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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CITY OF LONG BEACH, Cross-complainant and Appellant, v. STEVEDORING SERVICES OF AMERICA, Cross-defendant, Cross-complainant and Appellant; PARSONS TRANSPORTATION GROUP, INC., Cross-defendant and Respondent.	B187003 (Los Angeles County Super. Ct. No. NC022395)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. John Zebrowski, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Caroline E. Chan; Forgie & Leonard, Arthur A. Leonard; Robert E. Shannon, City Attorney, Belinda R. Mayes, Deputy City Attorney, for Cross-complainant and Appellant City of Long Beach.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part I.

Horvitz & Levy, Bradley S. Pauley, Julie L. Woods; Bereny & Wallace and Joshua B. Bereny for Cross-defendant, Cross-complainant and Appellant Stevedoring Services of America.

Palafox Law Corporation and Julie A. Palafox for Cross-defendant and Respondent Parsons Transportation Group, Inc.

* * * * * *

This is an action for contractual indemnity by the City of Long Beach (the City) against Stevedoring Services of America, Inc. (SSA) arising from a personal injury lawsuit filed against the City by an SSA employee. The City leased a portion of the Long Beach pier to SSA for operation of a marine cargo terminal. As part of a project to reconfigure the terminal, the City agreed to relocate certain fire hydrants. One day after a fire hydrant was left standing in a newly created traffic lane at the terminal, a truck driven by an SSA employee hit a concrete guardpost surrounding the hydrant. The employee sued the City and a jury found that the accident was caused by a dangerous condition created by the City and assessed $1.9 million in damages against the City.

The City cross-complained against SSA for contractual indemnity. SSA in turn filed a cross-complaint for equitable indemnity against Parsons Transportation Group, Inc. (Parsons), which provided a consultant to the City to manage the latter part of the reconfiguration project. After a bench trial, the trial court denied the City indemnity from SSA, finding that the City was actively negligent in the reconfiguration of the terminal. Because judgment on the cross-complaint was in favor of SSA, the trial court dismissed as moot SSA's cross-complaint against Parsons, and awarded costs to Parsons as the prevailing party pursuant to Code of Civil Procedure section 1032.

The City appealed the judgment in SSA's favor, and SSA cross-appealed from the order awarding costs to Parsons. We affirm both the judgment in favor of SSA on the City's indemnity cross-complaint and the award of costs to Parsons.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

The City owns marine terminal facilities at the Port of Long Beach. In 1981, the City and an affiliate of SSA entered into a preferential assignment agreement (the Agreement), which gave SSA a 20-year preferential assignment of Berths 245 to 247 on Pier J of the Long Beach wharf. SSA operated a marine cargo terminal at the assigned premises and the City essentially served as the landlord.

The Agreement contained an indemnity provision, which stated in part: "Assignee [SSA] shall indemnify, hold, protect and save harmless City . . . from and against any and all actions, . . . brought, made, filed against, imposed upon or sustained by City . . . and arising from or attributable to or caused, directly or indirectly, by the use of the premises and facilities located thereon, or from operations conducted thereon by Assignee [SSA], its officers, agents, employees or invitees, . . . *excluding any and all such actions, . . . to the extent arising from or attributable to or caused, directly or indirectly, from the sole negligence* (*active or passive*) *or the contributory active negligence of said City*, its boards, officers or employees, and its agents or any person or persons acting on behalf of City with the City's consent, express or implied, pursuant to this Agreement." (Italics added.)

In the early 1990's, additional space became available at Pier J and the City agreed to lease this space to SSA. The City also agreed to reconfigure the terminal to incorporate the additional space. With input from SSA, the City prepared designs for the reconfiguration and submitted them for SSA's review. The parties conducted weekly construction meetings.

The reconfiguration project involved relocating the vehicular traffic lanes or aisles and relocating the "parking spots" for shipping cargo containers by repaving and restriping the area and placing tire stops in the new parking spots. The restriping essentially involved painting new yellow stripes on the pavement similar to those in a parking lot. The project also involved relocating utilities such as light poles and fire hydrants. Due to the ongoing operations of the terminal, the work was performed in

stages. When one area was ready to be repaved and restriped, SSA would move its containers out of the area and would typically move the containers back into the new area "the evening following the afternoon" the work was completed.

