Filed 9/13/06 OPINION AFTER REHEARING

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DONNER MANAGEMENT COMPANY et al., Plaintiffs, Cross-Defendants and Appellants, v. MICHAEL SCHAFFER, Defendant, Cross-Complainant and Respondent.	D046439 (Super. Ct. No. GIC784722)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey Barton, Judge. Affirmed.

Duckor Spradling Metzger & Wynne, Scott L. Metzger, Robert M. Shaughnessy and Geoffrey C. Chackel for Plaintiffs, Cross-Defendants and Appellants.

Richard W. Weinthal; Gladych & Associates, John A. Gladych and Lauren L. McNerney for Defendant, Cross-Complainant and Respondent.

---

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Discussion parts I and II.

Donner Management Company[1] appeals from an order awarding attorney fees to Michael Schaffer, following the dismissal without prejudice of Donner's shareholder derivative lawsuit against Schaffer and nominal defendant Asia Web Holdings, Inc. (Asia Web).[2] In the published portion of this opinion, we hold that when at the commencement of a derivative lawsuit a shareholder-plaintiff voluntarily posts security under Corporations Code[3] section 800, a prevailing defendant seeking attorney fees at the conclusion of the lawsuit need not retrospectively show the lawsuit had no reasonable possibility of benefiting the corporation. We also reject Donner's argument that a frivolous litigation standard should be imposed as a prerequisite to a prevailing defendant's collection of a security furnished under section 800. Finally, we hold the practical definition of prevailing party applies to this case involving a dismissal without prejudice, and the trial court did not abuse its discretion in determining Schaffer was the prevailing party for purposes of an attorney fees award based on the security. Accordingly, we affirm the order.

In the unpublished portion of this opinion, we (1) deny Schaffer's motion to

---

1 Appellants also include Charles Greer, Norman Schwartz, David Reiter, David Levy, Elliot Pearlman, and David Burney. We refer to appellants collectively as "Donner."

2 During the pendency of the derivative lawsuit, Asia Web merged with Case Financial, Inc., and adopted the latter company's name. For simplicity, we refer to the company as Asia Web. Asia Web is not a party to this appeal.

3 Subsequent statutory references are to the Corporations Code unless otherwise specified.

dismiss the appeal, and (2) reject Donner's argument that the trial court abused its discretion in granting Schaffer relief under Code of Civil Procedure section 473 for a late filing of his attorney fees motion.

FACTUAL AND PROCEDURAL BACKGROUND

Schaffer was a director and the chief executive officer of Asia Web. On March 13, 2002, Donner filed a derivative shareholder complaint against Schaffer and nominal defendant Asia Web, alleging Schaffer had breached his fiduciary duty and engaged in conversion, and requesting an accounting. On April 22, 2002, Asia Web filed a motion requesting that Donner post a bond pursuant to section 800, subdivision (c). To support the bond motion, Asia Web submitted a declaration from the current chair of its board of directors explaining that Schaffer had resigned from the corporation, and detailing reasons why the lawsuit was detrimental to the corporation.

To avoid a discovery stay pending litigation of the bond motion, Donner voluntarily deposited a $50,000 cashier's check as security to satisfy the bond request, as allowed under section 800, subdivision (e) and Code of Civil Procedure section 995.710. A stipulated order filed June 11, 2002, provided: "Plaintiffs hereby agree that pursuant to Code of Civil Procedure § 995.710 the officer of the Court is authorized to collect, sell or otherwise apply this deposit to enforce the liability of plaintiffs, or any of them, if any, on the deposit . . . . [¶] . . . [¶] It is further stipulated and agreed that defendant Michael Schaffer may participate in the security deposited by plaintiffs. Defendants Asia Web Holdings, Inc. and Michael Schaffer reserve their respective rights to apply for attorneys fees and costs and oppose any application by either of them." (Capitalization omitted.)

Thereafter, the parties conducted discovery and the matter was set for trial. Meanwhile, in February or March 2004, Asia Web appointed a special litigation committee, composed of a newly elected board of directors, to investigate whether the lawsuit was of benefit to the corporation. After interviewing various parties to the litigation and examining documents, on April 12, 2004, the special litigation committee notified Donner of its conclusion that based on its business judgment it was not in the best interests of the company to continue the litigation. To reach this conclusion, the special litigation committee considered "a wide range of issues, independent of the merits of the litigation, including but not limited to the impact of this litigation on the time and resources of [company] personnel, its impact on future operations and fundraising efforts . . . ."

Accordingly, on May 28, 2004, Donner moved to dismiss the action without prejudice, based on its recognition that a "special litigation committee defense" in favor of the defendants had been established which barred the action. In moving to dismiss the action, Donner advised the court that it was not necessary to hold a full evidentiary hearing on the matter because Donner had concluded the members of the special litigation committee were properly independent and the committee had performed an adequate investigation, thus establishing the special litigation committee defense.

Schaffer did not oppose the motion to dismiss, but asserted that the dismissal should be with prejudice, contending that the lawsuit was without merit and had been brought to advance Donner's personal interests. The trial court rejected Schaffer's request for a dismissal with prejudice, finding that Schaffer had not presented any evidence to

prove his assertions. The court dismissed the action without prejudice on August 6, 2004.

