See *Howell*, *supra*, 18 Cal.App.5th at pp. 203–204 [reversing dismissal overall but affirming judgment on pleadings as to one plaintiff and instructing trial court to determine on remand which costs some defendants could recover from that plaintiff]; *Ducoing*, *supra*, 234 Cal.App.4th at p. 315 [reversal of nonsuit against one of two defendants required reversal of unapportioned cost award]; *Charton*, *supra*, 247 Cal.App.4th at pp. 743–745 [reversing 25 percent across-the-board reduction of cost award for one of four jointly-represented defendants who prevailed

against plaintiffs and remanding for determination of costs awardable to sole prevailing defendant]; *Heppler*, *supra*, 73 Cal.App.4th at p. 1274 [instructing trial court to determine on remand amounts of costs allocable to one subcontractor out of four found liable in construction defect case].) The common denominator in these cases—and the resulting need for apportionment on remand—was the statutory mandate to award costs only to the "prevailing party." (§ 1032, subd. (b).) Here, however, it is not Imerys's contention on appeal that plaintiffs' costs should be taxed by amounts attributable to other defendants *who prevailed against plaintiffs*. (See *ante*, fn. 4.)

Furthermore, none of the cases cited by Imerys involved an actual dispute over whether the trial court had discretion to allocate costs among multiple defendants to reduce the plaintiffs' recovery of costs. It is well established that cases do not stand for propositions not considered by the court. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.) And unlike *Smock*, Imerys's authorities do not address the second prong of section 1032, subdivision (a)(4), which by its terms limits the trial court's cost-apportionment discretion to cases involving recovery of "other than monetary relief" where prevailing-party status is "other than as specified" in the statute. (§ 1032, subd. (a)(4); see *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 977, overruled on other grounds in *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1330.)

In any event, as indicated, the trial court declined to apportion costs after assuming, for purposes of argument, that it had discretion to apportion under section 1032. In this regard, Imerys fails to demonstrate the court abused its discretion in doing so. All circumstances considered, the court's refusal to tax costs related to other defendants did not exceed the bounds of

reason because such costs were reasonably necessary to the conduct of the litigation and not merely convenient or beneficial. (§ 1033.5, subd. (c)(2); *River Valley*, *supra*, 37 Cal.App.4th at p. 181.)

Specifically, plaintiffs incurred the filing, motion, and service of process costs related to defendants other than Imerys in order to bring all of the potential tortfeasors into the lawsuit. This was not merely beneficial or convenient, but reasonably necessary given the nature of the case. Consistent with its right as a defendant to seek allocation of fault among all responsible entities (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603), Imerys's answer to the complaint denied all responsibility and asserted affirmative defenses that other tortfeasors were partly or completely responsible for plaintiffs' injuries. Consequently, to assess and rebut Imerys's denials and affirmative defenses, and to prove their case against Imerys, plaintiffs had to ascertain the full dose of asbestos that caused Booker's mesothelioma and establish Imerys's share of liability.

Deposing the corporate representatives of other defendants was also reasonably necessary to determine the claimed merit of Imerys's defenses and to ascertain Imerys's share of fault for liability and settlement purposes. The costs plaintiffs incurred in connection with other defendants' experts were likewise reasonably necessary to the conduct of the litigation. Indeed, any party may call as a witness at trial any expert that has been designated by another party and deposed (§ 2034.310, subd. (a)), and Imerys did in fact expressly reserve the right to call any other expert designated by any other defendant. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 132 [evaluating reasonable necessity of costs " 'from the pretrial vantage point of a litigant who does not yet know whether or not to oppose the expert's opinions' "].) Finally, although Dr. Longo offered specific opinions only about Vanderbilt's

talc products, his general testimony about asbestos—including the properties of asbestos, the definition of an asbestiform fiber, and the best method for detecting asbestos—was directly relevant to plaintiffs' case against Imerys and therefore reasonably necessary to the conduct of the litigation.

In sum, the trial court did not abuse its discretion in refusing to reduce plaintiffs' recovery of costs by amounts attributable to the other defendants for filing, motions, corporate and expert depositions, and service of process.

DISPOSITION

The postjudgment order denying in part Imerys's motion to tax is affirmed. Plaintiffs are entitled to their costs on appeal.

Fujisaki, J.

WE CONCUR:

Siggins, P.J.

Jackson, J.

A153995