The final plans reconfigured the terminal in such a way that certain fire hydrants not previously exposed to vehicular traffic were located in the middle of newly created traffic lanes. The City knew that hydrants located in traffic lanes constituted a collision obstacle and safety hazard and that vehicles in the terminal occasionally struck hydrants. Given the volume of traffic at the terminal, hard objects were frequently hit. The plans therefore called for the fire hydrants to be relocated out of the new traffic lanes and adjacent to light poles. It is undisputed that the City agreed to relocate the hydrants.

In May 1996, the City's manager on the reconfiguration project, Christine Applequist, prepared a "to do" list on the project, including the relocation of three fire hydrants. Applequist testified that it would have taken no more than two months to relocate the hydrants. That same month, Applequist's duties were reassigned to Diane Kravif, an employee of Parson's predecessor, De Leuw, Cather & Company. Kravif's employer had a consulting services contract with the City pursuant to which Kravif was loaned to the City as a temporary program manager. Applequist gave her list of remaining work to Kravif. Applequist did not order relocation of the fire hydrant in question prior to turning over her files to Kravif.

In July 1996, Kravif wrote a memorandum indicating that funding had been authorized for repaving and restriping the area in question and that the striping plans were available. The area was scheduled to be repaved and restriped the week of November 5, 1996. There is no evidence that Kravif made any arrangements to have the relocation of the fire hydrant coincide with the scheduled work. At a weekly construction meeting on October 31, 1996, an SSA representative inquired about the status of the hydrant relocation. There were discussions either before, during or after the meeting that leaving the hydrant in place would pose a threat to safety. It appeared to the City's principal construction inspector, Howard Morlock, that the task had been overlooked, and he directed the City's construction inspector, Dennis Neilan, to prepare a work order. The

same day as the meeting, Neilan prepared a work order for the City's maintenance department, but he did not specify a completion date. Neilan was unaware that he could designate the task as an emergency priority with an "E" code, and he simply requested the task to be completed "ASAP." He did not follow up on the work order. The fire hydrant in question was not relocated prior to the repaving and restriping of the area around it, which took place November 5 through 8, 1996. After the restriping was completed, SSA immediately moved its cargo containers into the area.

The fire hydrant in question was painted bright yellow and four vertical matching yellow concrete guardposts surrounded it. The hydrant was located in the middle of a newly created traffic lane or aisle between rows of containers. On November 9, 1996, one day after the restriping was completed, Kathy Young, a longshoreperson employed by SSA, was driving a small truck looking for a missing container when she collided with one of the guardposts in front of the hydrant. Young admitted that she was not looking straight ahead because she was looking at the containers. The fire hydrants were relocated in January 1997.

Procedural History

Young sued the City and others for personal injury. The City filed a cross-complaint against SSA for contractual indemnity. SSA in turn filed a cross-complaint for equitable indemnity against Parsons. The cross-complaints were severed from Young's action, which was tried to a jury. The jury found that the City's property was in a dangerous condition at the time of the accident, the dangerous condition was the cause of the accident, and the dangerous condition was created by a negligent or wrongful act or omission of a City employee acting within the scope of employment. The jury found that the City was 40 percent at fault, Young was 25 percent at fault and other parties were 35 percent at fault. After reducing the award to account for Young's own negligence, the trial court entered judgment against the City in the amount of $1,938,990.29. The City appealed the judgment and thereafter settled with Young for the full amount of the judgment.

The City's cross-complaint against SSA proceeded to a bench trial. At the conclusion of the City's case, SSA filed a motion for judgment under Code of Civil Procedure section 631.8.[1] The trial court granted the motion. In a lengthy statement of decision, the court found that the City was actively negligent and therefore SSA had no duty to indemnify the City under the Agreement. Because SSA was not liable to the City, the court dismissed SSA's cross-complaint against Parsons as moot. The court found that Parsons was the prevailing party and ordered SSA to pay Parsons' costs. The City has now appealed the judgment in favor of SSA, and SSA has filed a cross-appeal from the order awarding costs to Parsons.

