Victory on Appeal Becomes Binding Law for California

Frank D'Oro (Senior Partner/Los Angeles Office) A recent W & Z victory on appeal has been selected for publication, which means it becomes binding law for all of California, not just as between the parties. In Mon Chong Loon Trading Corp. v. Defang Cui, plaintiff allegedly fell at a supermarket and suffered serious injuries, and sued the supermarket. Partner Frank D'Oro and associate Jennifer Winters defended the market. Plaintiff rejected defendant's $10,000 offer, made pursuant to Code Civ. Proc. '998. That section gives the court the right to award defendant not just ordinary costs but expert fees if the plaintiff fails to beat the 998. Plaintiff then failed to show up for IME, and also failed to respond to defendant's demand for exchange of expert information. Defendant filed a motion in limine to prevent plaintiff from putting on any expert testimony as to liability, medical opinion as to diagnosis or causation, or anything else, and to bar medical testimony at all based on the failure to show up for IME. Plaintiff then got new counsel, who then filed a dismissal "without prejudice" on the very last day to file an opposition to the motion in limine.

Defendant argued that plaintiff was trying to "game the system", and filed a cost bill that included expert fees. The court granted ordinary costs but denied expert costs. On appeal, plaintiff's attempt to take advantage of the system was rebuffed. The Court of Appeal held that the defendant was eligible under the circumstances for expert fees under the 998 offer, even though a dismissal without prejudice does not constitute a "judgment". Otherwise, plaintiff could make defendant amass enormous debt in fees and then dismiss without prejudice, without ever refiling, thereby avoiding just compensation to the defendant.

The problem was that the pertinent code section, '998, is written in terms of a "more favorable judgment", but a dismissal without prejudice does not operate as a judgment. When a case is dismissed "with prejudice" it does operate as a judgment, that is, plaintiff cannot refile the case, and under the rule known as res judicata, plaintiff also cannot later file any complaint, under any name or theory, that raises causes of action that even could have been brought in the original action. By contrast, when someone dismisses "without prejudice", they can arguably refile their complaint at any time as long as the statute of limitations has not run. Plaintiff in fact did file a new complaint in this case. The "without prejudice" designation on a dismissal ordinarily means there is no final judgment yet – there can be a second action where there will be a final judgment later if it goes to trial or gets dismissed "with" prejudice. In short, the trial judge ruled that because there had been no judgment, only a dismissal without prejudice, he would not award 998 expert costs. It

was this ruling that was overturned. In the judge's view, in order to "beat the 998" there has to be an actual final judgment.

W & Z appealed and the court of appeal held that there does not have to be a final judgment for a defendant to be eligible for 998 costs. The court declined to rule one way or the other on W & Z's argument that this dismissal should be considered as a judgment because it unfairly tried to do an end-run around the likely upcoming ruling on the motion to preclude experts or medical opinion, etc. Instead, the court of appeal agreed with W & Z on the expert cost issue, holding that a defendant is eligible for consideration of expert costs anytime the case before the judge is concluded (even if it is concluded "without prejudice" with plaintiff retaining the right to file a new case later), if the plaintiff in that case "fails to obtain" a more favorable judgment than the 998. In other words, a final judgment is not necessary. Dismissing without prejudice concludes the particular case (even if another one can be refiled), and just like ordinary costs can be assessed after a dismissal without prejudice, so can 998 expert costs, because a dismissal without prejudice is a failure to obtain a more favorable judgment.

The court said in a footnote that expert fees awarded in this action can be taken into account in a future action at the end. It is unclear what this means, but presumably it simply prevents double recovery on defense fees. If defendant wins the next action, defendant should be able to get expert fees spent in the new action, but if a plaintiff wins a subsequent action, the issue will be whether the plaintiff has any argument for recouping the defense fees already paid out in this action. We would argue that each action is separate, and the right to issue new 998's in the new action would further complicate things if the judge in the new action were allowed to go back and revisit the award in the old action. We would argue that a plaintiff's failure to obtain a more favorable judgment in the first action, and forcing the costs on defendant before dismissing, militate against revisiting the costs awarded in the first action. Presumably, the footnote allowing a subsequent judge to "take into account" fees previously awarded in a prior action only means that a subsequent judge cannot award a double recovery, so that if a defendant applied for expert costs in a second action that included costs already awarded, the subsequent court could have the first award "taken into account" to prevent a double recovery.

This victory in changing case law is one step towards a larger goal W & Z has been pursuing, which is to get case law published limiting a serious asymmetry and injustice in the current law and procedure of dismissal. Over the years, W & Z has challenged the current dismissal-without-prejudice procedures as often understood and applied, as unfairly giving the plaintiff a free "re-do" or "mulligan" (a second shot from the tee, for the reader who doesn't play golf) if things start going badly for plaintiff. Under the view of some plaintiffs, if

a plaintiff still has time on the statute of limitations all he or she has to do is dismiss "without prejudice", refile, and start the whole lawsuit over again, with all old rulings erased and going forward with all new discovery, experts, depos, rulings, etc. This is not a right defendant has, as defendant has no option of filing a dismissal to start over again if bad rulings pile up or deadlines get missed or other misfortunes occur. Under the rules, a re-filed action is supposed to go back to the same judge; but plaintiffs argue that even so, they get to start the discovery clock and litigation deadlines all over again, and that all past missed deadlines and rulings are erased. W & Z has argued in various published and unpublished cases that this is unfair and in violation of public policy, and continues to press for explicit rules that limit the ability of one side to get advantages out of the dismissal-without-prejudice procedure that are not equally available to the other side via any similar mechanism.