Schaffer filed a motion for attorney fees and costs based on the $50,000 security posted by Donner under section 800. The court ruled that Schaffer was the prevailing party entitled to attorney fees. To support its ruling, the court found that the special litigation committee defense was more than a procedural defense; Schaffer was successful in "mak[ing] the case go away"; and there was no recovery on the complaint.[4]

DISCUSSION

I. *Schaffer's Motion to Dismiss the Appeal*

In a motion filed on appeal, Schaffer requests that we dismiss the appeal premised on the fact that one of the plaintiffs, David Levy, has sold all of his stock in Asia Web. To support his argument for dismissal, Schaffer cites the rule that a plaintiff who sells his or her entire stock in a corporation no longer has standing to prosecute claims in a shareholder's derivative lawsuit (the "continuous ownership" requirement). Schaffer posits that if Levy cannot challenge the attorney fees order, an appeal by the remaining plaintiffs is rendered moot because Schaffer can collect the security based on the order against Levy, given that all plaintiffs are jointly and severally liable for the attorney fees.

The validity of the continuous ownership requirement under California law is

---

[4] The trial court also ruled that a cross-complaint filed by Schaffer, which had been adjudicated in favor of Donner on summary judgment, did not impact Schaffer's prevailing party status. Other than a passing comment in a footnote in its appellate brief, Donner does not challenge this aspect of the court's ruling.

currently unsettled. (Compare *Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 130, [assumes continuous ownership requirement applies in California], with *Gaillard v. Natomas Co*. (1985) 173 Cal.App.3d 410, 414 [holds California only requires "contemporaneous ownership"; i.e., ownership at time of alleged wrongdoing and filing of lawsuit]; see Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2006) ¶¶ 6:614 to 6:619, pp. 6-138 to 6-138.2.)[5] Assuming (without deciding) that Schaffer's mootness argument might have merit if Levy lacked standing and that the continuous ownership requirement defined in *Heckmann* is valid, we conclude the latter requirement is inapplicable here given the posture of the case on appeal.

A shareholder derivative lawsuit is authorized when a corporation fails to pursue redress of an injury suffered by the corporation. (*Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 183.) The gravamen of the complaint in a derivative lawsuit is injury to the corporation, not to the individual shareholders. (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 313.) The rationale for the continuous ownership requirement is that only a shareholder may "'step into the corporation's shoes'" and seek a remedy to protect the corporation. (*Shilling v. Belcher* (5th Cir. 1978) 582 F.2d 995, 999.) Donner does not challenge a court's ruling granting or denying a remedy on behalf of the corporation. Rather, Donner challenges the court's order which requires the plaintiffs to forfeit the monies they furnished as security under section 800.

---

5 A decision from this court (*Grosset v. Wenaas*, review granted Jan. 4, 2006, S139285), agreeing with the rule set forth in *Heckmann* and disagreeing with the rule in *Gaillard*, is currently on review before the California Supreme Court.

Under these circumstances, the underpinning of the continuous ownership rule is lacking. In this appeal the plaintiffs are not seeking to "stand in the shoes" of the corporation to protect the corporation, but are seeking to protect their own rights not to lose the money they provided for the security. Accordingly, the fact that Levy no longer owns stock in the corporation does not impact his right to pursue an appeal for purposes of challenging the trial court's order that he relinquish the money he posted as a bond. Schaffer's motion to dismiss the appeal is denied.

II. *Code of Civil Procedure Section 473 Relief to Schaffer*

Background

After the trial court dismissed the action without prejudice on August 6, 2004, Schaffer served Donner with notice of this ruling on August 23, 2004. On or about September 23, 2004, Schaffer filed a memorandum of costs to claim costs as the prevailing party under Code of Civil Procedure section 1032. On October 13, 2004, Donner moved to strike the cost claim, contending Schaffer had not complied with the 15-day limitations period for filing cost claims prescribed in California Rules of Court,[6] rule 870. Schaffer then withdrew his cost claim, contending that it was prematurely filed because the court's order had not yet been entered as a judgment. Further, on or about October 27, 2004, Schaffer filed a proposed judgment and an amended cost claim. In his proposed judgment, Schaffer included a statement providing that in addition to being awarded costs, he shall "be permitted to seek recovery of his litigation expenses from the

---

6 Subsequent references to rules are to the California Rules of Court.

bond/security posted by Plaintiffs pursuant to Corporations Code section 800 *et. seq*." (Underscoring omitted.)

On November 9, 2004, Donner objected to Schaffer's proposed judgment, asserting that a voluntary dismissal without prejudice could not be entered as a judgment. Further, on November 16, 2004, Donner moved to strike Schaffer's amended cost claim on the basis of untimeliness under rule 870.

On December 30, 2004, the trial court granted Donner's motion to strike Schaffer's cost claim as untimely under rule 870. The court ruled that it had entered the dismissal on August 6, 2004; the notice of ruling was served on August 23, 2004; and the cost bill should have been filed by September 7, 2004. The court further ruled that Schaffer's request to enter a judgment of dismissal was moot in light of the dismissal of the complaint.

On or about January 21, 2005, Schaffer filed his attorney fees motion seeking to collect on the $50,000 security posted by Donner under section 800. To support the timeliness of his motion, Schaffer cited Code of Civil Procedure section 996.440, subdivision (b) of the Bond and Undertaking Law, which sets forth a one-year limitations period for enforcement of liability on a bond.