DISCUSSION

I. THE CITY'S APPEAL FROM THE JUDGMENT IN FAVOR OF SSA

In challenging the trial court's judgment that the City was not entitled to contractual indemnity from SSA, the City divides its arguments into three main sections. Accordingly, we will address these arguments in the order presented. But first we discuss the applicable standard of review.

A. Standard of Review

The parties disagree on the appropriate standard of review. "The standard of review of a judgment and its underlying findings entered pursuant to [Code of Civil Procedure] section 631.8 is the same as a judgment granted after a trial in which evidence was produced by both sides. In other words, the findings supporting such a judgment 'are entitled to the same respect on appeal as are any other findings of a trial court, and are not erroneous if supported by substantial evidence.' [Citations.]" (*San Diego*

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[1] Code of Civil Procedure section 631.8 provides in part: "(a) After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634, or may decline to render any judgment until the close of all the evidence."

Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal.App.4th 517, 528.) The appellate court views the evidence in the light most favorable to the respondent, resolves all evidentiary conflicts in favor of the prevailing party and indulges all reasonable inferences possible to uphold the trial court's findings. (*Ibid*.) "However, when the decisive facts are undisputed, the reviewing court is confronted with a question of law and is not bound by the findings of the trial court." (*Ibid*.)

The City asserts that "the evidence is undisputed that it [was] not negligent" and that our review should be de novo. We do not understand how the City can plausibly make this argument. The ultimate factual question to be answered below, and therefore the main focus of the litigation, was whether the City was actively negligent. Indeed, in the statement of decision, the trial court stated: "The parties agree that the first contractual issue to be decided is whether the City was actively negligent." Nevertheless, after first making this argument in its opening brief, the City then labels the heading of its last argument as follows: "The Trial Court's Finding That the City of Long Beach Was Actively Negligent and Was Not Entitled to Indemnity is Not Supported by the Evidence in this Case Given the Lack of Causation on the Part of the City." The City's arguments are contradictory. In any event where, as here, a factual issue is in dispute, the proper standard of review is the deferential substantial evidence test.

B. Substantial Evidence Supports the Finding That the City Was Actively Negligent

"Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. [Citation.]" (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 (*Rossmoor*).) Where, as here, the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract. (*Ibid*.)

The Agreement's indemnity provision requires SSA to indemnify the City against all claims arising out of SSA's use of the premises excluding those claims caused by "*the*

sole negligence (*active or passive*) *or the contributory active negligence of said City*." (Italics added.)

"Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. [Citations.] Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform. [Citations.]" (*Rossmoor*, *supra*, 13 Cal.3d at p. 629.) "'The crux of the inquiry is to determine whether there is participation in some manner by the person seeking indemnity in the conduct or omission which caused the injury beyond the mere failure to perform a duty imposed upon him by law.'" (*Ibid.*, quoting *Morgan v. Stubblefield* (1972) 6 Cal.3d 606, 625.) Whether conduct constitutes active or passive negligence depends upon the circumstances of a given case and is ordinarily a question for the trier of fact. (*Ibid*.)

The trial court found that the City was actively negligent because "the City *created* the dangerous condition" by failing to relocate the fire hydrant and surrounding guardposts and leaving them in the middle of a newly created traffic lane. Ample evidence supports this finding.

The evidence showed that the City agreed to undertake the terminal reconfiguration and agreed to relocate the hydrant in question. The City's manager on the project, Applequist, included relocation of the hydrant on her "to do" list for the project, which she gave to Kravif, who took over Applequist's duties on the project. Although the area in question was scheduled to be repaved and restriped the week of November 5, 1996, Kravif did not make any arrangements to have the relocation of the hydrant coincide with the scheduled work. The City's principal construction inspector testified that it appeared to him at a weekly construction meeting on October 31, 1996 that the task had been overlooked, and he directed the City's construction inspector to prepare a work order. While the inspector submitted a work order for the City's maintenance department the same day he was asked to do so, he did not specify a

completion date, did not designate the task as an emergency priority and did not follow up on the work order. Consequently, the fire hydrant in question was not relocated prior to the repaving and restriping of the area around it. By restriping the terminal without relocating the hydrant, and thereby leaving the hydrant in the middle of the newly created traffic lane, the City created the safety hazard that caused Young's accident. The City was therefore actively negligent.

In addition, we agree with SSA that the City was also actively negligent because of its knowledge of and acquiescence in the existence of the dangerous condition. There was testimony by more than one witness that the City knew the hydrant was dangerous if not relocated because someone driving in the traffic lane could hit it. There was also testimony that the City knew it was SSA's practice to immediately begin using the premises once the repaving and restriping work was completed. Yet the City returned the premises to SSA knowing the hazard remained and knowing that SSA would immediately begin using the premises. This acquiescence in SSA's use of the premises in a dangerous state is also active negligence.

Despite this showing of substantial evidence of the City's active negligence, the City nevertheless argues that it cannot be found negligent as a matter of law because it owed no duty of care to Young. The City points out that at the time of Young's accident the City did not control or have possession of the premises, and did not have any right or duty to tell SSA when to resume operations on the premises or how to employ its workers. The City misses the point. Regardless of possession or control at the time of the accident, the City *created* the dangerous condition that caused the accident. Thus, the City's reliance on *Martinez v. Bank of America* (2000) 82 Cal.App.4th 883, 890–892 and *Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 85 is misplaced because those cases involved landlords who did not create or know of the dangerous condition. Where, as here, a landlord creates a dangerous condition or acquiesces in its creation, the landlord is negligent. (*People ex rel. Dept. Pub. Wks v. Daly City Scavenger Co.* (1971) 19 Cal.App.3d 277, 282–283; *Marincovich v. Oriana, Inc.* (1970) 13 Cal.App.3d 146, 163.)

The City also argues that any contributory negligence on its part was at most passive, not active, because SSA, not the City, created the dangerous condition. According to the City, the dangerous condition was not the preexisting hydrant, but SSA's creation of the new traffic lane around the hydrant by SSA's placement of the containers. The City is mistaken. *The City*, not SSA, designated the traffic lanes on the plans the City prepared. The City restriped the pavement with painted lines similar to parking spaces and added cement tire stops consistent with the reconfiguration plans. The painted lines demarcated the traffic lanes from the container areas. SSA simply placed the containers in the designated container areas, consistent with the City's plans.

The City also argues that it was not actively negligent because SSA requested the reconfiguration of the property and the plans were subject to SSA's modification and approval. Again, the City misses the point. Young's injury resulted from the City's failure to relocate the fire hydrant. The City had the task of relocation; SSA had no responsibility with regard to that task. The fact that SSA requested the reconfiguration is irrelevant. *Marincovich v. Oriana, Inc., supra*, 13 Cal.App.3d 146, makes this point clear. There, the City erected a fence at one of its piers at the request, and in accordance to the specifications, of one of its tenants. After a worker was injured while trying to lift a mooring line over the fence, the worker sued the shipping company, which cross-complained against the City for indemnity. (*Id*. at p. 150.) The City then cross-complained against the tenant for indemnity. (*Ibid*.) On appeal, the City argued that it was entitled to indemnification from the tenant because the fence was constructed at the request of the tenant in accordance with its plans and specifications. (*Id*. at p. 161.) The appellate court rejected this argument, finding that the City was not entitled to indemnity from the tenant because the City "was guilty of active negligence in the manner and place of construction of the fence." (*Id*. at p. 163.)

Finally, the City suggests that it was not actively negligent because it did not promise to relocate the hydrant by a certain date. But as SSA correctly notes, this argument confuses tort duties with contractual obligations. Implicit in the City's promise to undertake the reconfiguration was a duty to perform the task in a competent manner.

(See, e.g., *North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 774.) Here, the City created a dangerous condition by failing to relocate the hydrant and leaving it in the middle of a traffic lane, then returning the area to SSA knowing that it would immediately use the premises.

The trial court's finding that the City was actively negligent is amply supported by the evidence.