On March 18, 2005, Donner filed an opposition to Schaffer's attorney fees motion, contending the motion was untimely under rule 870.2, which identifies a 60-day limitations period for filing a motion for attorney fees. Donner argued that the 60-day period began to run on August 23, 2004 (when notice of the dismissal was served), and expired on October 25, 2004. Donner argued that the one-year limitations period in Code

of Civil Procedure section 996.440 did not apply to Schaffer's attorney fees request because Schaffer could not enforce the bond under the Bond and Undertaking Law until he first obtained a prevailing party determination on a timely motion under rule 870.2.

In response, Schaffer conceded Donner's interpretation "ha[d] some merit" and that "an initial motion was probably required to be made" under rule 870.2. However, Schaffer requested relief under Code of Civil Procedure section 473, claiming that he had made a reasonable mistake of law based on his reliance on the one-year limitations period set forth in the Bond and Undertaking Law. To support his request for relief, Schaffer's attorney submitted a declaration explaining that he believed liability for attorney fees and costs had already been established by virtue of the dismissal; he did not believe a two-step motion procedure was required; and based on his research of section 800 and Code of Civil Procedure section 996.440 he believed Schaffer had one year from the date of dismissal to file the motion to collect on the security.

On April 26, 2005, the trial court granted Schaffer relief under Code of Civil Procedure section 473. The court reasoned that Code of Civil Procedure section 996.440 was ambiguous and that counsel made a reasonable mistake of law.

Analysis

Donner argues the trial court abused its discretion in granting Schaffer's motion for relief under Code of Civil Procedure section 473 (section 473). Under section 473, subdivision (b), a trial court has the discretion to provide relief from an order based on an attorney's mistake of law. However, section 473 is not "a catch-all remedy for every case of poor judgment on the part of counsel . . . ." (*State Farm Fire and Casualty Co. v.*

Pietak (2001) 90 Cal.App.4th 600, 611-612.) Rather, a trial court may allow relief for a mistake of law only "when the legal problem posed is "'complex and debatable.'"" (*Id.* at p. 611.) "The controlling factors in determining whether a mistake of law is excusable are the reasonableness of the misconception and the justifiability of the failure to determine the correct law." (*Ibid.*) Where the alleged mistake is the result of "'unjustifiable negligence in the discovery or research of the law,'" relief is normally denied. (*Ibid.*) In contrast, when the law is ambiguous and counsel makes a reasonable error in construing the law, relief may be warranted. (See *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352, 362.)

We review the trial court's ruling under section 473 for abuse of discretion. (*State Farm Fire and Casualty Co. v. Pietak, supra,* 90 Cal.App.4th at p. 610.) "'[W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court.'" (*Ibid.*)

Donner claims the applicability of the limitations period in rule 870.2 to the section 800 bond was a simple matter, and thus the late filing cannot be excused under section 473. Schaffer, on the other hand, asserts that because of the specific limitations period set forth in the Bond and Undertaking Law, the applicable limitations period was not clear and his reliance on Code of Civil Procedure section 996.440 was a reasonable mistake. Both before the trial court and on appeal, Schaffer does not dispute Donner's interpretation that the limitations period in rule 870.2 governs. Given this concession, the issue has not been fully briefed by the parties. For purposes of our review of the trial court's grant of section 473 relief, we need not, and do not, express an opinion on the

ultimate resolution of the issue. As we shall explain, we conclude the matter is debatable, and accordingly the trial court could reasonably find section 473 relief was warranted.

Code of Civil Procedure section 996.440 (section 996.440) sets forth a one-year limitations period from entry of judgment to enforce liability on a bond. Section 996.440, which is part of the Bond and Undertaking Law, states:

> "(a) *If a bond is given in an action or proceeding, the liability on the bond may be enforced on motion made in the court without the necessity of an independent action.*
> "(b) The motion shall not be made until after entry of the final judgment in the action or proceeding in which the bond is given and the time for appeal has expired or, if an appeal is taken, until the appeal is finally determined. *The motion shall not be made or notice of motion served more than one year after the later of the preceding dates.*
> "(c) Notice of motion shall be served on the principal and sureties at least 30 days before the time set for hearing of the motion. The notice shall state the amount of the claim and shall be supported by affidavits setting forth the facts on which the claim is based. The notice and affidavits shall be served in accordance with any procedure authorized by Chapter 5 (commencing with Section 1010).
> "(d) *Judgment shall be entered against the principal and sureties in accordance with the motion unless the principal or sureties serve and file affidavits in opposition to the motion showing such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. If such a showing is made, the issues to be tried shall be specified by the court.* Trial shall be by the court and shall be set for the earliest date convenient to the court, allowing sufficient time for such discovery proceedings as may be requested.
> "(e) The principal and sureties shall not obtain a stay of the proceedings pending determination of any conflicting claims among beneficiaries." (Italics added.)

The Bond and Undertaking Law provisions, including section 996.440, were enacted in 1982 for the purpose of consolidating the provisions applicable to bonds that had previously been disbursed throughout the codes. (6 Witkin, Cal. Procedure (4th ed.

1997) Provisional Remedies, §§ 7, 8, p. 30.) Code of Civil Procedure section 995.020, subdivision (a) provides that the Bond and Undertaking Law applies "to a bond or undertaking executed, filed, posted, furnished, or otherwise given as security pursuant to *any* statute of this state, except to the extent the statute prescribes a different rule or is inconsistent." (Italics added.) The main purpose of a bond is "to protect the defendant against loss incurred if the defendant prevails in the main action." (6 Witkin, *supra*, Provisional Remedies, § 10, p. 32; see, e.g., *Special Editions v. Kellison* (1982) 129 Cal.App.3d 803, 808-809.)