C. Substantial Evidence Supports the Finding That a Fire Hydrant Exposed in the Path of Traffic Is a Dangerous Condition of Public Property

The City next argues that because it is a public entity it is immune from tort liability as a matter of law under the Tort Claims Act (Gov. Code, §§ 810, 815). The City claims that the only possible exception to tort immunity is Government Code section 835, which imposes liability on a public entity for the dangerous condition of public property. But the City argues that leaving the fire hydrant exposed to traffic was not a dangerous condition. We disagree.

Government Code section 835 provides that a public entity is liable for a dangerous condition on its property when either (1) the dangerous condition was caused by a negligent or wrongful act or omission of an employee of the public entity acting within the scope of employment or (2) the public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have taken preventative measures. (Gov. Code, § 835, subds. (a) & (b).) A "dangerous condition" is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) The phrase "use with due care" refers to the public generally and not to the particular plaintiff's contributory negligence, which is a matter of defense. (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 239.)

The existence of a dangerous condition is ordinarily a question of fact, but can be decided as a matter of law if reasonable minds can reach only one conclusion. (*Bonanno*

v. Central Contra Costa Transit Authority (2003) 30 Cal.4th 139, 148.) The trial court found that the presence of the hydrant in the newly created traffic lane was a dangerous condition. This finding is supported by the evidence.

The City acknowledges that the terminal was a busy port subject to round-the-clock traffic. The City knew that workers at the terminal drove on the traffic lanes to search for and retrieve shipping containers, and that a worker might not be able to look straight ahead at all times because the search would necessarily require looking to the side of the traffic lane towards the storage areas or looking down at shipping documents. We agree with the trial court that such action would not necessarily constitute a lack of due care on the part of a driver under these circumstances. Furthermore, a driver exercising due care by looking straight ahead could still be injured by the unforeseen presence of a hydrant in the middle of a traffic lane. This is particularly true where, as here, there were no hydrants exposed to traffic under the prior configuration of the area. Thus, for example, a careful driver not expecting an obstruction in the middle of a traffic lane might not be able to see the hydrant in poor weather in sufficient time to avoid hitting it. As the trial court aptly noted, "if the City had placed a fire hydrant directly in a lane of traffic on a public street, a finding that this did not constitute a dangerous condition of public property would be almost inconceivable." The same is true here.

The City nevertheless argues that the property was not in a dangerous condition because vehicles rarely hit hydrants at the terminal. This argument ignores the evidence that prior to the reconfiguration of the terminal, no hydrants were situated in the path of traffic. Rather, they were located in container storage areas out of the path of traffic. Thus, the absence of a large number of prior accidents involving fire hydrants would not be a material factor in determining whether the location of the hydrant was a dangerous condition. The City also points out that no other vehicles collided with this particular hydrant before or after Young's accident. We find no significance to this fact. The hydrant was exposed to traffic for only 30 hours before Young's accident and for two months after the accident. Following the accident, SSA requested that flashing barricades be installed in front of the hydrant until it could be relocated. It is not clear from the

record whether such barricades were actually installed, but if so, such an obvious warning would undoubtedly have a bearing on the number of accidents.

Accordingly, we find no merit to the City's contention that a dangerous condition did not exist.

D. Substantial Evidence Supports the Finding That There Were No Superseding Causes of Young's Accident

In its final argument, the City contends that it cannot be found actively negligent because the negligence of both SSA and Young constituted superseding causes of Young's accident. The trial court did not make any express findings on this issue. But implicit in the trial court's determination that any negligence by SSA and Young would merely go to the issue of apportionment of fault was the court's finding that their actions did not constitute superseding causes. Such a finding is supported by the evidence.

The term "superseding cause" means "an independent event [that] intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original [wrongdoer] should have foreseen[,] that the law deems it unfair to hold him responsible." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 573, fn. 9; *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 725.) "A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen and, therefore, not foreseeable. [Citations.] . . . . The defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable." (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 760.) The question is usually one for the trier of fact. (*Ibid*.)

The City argues that SSA's placement of the containers in such a way as to leave the hydrant exposed was a superseding cause of Young's accident. In other words, the City once again relies on its argument that SSA created the new traffic lane and that "absent this aisle way, the hydrant would still be tucked away behind some containers." We have already concluded that *the City*, not SSA, created the traffic lanes in its design

plans and striped the area consistent with those plans to demarcate the traffic lanes from the storage areas. SSA simply arranged storage containers consistent with the striping plan prepared by the City. This action by SSA does not constitute a superseding cause of Young's injury.

With respect to Young, the City argues that her lack of attention to the direction she was driving caused her accident. That Young's negligence contributed to the accident is not in doubt. But the question is whether her collision was foreseeable. It was entirely foreseeable that a driver could accidentally collide with a hydrant left standing in the middle of a traffic lane. Such conduct is even more foreseeable where terminal workers use the traffic lanes to search for containers and must necessarily look off to the sides of the lanes for containers. The City's own employees admitted that the existence of a hydrant in a traffic lane constituted a safety hazard.

In making its arguments, the City fails to cite any California authority. Instead, the City cites to a federal case based on admiralty law, *United States v. Rothschild International Steve. Co.* (9th Cir. 1950) 183 F.2d 181. That case is not instructive because there was no discussion on whether the intervening third-party act—of knowingly using a defective product—was foreseeable.

We find no merit to the City's contention that SSA's and Young's conduct constituted superseding causes of the accident.

II. SSA'S CROSS-APPEAL FROM THE AWARD OF COSTS TO PARSONS

After the City filed a cross-complaint for contractual indemnity against SSA, SSA in turn filed a cross-complaint for equitable indemnity against Parsons. Because the trial court ruled that SSA was not liable to the City for indemnity, it dismissed SSA's cross-complaint against Parsons as moot. The court then ordered SSA to pay Parsons's costs of $18,821.26 on the ground that Parsons was the prevailing party under Code of Civil Procedure section 1032. SSA contends the trial court erred in concluding that Parsons was the prevailing party. Where, as here, the determination of whether costs should be

awarded is an issue of law on undisputed facts, we exercise de novo review. (*Acosta v. SI Corp*. (2005) 129 Cal.App.4th 1370, 1374.)

Code of Civil Procedure section 1032, subdivision (b), provides: "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." The statute defines "prevailing party" as follows: "'Prevailing party' includes 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. When 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." (Code Civ. Proc., § 1032, subd. (a)(4).)

The trial court concluded that Parsons was a prevailing party because it was "a defendant in whose favor a dismissal is entered." SSA contends this was error, arguing that because the cross-complaint against Parsons was dismissed as moot, the dismissal was not in favor of either party. SSA points out that its indemnity cross-complaint against Parsons was a contingent claim because SSA sought indemnity from Parsons *only if* the City prevailed on its claim against SSA. Because the City did not prevail, the contingency never arose, or, as SSA puts it, "the cross-complaint never ripened into an actual adversarial claim between SSA and Parsons."[2]

Parsons counters that dismissal of a complaint or cross-complaint is always in favor of the defendant or cross-defendant. Parsons points out that while SSA received nothing by way of its cross-complaint, Parsons received what it sought—dismissal. SSA acknowledges that Parsons achieved its litigation objective of avoiding liability on the

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2 In support of its position, SSA relies upon *Miller v. American Honda Motor Co.* (1986) 184 Cal.App.3d 1014. But that case discussed an earlier version of Code of Civil Procedure section 1032, which had a different definition of "prevailing party" than exists in the current version. We therefore do not find that case to be instructive.

cross-complaint, but argues that SSA also achieved its litigation objective of prevailing in the City's action against it and recovering indemnity from Parsons only if SSA lost to the City. SSA also argues that because the dismissal of the cross-complaint was "merely an inevitable clerical act" flowing from the defeat by SSA of the City's action against it, Parsons did not prevail against SSA.

A dismissal of an action against a defendant based on mootness grounds will always be a mere clerical act. But that does not mean that the dismissal was not in the defendant's favor. Parsons is correct that the dismissal of the cross-complaint against it allowed Parsons to achieve its litigation objective of avoiding liability.