Section 800 is a statute that provides for a bond, allowing a defendant in a shareholder derivative lawsuit to bring a motion to "require security for costs and attorneys' fees . . . ." (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 335, p. 429.) On its face, there is nothing in section 800 that indicates it is *not* governed by the Bond and Undertaking Law. To the contrary, the Law Revision Commission Comment to section 800 refers to amendments made to section 800 so as "to delete provisions duplicated in the Bond and Undertaking Law." (Cal. Law Revision Com. com., 23E West's Ann. Corp. Code, 1982 Amendment (1990 ed.) foll. § 800, p. 345.) Thus, a facial examination of section 800 and a reading of the accompanying comment suggest that the Bond and Undertaking Law applies to section 800's provisions.

Under rule 870.2, a party has 60 days from the mailing or service of "'Notice of Entry'" of judgment to request attorney fees. (Rules 870.2(b), 2.) Defining its applicability, rule 870.2(a) states: "*Except as otherwise provided by statute*, this rule

applies in civil cases to claims for statutory attorney fees and claims for attorney fees provided for in a contract." (Italics added.)

Based on an examination of the above-described provisions, the trial court did not abuse its discretion in finding that a reasonable attorney could conclude that a request for attorney fees under a section 800 security is governed by the limitations period set forth in section 996.440 of the Bond and Undertaking Law rather than the limitations period set forth in rule 870.2. The language used in section 996.440, subdivision (a), making the section broadly applicable to enforcement of "liability on the bond," can reasonably be construed as applying to liability for attorney fees derived from a section 800 security. Thus, an attorney could deduce that the caveat in rule 870.2, excluding attorney fees requests governed by other statutes, was applicable to an attorney fees request based on a section 800 security. (See 2 Ballantine & Sterling, Cal. Corporation Laws (4th ed. 2005) § 293.07, p. 14-28 [discussing one-year limitations period for enforcement of section 800 security under Bond and Undertaking Law with no reference to rule 870.2].)

In its pleadings opposing Schaffer's attorney fees request as untimely, Donner argued that section 996.440 only allowed for enforcement of a bond once liability on the bond was established, and that liability could not be established until a prevailing party determination was made within the time frame set forth in rule 870.2 for attorney fees motions. Although Donner's interpretation of section 996.440 is a plausible one, it is not the only possible construction. Section 996.440, subdivision (d) allows for a hearing when there are issues of fact that need to be resolved before a judgment can be entered in favor of the party seeking enforcement of liability on the bond. Arguably, such a hearing

could properly be used to adjudicate the prevailing party issue without need of a motion under rule 870.2.

The issue of the applicability of rule 870.2 over section 996.440 to a section 800 bond is not readily ascertainable from the statute and rules, and the issue is debatable. Under these circumstances, the trial court reasonably granted section 473 relief based on Schaffer's reliance on section 996.440.

The reasonableness of the trial court's grant of section 473 relief is further supported by the fact that Donner's deposit of a $50,000 cashier's check in lieu of furnishing a bond was made pursuant to a provision in the Bond and Undertaking Law, Code of Civil Procedure section 995.710, providing for this procedure. The stipulated order entered to effectuate the deposit as a substitute for a bond specifically refers to Code of Civil Procedure section 995.710.[7] Thus, the record supports a finding that the parties understood that a section 800 security is generally governed by the provisions in the Bond and Undertaking Law. It follows that Schaffer's attorney could reasonably conclude the limitations period set forth in the Bond and Undertaking Law governed his attorney fees request premised on the section 800 security.

Donner asserts the court abused its discretion in granting section 473 relief because Schaffer's attorney had notice of the existence of rule 870.2 from Donner's first

---

[7] Code of Civil Procedure section 995.710, allowing for a deposit in lieu of bond, provides: "(c) The deposit shall be accompanied by an agreement executed by the principal authorizing the officer to collect, sell, or otherwise apply the deposit to enforce the liability of the principal on the deposit. . . ." The stipulated order contains this required agreement and references Code of Civil Procedure section 995.710.

motion to strike Schaffer's claim for costs as untimely. Donner's motion to strike costs was filed 12 days before the 60-day limit in rule 870.2 expired, and the motion cited case authority (*Sanabria v. Embrey* (2001) 92 Cal.App.4th 422) referring to both rules 870 and 870.2. We agree that a reasonable attorney would have been alerted to the existence of rule 870.2 based on Donner's motion to strike costs premised on companion rule 870.[8] Nevertheless, there is nothing in Donner's pleadings or the court's ruling on the *cost* claim that necessarily alerted Schaffer that the trial court might construe an *attorney fees* request based on the section 800 security as governed by the limitations period in rule 870.2 as opposed to the limitations period in section 996.440. There is no showing that the issue of the applicability of section 996.440 was raised or discussed by the parties during the proceedings pertaining to the cost claim. Thus, although the cost claim motion may have put Schaffer's attorney on notice of the *existence* of rule 870.2, the record does not establish it put him on notice of the *applicability* of that rule over section 996.440.

Further, the right to seek statutory attorney fees and the right to seek costs under the general cost statute (Code Civ. Proc., § 1032) can exist independently of each other, and the loss of one does not dictate the loss of the other. Thus, even though Schaffer lost his claim for costs because of untimeliness under rule 870, this did not necessarily mean he could not independently pursue a request for attorney fees under the Bond and Undertaking Law. (See *Agnew v. State Bd. of Equalization* (2005) 134 Cal.App.4th 899,

---

8 Although it is not entirely clear from the pleadings below, in briefing on appeal Schaffer contends his trial attorney was aware of the limitations period in the rules but believed that section 996.440 governed.

911-913 [Code of Civil Procedure section 1032 costs and statutory attorney fees may be independently pursued].)

We conclude the trial court did not abuse its discretion in affording section 473 relief to Schaffer based on his attorney's reliance on the limitations period defined in section 996.440 of the Bond and Undertaking Law.

III. *Award of Attorney Fees to Schaffer as the Prevailing Party Under Section 800*

Donner challenges the propriety of the trial court's decision to award attorney fees under the section 800 security to Schaffer as the prevailing party. Donner argues fees should not be awarded under section 800 without a determination that (1) there was no reasonable possibility the lawsuit would benefit the corporation, and (2) the lawsuit was frivolous. Further, he asserts Schaffer cannot properly be characterized as the prevailing party given that the lawsuit was dismissed without prejudice with no reflection on the merits.

A. *Attorney Fees Under Section 800*

To evaluate Donner's first two arguments, we review the legal principles applicable to attorney fees awards under section 800.

Attorney fees may not be awarded absent statutory authorization or contractual agreement. (Code Civ. Proc., § 1021; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 607, fn. 4.) Section 800 provides a statutory basis for attorney fees in shareholder derivative lawsuits. (See *Brusso v. Running Springs Country Club, Inc*. (1991) 228 Cal.App.3d 92, 101 (*Brusso*).)

To compel a plaintiff-shareholder in a derivative lawsuit to furnish a bond securing payment of the defendant's attorney fees, section 800 requires that the defendant "establish[ ] a probability," based on affidavits or oral testimony, (1) "[t]hat *there is no reasonable possibility that the prosecution* of the cause of action alleged in the complaint against the moving party *will benefit the corporation or its shareholders*[,] [or] (2) [t]hat the [defendant] moving party, if other than the corporation, did not participate in the transaction complained of in any capacity." (§ 800, subds. (c)(2), (d), italics added.) In assessing whether there is no reasonable possibility the action will benefit the corporation, the court "must evaluate the possible defenses which the plaintiffs would have to overcome before they could prevail at trial." (2 Ballantine & Sterling, Cal. Corporation Laws, *supra*, § 293.02, p. 14-23.)

If the defendant does not satisfy one of the section 800 grounds for a bond and accordingly no bond or other security is posted, the defendant will not be entitled to section 800 attorney fees even if he or she prevails at the end of the litigation. (*Alcott v. M. E. V. Corp.* (1987) 193 Cal.App.3d 797, 799; Friedman, Cal. Practice Guide: Corporations, *supra*, ¶ 6.659.1, pp. 6-138.15 to 1-138.16.) On the other hand, if the defendant does establish one of the section 800 grounds, the court fixes the amount of the bond (not to exceed $50,000) "to be furnished by the plaintiff for reasonable expenses, including attorneys' fees, which may be incurred by the moving party and the corporation

in connection with the action, including expenses for which the corporation may become liable pursuant to Section 317."[9] (§ 800, subd. (d).)

To prevent collateral estoppel effect, section 800, subdivision (d) provides that a court's ruling granting or denying the motion for security "shall not be a determination of any issue in the action or of the merits thereof." (See 3 Witkin, *supra*, Actions, § 337, p. 431.) If a defendant makes a successful motion under section 800 requiring the plaintiff to post a bond as security for attorney fees, and the plaintiff fails to post the bond, the trial court must dismiss the action. (§ 800, subd. (d); see *Brusso, supra,* 228 Cal.App.3d at p. 105.)

A plaintiff in a derivative lawsuit has the option of "avoid[ing] the inconvenience and delay of the motion proceeding by voluntarily posting a bond in the aggregate amount of $50,000, either before or after a motion [for security] is made. This will be deemed full compliance, and any pending motion must be dismissed." (3 Witkin, *supra*, Actions, § 338, p. 432; § 800, subds. (e), (f).)[10]

---

9 Section 317 sets forth the standards governing a corporate agent's request for indemnification from the corporation for payment of attorney fees. (See *Brusso, supra,* 228 Cal.App.3d at pp. 102-103.)

10 Section 800, subdivision (e) states: "If the plaintiff shall, either before or after a motion is made pursuant to subdivision (c), or any order or determination pursuant to the motion, furnish a bond in the aggregate amount of fifty thousand dollars ($50,000) to secure the reasonable expenses of the parties entitled to make the motion, the plaintiff has complied with the requirements of this section and with any order for a bond theretofore made, and any such motion then pending shall be dismissed and no further or additional bond shall be required."

Additionally, Code of Civil Procedure section 995.710 sets forth the procedure utilized by Donner, which allows a deposit in lieu of a bond.

The purpose of the section 800 security provision is to prevent unwarranted shareholder derivative lawsuits. (3 Witkin, *supra*, Actions § 335, p. 429; *Brusso, supra,* 228 Cal.App.3d at p. 104.) The justification for the security is derived from the fact that the cause of action and potential remedy belong to the corporation, not the shareholder (see *Desaigoudar v. Meyercord, supra*, 108 Cal.App.4th at p. 183), and the corporation has chosen not to pursue the litigation. As explained by the California Supreme Court: "[E]very stockholder who . . . is unable to induce the corporation, through its board of directors, to institute a particular action on its own behalf, and who undertakes as its volunteer representative to sue on the cause asserted by him, may be required to furnish security." (*Beyerbach v. Juno Oil Co*. (1954) 42 Cal.2d 11, 21 (*Beyerbach*).) "In these circumstances the Legislature, for the protection of third persons who have dealt with the corporation, as well as for the protection of the corporation and its officers and employe[e]s, can constitutionally require that the stockholder who would act as in the nature of a guardian ad litem must, as a condition of prosecuting the action on behalf of the corporation, either show a reasonable probability that the suit will be successful or secure the payment of the defendants' expenses should they prevail. The Legislature, of course, can attribute some weight to the fact that the corporation has not seen fit to institute action on a cause which either belongs to it or to no one." (*Id*. at pp. 23-24; see also *Chase v. Super-Cold Corp*. (1958) 163 Cal.App.2d 83, 85.)

1. *No Reasonable Possibility of Benefit Standard*

Donner argues that no fees should be awarded unless there has been compliance with section 800's provision that a mandatory bond requires a showing of no reasonable

possibility of benefit to the corporation from the action. Donner contends that because plaintiffs voluntarily posted the security in this case, this showing has not been made.

After initially filing our opinion in this case, we granted a rehearing and asked the parties to file supplemental briefs on the issue of whether a plaintiff's voluntary posting of a security excuses the requirement that a defendant show no reasonable possibility of benefit to the corporation. Having considered the parties' arguments, we conclude that when a plaintiff voluntarily posts security, the defendant may seek to enforce the security as the prevailing party at the conclusion of the case without having to retrospectively satisfy the no reasonable possibility of benefit standard.

When interpreting statutes, we seek to ascertain legislative intent so as to effectuate the purpose of the law. (*DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 387.) Our first task is to look at the language of the statute itself. (*Ibid*.) Section 800 contains no express language addressing what, if any, showing must be made when a defendant seeks to collect on a security that was posted voluntarily. However, section 800's voluntarily posting provision suggests that once security is posted by the plaintiff, the bond is available to pay for the defendant's attorney fees should the defendant emerge as the prevailing party. Section 800, subdivision (e) states: "If the plaintiff shall, either before or after a motion is made pursuant to subdivision (c), or any order or determination pursuant to the motion, furnish a bond in the aggregate amount of fifty thousand dollars ($50,000) *to secure the reasonable expenses of the parties entitled to make the motion*, the plaintiff has complied with the requirements of this section and with any order for a bond theretofore made, and any such motion then pending shall be

dismissed and no further or additional bond shall be required." (Italics added.) The phrase "to secure the reasonable expenses of the parties entitled to make the motion" reflects that the security, once posted, is available to pay for the prevailing defendant's expenses. There is nothing to indicate that a prevailing defendant must make *an additional showing* to access the security.

Additionally, the bond statute mandates *dismissal* of the bond motion after a voluntary posting of security. This feature supports a conclusion that the Legislature did not intend to require a retrospective determination of the no reasonable possibility of benefit standard. When a plaintiff voluntarily posts security, the section 800 bond motion is not merely placed in abeyance waiting for resolution at the conclusion of the case. Instead, the motion is dismissed, eliminating the need and the opportunity for the court to rule on whether the moving party met its statutory burden. Thus, when a prevailing defendant seeks to collect on the security at the conclusion of the case, there is no pending bond motion upon which the trial court is expected to rule. Section 800's dismissal provision correlates with a legislative intent to dispense with the no reasonable possibility of benefit requirement in the event of a voluntary posting of security.

Moreover, from a practical perspective, imposition of a no reasonable possibility of benefit requirement at the conclusion of the litigation would fashion an awkward adjudicatory rule. The statute imposes this requirement as a threshold determination to be made by the trial court based on an assessment of whether there is a reasonable possibility the litigation will be of benefit to the corporation. After the case is concluded, retrospective evaluation of the no reasonable possibility of benefit standard would require

the trial court to ascertain whether it would have been persuaded *at the commencement of the lawsuit* that the "no benefit" showing had been made so as to compel posting of a bond. It is unlikely the Legislature would have intended to impose such a speculative task on the parties or the trial court.

Our conclusion, derived from the plain language and substantive structure of the statute, is also supported by the California Supreme Court's discussion of the bond statute in *Beyerbach, supra*, 42 Cal.2d 11. In *Beyerbach*, the court recognized that the Legislature was entitled to impose special rules on shareholder derivative lawsuits because of their unique characteristics. In upholding the constitutionality of the bond statute, *Beyerbach* reasoned that the Legislature could determine that normally corporations will pursue their own causes of action when of benefit to the corporation, and that shareholders may abuse the right to bring a derivative suit. (*Id*. at p. 23.) Accordingly, it was reasonable for the Legislature to enact a statute requiring a plaintiff-shareholder in a derivative lawsuit to "*either show a reasonable probability that the suit will be successful or secure the payment of the defendants' expenses should they prevail.*" (*Beyerbach, supra*, 42 Cal.2d at pp. 23-24, italics added.) The analysis in *Beyerbach* underscores that the purpose of the security is to restrain derivative lawsuits filed by shareholders instead of the corporation itself, and supports that once the security is furnished so as to allow the plaintiff to proceed with the litigation, the security is available to reimburse the defendant should the defendant prevail.

In evaluating the constitutionality of the pretrial bond requirement, the *Beyerbach* court noted that the no reasonable possibility of benefit standard provides a due process

safeguard for the plaintiff. (*Beyerbach, supra,* 42 Cal.2d at p. 24.) However, in a situation where the plaintiff voluntarily posts bond, the plaintiff is, of his or her own accord, in effect choosing to substitute one benefit (the defendant's burden to show the lawsuit is not beneficial to the corporation prior to obtaining a bond) for another benefit (the speedier resolution of the lawsuit by dispensing with litigation of the bond motion). The fact that the defendant will be able to collect on the security only if he or she is the prevailing party ensures that the plaintiff will not be unfairly deprived of his or her posted funds. Under these circumstances, there is no due process imperative for imposing the no reasonable possibility of benefit standard at the conclusion of the case in a situation where the plaintiff voluntarily furnished security.

Donner contends that if a prevailing defendant is not required to meet the no reasonable possibility of benefit standard at the conclusion of the case, plaintiffs will not be inclined to voluntarily post security. We do not find this to be a pivotal consideration impacting our interpretation of section 800. As noted, the essential purpose of the section 800 bond statute is to create a deterrent to unwarranted shareholder derivative lawsuits by providing a mechanism for securing a prevailing defendant's expenses up to $50,000. The voluntary posting option is a corollary provision that allows a plaintiff to avoid the delay inherent in litigating a defendant's bond motion. When deciding whether to post bond, the plaintiff must decide if the benefits of voluntarily posting (i.e., quicker resolution of the case) outweigh the risk that the plaintiff might lose the case and forfeit the security. However, regardless of whether the defendant's bond motion is litigated or resolved voluntarily, the statute's purpose of imposing a security impediment to

shareholder derivative lawsuits remains intact. There is nothing in the legislative scheme suggesting the statute should be interpreted to *maximize* voluntarily posting, at the expense of expanding litigation at the conclusion of the case by requiring a retrospective determination of the no reasonable possibility of benefit standard. To the extent voluntary posting should be encouraged as a matter of public policy, any restructuring of the section 800 bond statute to further this goal is a matter for the Legislature to consider.

To support its argument that the no reasonable possibility of benefit standard should be evaluated in hindsight after the conclusion of the case, Donner cites the parties' stipulation at the time of the voluntary posting which provides that the deposit could be applied to enforce the plaintiffs' liability "*if any*." (Italics added.) Donner posits that the stipulation's recognition that liability on the bond was not established by the posting contemplates further proceedings, and that the parties understood these further proceedings would include litigation of the no reasonable possibility of benefit standard. We are not persuaded. At the time Donner voluntarily posted security, liability on the security was not established because it was not known which party would prevail. The reference to the undetermined bond liability in the stipulation does not shed any definitive light on the issue of whether the no reasonable possibility standard should be included in the matters to be resolved once the defendant prevailed. For the reasons stated above, we conclude it should not.

2. *Frivolousness Standard*

Donner further argues that as a matter of policy an award of fees under section 800 should require a showing the plaintiff's lawsuit was frivolous. Donner posits that if this

requirement is not imposed, there will be a chilling effect on shareholder derivative lawsuits because shareholders will know attorney fees liability will be incurred in any case in which they voluntarily provide security and a special litigation committee thereafter ascertains the lawsuit should not be pursued for business reasons, even if the allegations in the complaint are meritorious.

Donner is essentially asking us to rewrite the section 800 bond requirements. There is no frivolousness requirement for attorney fees recovery expressly or implicitly set forth in section 800. Donner's request for the insertion of a frivolousness standard is a policy matter for the Legislature, not the courts.

B. *Prevailing Party Determination After Dismissal Without Prejudic*e

Section 800 does not define the circumstances under which the defendant may obtain attorney fees on a bond or other security furnished by the plaintiff. Consistent with the intent of section 800 and other legislative schemes authorizing attorney fees, the courts and commentators have inferred that a defendant may enforce a security posted under section 800 if he or she is determined to be the prevailing party. (See *Beyerbach, supra,* 42 Cal.2d at pp. 21, 23-24; *Alcott v. M. E. V. Corp., supra,* 193 Cal.App.3d at p. 799; Friedman, Cal. Practice Guide: Corporations, *supra,* ¶ 6:659, p. 6-138.15.) The definition of prevailing party is not uniform under California law, and many attorney fees statutes contain a technical definition applicable to the particular statutory scheme. (See, e.g., *Santisas v. Goodin, supra,* 17 Cal.4th at p. 609; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565; *Agnew v. State Bd. of Equalization, supra,* 134 Cal.App.4th at pp. 908-909.) Because section 800 does not define prevailing party, we must construe

the meaning of the term for purposes of a section 800 attorney fees award after a dismissal without prejudice without the benefit of any express statement of legislative intent.

In reaching its prevailing party determination, the trial court relied on the practical standard set forth in *Damian v. Tamondong* (1998) 65 Cal.App.4th 1115 (*Damian*). As we shall explain, we conclude the court applied the correct standard and reasonably exercised its discretion to characterize Schaffer as the prevailing party.

Schaffer asserts the definition of prevailing party set forth in Code of Civil Procedure section 1032 (which applies to an award of costs) is the standard applicable to section 800 fees. Code of Civil Procedure section 1032, subdivision (4) defines prevailing party as including a "defendant in whose favor a dismissal is entered," with no requirement that the court evaluate the merits of the lawsuit. An opposite standard for prevailing party is set forth in Civil Code section 1717, subdivision (b)(2) (applicable to contractual attorney fees awards for contract claims), which *precludes* an award of attorney fees after a voluntary dismissal, regardless of the potential merits of the action. The courts have repeatedly rejected the contention that either of these prevailing party standards should be automatically applied in cases where the authorizing attorney fees statute does not define prevailing party. (*Gilbert v. National Enquirer, Inc*. (1997) 55 Cal.App.4th 1273, 1276-1277 (*Gilbert*); *Damian, supra*, 65 Cal.App.4th at pp. 1123-1126, 1129; *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1572-1574 (*Heather Farms*); see *Santisas v. Goodin, supra*, 17 Cal.4th at pp. 614-615, 617.)

In the absence of legislative direction in the attorney fees statute, the courts have concluded that a rigid definition of prevailing party should not be used. (*Gilbert, supra,* 55 Cal.App.4th at p. 1277.) Rather, prevailing party status should be determined by the trial court based on an evaluation of whether a party prevailed "'on a practical level,'" and the trial court's decision should be affirmed on appeal absent an abuse of discretion. (*Ibid*.; *Damian, supra*, 65 Cal.App.4th at pp. 1126, 1129-1130 and fn. 15; *Heather Farms, supra*, 21 Cal.App.4th at p. 1574; see *Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 622 [pragmatic definition of prevailing party, based on extent to which party has realized litigation objectives, applies to tort claims under contractual attorney fees provision]; *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1018, 1022-1024 [policy underlying particular attorney fees statute considered as part of practical test].)

This "practical level" standard has been applied in cases involving a dismissal without prejudice. (*Gilbert, supra*, 55 Cal.App.4th at pp. 1277-1278; *Heather Farms, supra,* 21 Cal.App.4th at pp. 1570, 1574; *Parrot v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 875, 879.) For example, in *Gilbert*, a case involving a plaintiff who voluntarily dismissed certain causes of action without prejudice in order to expedite the appeal of other causes of action that had been stricken on demurrer, the appellate court affirmed the trial court's decision that it was premature to decide which party had prevailed "on a practical level." (*Gilbert, supra*, at pp. 1277-1278.)

Given that there is no statutory definition of prevailing party here, the flexible, pragmatic standard generally used by the courts to determine prevailing party status

applies. Thus, the matter is to be determined by the trial court in the exercise of its discretion based on practical considerations.

Donner contends that because this case involves a dismissal without prejudice that did not reflect on the merits of the allegations in the complaint, the trial court could not properly characterize Schaffer as a prevailing party. Donner's argument is premised on the unique characteristic of the special litigation committee defense. The special litigation committee defense is rooted in the business judgment rule, which restrains courts from unduly interfering in the good faith business decisions of corporate directors. (*Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1157-1163; *Desaigoudar v. Meyercord, supra,* 108 Cal.App.4th at pp. 183-184, 186-188.) When a committee of directors concludes that pursuit of the derivative lawsuit is not in the best interests of the company, the trial court must determine whether this decision abrogates the lawsuit. (*Finley v. Superior Court, supra,* 80 Cal.App.4th at p. 1158.) To determine whether the special litigation committee defense should prevail, the court does not evaluate the merits of the lawsuit, but only considers whether the committee members acted independently and made an adequate investigation of the controversy. (*Desaigoudar v. Meyercord, supra,* 108 Cal.App.4th at pp. 185, 188.) If the court finds a disinterested committee made a good faith, reasonable inquiry before reaching its decision that the lawsuit should not be prosecuted, the committee's decision provides a complete defense to the derivative lawsuit. (*Ibid*.)

We conclude the trial court reasonably exercised its discretion to find that Schaffer was the prevailing party. Donner's dismissal of the complaint was not truly voluntary;

rather, it was compelled by the special litigation committee's decision that it was not in the best interests of the corporation to continue the lawsuit. Even though the special litigation committee's decision did not establish that the *allegations in the complaint* lacked merit, it did establish that the *lawsuit itself* could not be pursued because of the peculiar nature of the business judgment rule/special litigation committee defense which blocks litigation that is properly determined not to be in the best interests of the company. Thus, as a practical matter, the special committee's decision ended the litigation in favor of Schaffer and against plaintiffs. Donner has not proffered any persuasive argument as to why, under the circumstances of this case, the trial court was necessarily required to also consider the underlying merits of the allegations in the complaint. We conclude the trial court did not abuse its discretion in finding that Schaffer prevailed because the lawsuit ended based on the existence of a complete defense, and with no recovery obtained by Donner on behalf of the corporation.

DISPOSITION

The order is affirmed. Donner to pay Schaffer's costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

HALLER, Acting P. J.

WE CONCUR:

MCDONALD, J.

O'ROURKE, J.