There are no cases precisely on point, but Parsons cites to three cases which are instructive. In *Santisas v. Goodin* (1998) 17 Cal.4th 599, the California Supreme Court concluded that where plaintiffs voluntarily dismissed their action with prejudice, the defendants were "defendants in whose favor a dismissal has been entered." (*Id*. at p. 606.) Accordingly, the defendants were considered "prevailing parties" entitled to recover their costs as a matter of right under Code of Civil Procedure section 1032, subdivision (b).

In *Crib Retaining Walls, Inc. v. NBS/Lowry, Inc*. (1996) 47 Cal.App.4th 886, the plaintiffs filed a construction defect lawsuit against Crib Retaining Walls, Inc., which cross-complained against NBS/Lowry, Inc. seeking equitable indemnity and contribution. (*Id*. at p. 888.) The plaintiffs filed an amended complaint adding NBS as a defendant. NBS eventually settled with the plaintiffs, then obtained both approval of the settlement as being in good faith under Code of Civil Procedure section 877.6 and a dismissal of Crib's indemnity cross-complaint. (*Crib Retaining Walls, Inc. v. NBS/Lowry, Inc*., *supra,* at p. 889.) The trial court's denial of costs to NBS was reversed. The appellate court found that NBS was a party in whose favor a dismissal was entered and was therefore entitled to costs as a matter of right. (*Id*. at p. 890.) Quoting from *Rappenecker v. Sea-Land Service, Inc*. (1979) 93 Cal.App.3d 256, 263, the court cautioned against engrafting exceptions onto the clear language of Code of Civil Procedure section 1032: "'[O]ne should not read into the statute allowing costs a restriction which has not been placed

there. "In general, a court should not look beyond the plain meaning of a statute when its language is clear and unambiguous, and there is no uncertainty or doubt as to the legislative intent. [Citation.]"'" (*Crib Retaining Walls, Inc. v. NBS/Lowry, Inc.*, *supra*, at p. 890.)

In *Great Western Bank v. Converse Consultants, Inc*. (1997) 58 Cal.App.4th 609, the plaintiffs sued a defendant in four separate lawsuits. The defendant filed cross-complaints for indemnity against a third party in all four lawsuits. After the third party settled with the plaintiffs and obtained a good faith settlement determination, the third party obtained a dismissal of the indemnity cross-complaints and was awarded costs as the prevailing party. (*Id*. at p. 612.) The appellate court affirmed, finding that a cross-defendant who obtains the dismissal of the cross-complaint after a good faith settlement with the plaintiff is the prevailing party for purposes of a cost award. (*Id*. at p. 613.) The court noted that the language of Code of Civil Procedure section 1032 is "clear and unambiguous" and that "[t]here is no exception in the cost statute for dismissals obtained as the result of a good faith settlement determination by the trial court." (*Great Western Bank v. Converse Consultants, Inc.*, *supra*, at p. 614.)

SSA argues these cases are distinguishable because different policy considerations are at play when a good faith settlement bars recovery on a cross-complaint. Allowing a cross-defendant to recover its costs following a determination of good faith settlement "facilitates the legislative purposes of encouraging settlements and promoting equitable sharing of damages by the parties at fault." (*Great Western Bank v. Converse Consultants, Inc.*, *supra*, 58 Cal.App.4th at p. 615.) SSA argues that, by contrast, awarding costs to a cross-defendant when a cross-complaint has been dismissed as moot would not promote any public policy goals but would instead encourage defendants to delay filing cross-complaints against responsible parties until after the trial of the plaintiff's action and therefore create a multiplicity of actions.

We are mindful of this concern and loathe to encourage judicial inefficiency. But we will not engraft exceptions onto a statute that do not exist. There is no exception in the cost statute for dismissals of cross-complaints obtained on the ground that the cross-

complaint has become moot. When a cross-complaint is dismissed as moot, the cross-defendant is one in whose favor the cross-complaint was dismissed and is therefore a prevailing party under Code of Civil Procedure section 1032 entitled to costs as a matter of right.

DISPOSITION

The judgment in favor of SSA on the City's cross-complaint for contractual indemnity is affirmed. The order awarding costs to Parsons is affirmed. Costs on appeal are awarded to SSA on the appeal and to Parsons on the cross-appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST