Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2003 WL 463611 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 7, California.
Francis COPPOLA et al., Plaintiffs and Appellants,
v.
WARNER BROS., Defendant and Respondent.
No. B154280.
(Los Angeles County Super. Ct. No. BC 135198).

Feb. 25, 2003.

Motion picture producer brought action against motion picture studio, alleging claims for declaratory relief, interference with prospective economic advantage, interference with contract, slander of title, and restitution and rescission. Studio filed cross-complaint alleging breach of settlement agreement. The Superior Court, Los Angeles County, Super. Ct. No. BC 135198, Madeleine Flier, J., granted producer's motions for summary adjudication as to claims for declaratory relief and for summary judgment on cross-complaint, and entered judgment on jury verdict awarding producer $20 million in compensatory damages on interference claims. Studio appealed. The Court of Appeal reversed and remanded. On remand, the trial court entered judgment in entirety in favor of studio, and producer appealed. The Court of Appeal, Aurelio Munoz, Judge of Superior Court sitting by assignment, held that: (1) trial court's judgment on remand was at material variance with its original opinion, and (2) award of costs on remand was discretionary with the trial court.

Reversed and remanded with instructions.

West Headnotes

[1] Appeal and Error 30 1207(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(F) Mandate and Proceedings in Lower Court
30k1207 Rendition and Entry of Judgment or Order as Directed
30k1207(1) k. In General. Most Cited Cases

Declaratory Judgment 118A 395

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak395 k. Determination and Disposition of Cause. Most Cited Cases
Trial court's judgment on remand, following motion picture studio's successful appeal from judgment in favor of motion picture producer, entering judgment in favor of studio on producer's claims for declaratory relief and for monetary damages on claims of interference with economic advantage and with contract, was at material variance with its original opinion, where original opinion did not address issue of declaratory relief claims except to state that they were “moot,” only issue on appeal had been applicability of litigation privilege to letter from studio alleged to constitute interference, and privilege defense to inter-

ference claims did not dispose of declaratory relief claims.

[2] Costs 102 ⚿32(3)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k32 Prevailing or Successful Party in General
102k32(3) k. Partial Success in General. Most Cited Cases
(Formerly 379k30)
Award of costs on remand in action for declaratory relief and monetary damages for intentional interference with economic advantage and with contract was discretionary with the trial court, where neither party obtained net monetary recovery, neither party was dismissed as a defendant from either complaint or cross-complaint, and both sides recovered relief against each other. West's Ann.Cal.C.C.P. § 1032(a)(4).

APPEAL from a judgment of the Superior Court of Los Angeles County. Madeleine Flier, Judge. Reversed with directions.Greenberg Glusker Fields Claman Machtinger & Kinsella, Robert S. Chapman and Stephen S. Smith for Plaintiffs and Appellants Francis Coppola, Fred Fuchs, and Francis Ford Coppola, Inc.

Rintala, Smoot, Jaenicke & Rees, J. Larson Jaenicke and Melodie K. Larson; Horvitz & Levy, Frederic D. Cohen and Mitchell C. Tilner, for Defendant and Respondent Warner Bros.

MUNOZ (AURELIO), J.[FN*]

FN* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California .

***1** Francis Ford Coppola, Fred Fuchs, and Francis Ford Coppola, Inc. (Coppola) appeal judgment entered in favor of Warner Bros. (Warner) after remand of this matter. In a prior appeal, we reversed a jury verdict of $20 million in Coppola's favor on the grounds that Warner's conduct in sending Coppola a “cease and desist” letter regarding rights to a film project based upon the classic “Pinocchio” story was protected by the litigation privilege and therefore did not constitute intentional interference with contract. After remand, the trial court entered judgment in entirety in Warner's favor. Coppola contends this was error, as the trial court had previously granted summary judgment in his favor on two declaratory relief claims, and that the blanket reversal had the effect of wiping out these judgments in his favor. We agree with Coppola that these claims were not mooted by application of the litigation privilege to the interference claims, and thus that entry of judgment in favor of Warner on all claims was not harmless error. We therefore reverse and remand with instructions.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. *The Underlying Facts.*[FN1]

FN1. Because the facts are only relevant to an understanding of the judgment ultimately entered in the trial court after the prior appeal (which judgment is the subject of the instant appeal), we set forth an abbreviated version of the facts.

In the late 1980s, Coppola conceived of the idea to develop the classic “Pinocchio”

story, which is in the public domain, into a film. Sometime in 1991, Warner approached Coppola about a deal whereby Coppola would produce and direct the film for Warner. Coppola, whose prior dealings with Warner had not been harmonious, was not interested at first but then entered into negotiations with Warner.

The parties dispute the exact terms of the agreement ultimately entered into. The undisputed facts show that with respect to writings, in July 1992 Coppola executed a form document entitled "Certificate of Employment." FN2 Coppola did not execute any other form of written agreement; a "long form" studio agreement (a "Producer's Agreement") was being circulated in draft. Apparently, however, tentative oral agreements concerning certain portions of the total agreement were reached, and discussions of the remainder of the terms of the agreements were ongoing. In February 1992, a Warner in-house attorney sent a draft agreement to Coppola for consideration.

> FN2. This certificate provided that "(Coppola) for good and valuable consideration (receipt of which is hereby acknowledged) (does) hereby acknowledge, certify and agree that (i) all of the results and proceeds of the services of every kind heretofore rendered by and hereafter to be rendered by Employee in connection with the Picture, and (ii) all ideas, suggestions, plots, themes, stories, characterizations and other material, whether in writing or not in writing at any time heretofore or hereafter created or contributed by Employee which in any way relate to the Picture or to the material on which the Picture will be based are and shall be deemed works 'made-for-hire' for Producer and/or works assigned to Producer, as applicable. Accordingly, Employer and Employee further acknowledge, certify and agree that Producer is and shall be deemed the author and/or exclusive owner of all the foregoing for all purposes and the exclusive owner throughout the world of all of the rights comprised in the copyright thereof, and of any and all other rights thereto, and that Producer shall have the right to exploit any and all of the foregoing in any and all media, now known or hereafter devised, throughout the universe, in perpetuity, in all languages as Producer determines. Employe[e] hereby grants to Producer all rights which it may have in and to all of said material as Employee's general employer...."

Meanwhile, Warner, with Coppola's approval, hired Frank Gelati to write a screenplay, which proved to be unacceptable to Warner. Warner bought out the remainder of Gelati's contract.

On June 30, 1993, Coppola wrote to Warner and advised Warner that he did not wish to continue negotiations in connection with the "Pinocchio" project. Coppola advised Warner that it was his position that no agreement was in place because the material terms of any such agreement had not been agreed to by the parties.

As a last attempt to reach an agreement with Warner, Coppola proposed a "negative pickup" agreement whereby he would produce the film and Warner would obtain distribution rights. Warner counteroffered to buy a Pinocchio script written by

Coppola for $1 million. Coppola rejected the counter-offer, and negotiations broke off.

***2** Coppola wrote his own original draft of the "Pinocchio" story, which he submitted to Columbia Pictures in late 1993. Coppola warned Columbia that Warner might make a claim to the Pinocchio project, but after review of the Warner files on the Pinocchio matter, Columbia determined Warner had no claim to the current Pinocchio project. At trial, Warner disputed that Columbia reached this conclusion, contending it recognized Warner's claim.

However, on February 14, 1994, Steven S. Spira, a Senior Vice President at Warner, sent a letter (Spira Letter) to Coppola's agent. The brief letter stated: "It has come to our attention that Francis [Coppola] may be considering making a deal in connection with a [Pinocchio] project at Columbia. As you know, [Warner] has previously notified Francis that he has an agreement at [Warner] in connection with any such project. Such agreement would preclude him from proceeding at Columbia, and [Warner] hereby reserves any and all rights arising out of such agreement."

Because of the Spira Letter, in September 1994, when Columbia entered into a "negative pickup" agreement with Coppola, it required Coppola to assure it that "the Warner Bros. situation ... is resolved to the mutual satisfaction of Columbia...." The agreement provided that resolution of the "Warner Bros. situation" was a condition precedent: "it is a condition to the effectiveness of this entire agreement that all claims asserted by Warner Bros. be resolved to the mutual satisfaction of Columbia...." At trial, the parties disputed whether Spira had reason to believe Warner had a colorable claim because the "Pinocchio" story was in the public domain and the Coppola negotiations had not produced a contract.

In September 1994, the parties attempted to settle the dispute. Warner sent a letter dated September 23, 1994, which it believed set forth the terms of the parties' agreement. However, Coppola rejected the letter, but it nonetheless became the basis of numerous counter-proposals and draft settlement agreements throughout the fall of 1994. No agreement was signed.

As a result, Coppola was never able to make "Pinocchio;" instead, this litigation followed.

B. *The Litigation and Prior Appeal; Remand to the Trial Court.*

On September 13, 1995, Coppola commenced this action, alleging claims for declaratory relief, interference with prospective economic advantage, slander of title, and restitution and rescission. The operative first amended complaint, filed November 20, 1996, added a claim for interference with contract. Coppola alleged that the Spira Letter interfered with his ability to make the "Pinocchio" project at Columbia and ultimately resulted in the loss of his deal with Columbia. Warner filed a cross-complaint alleging breach of the purported settlement of September 1994.

Coppola filed a motion for summary adjudication on his first two causes of action for declaratory relief relating to the "Producing Agreement," and the "Certificates of Employment." Those motions were granted. Coppola also sought and was granted summary judgment on the

cross-complaint.

***3** The matter proceeded to trial on the interference claims. The jury found for Coppola on these claims, rejected Warner's argument that the Spira Letter was a privileged pre-litigation communication and did not constitute interference but instead was a justified claim of right. The jury awarded Coppola $20 million in compensatory damages and $60 million in punitive damages. The trial court granted Warner's JNOV motion as to punitive damages, striking that award.

Warner appealed from the judgment, alleging the Spira Letter was privileged as a matter of law and the matter never should have gone to the jury. Warner contended it had "probable cause" to assert an interest in the "Pinocchio" project. Warner also contended that the trial court erroneously deprived it of the assertion of those privileges; the undisputed evidence established the letter did not interfere with Coppola's relationship with Columbia; the court erroneously instructed the jury that Warner acted in bad faith if it was motivated by financial gain; the court erred in invalidating the two agreements that were the subject of Coppola's declaratory relief action; and erred in invalidating the parties' settlement agreement.[FN3] Coppola cross-appealed the JNOV striking the punitive damage award.

> FN3. Coppola cross-appealed from the JNOV and the non-suit on his slander of title claim. That cross-appeal is not relevant here.

Warner's opening brief addressed the summary adjudication of Coppola's declaratory relief claims, contending that "[t]hose erroneous rulings, which are subject to *de novo* review""deprived Warner of a critical defense"-that it actually had a valid "Pinocchio" agreement with Coppola. Warner argued the error was not harmless, as a finding the Certificate of Employment was enforceable would have entitled Warner to a directed verdict on the interference claims and even if Warner did prevail on a nonsuit, it would have proved to be a valuable defense to the interference claims.

Our opinion in the prior appeal found the litigation privilege protected Warner's conduct. The opinion stated, "[w]e hold that Warner has absolute defenses under Civil Code sections 47, subdivisions (b) and (c) to Coppola's tort causes of action for wrongful interference with prospective economic advantage and wrongful interference with contract. This determination is dispositive of the entire litigation. All remaining issues are, therefore, moot."The disposition of the prior appeal stated that "The judgment in favor of Coppola and against Warner is reversed. The case is remanded for entry of judgment in favor of Warner and against Coppola."Nowhere did the opinion discuss the declaratory relief claims.

Coppola filed a petition for rehearing alleging numerous errors in the opinion, including that the disposition was inconsistent with the fact Warner did not appeal Coppola's favorable judgment on the declaratory relief claims. Warner argued that its appeal from the declaratory relief claims was only done defensively in connection with its tort claims, and therefore the appeal from those claims was moot.[FN4] We denied the petition for rehearing.

> FN4. Warned argued: "The validity of the [two agreements] has always been a subsidiary issue in this appeal. Warner challenged the summary adjudication rulings as to these contracts solely on the

> grounds the rulings prejudiced Warner's ability to defend itself against *Coppola's interference claims*.... Having concluded Warner must prevail on its defense, the question whether Warner was entitled to assert *additional defenses* to the tort claims was rendered moot."

***4** On remand to the trial court, Warner submitted a proposed judgment to the trial court that awarded itself judgment on the interference claims *and* the declaratory relief claims. Warner also sought its costs at trial. Coppola objected to the proposed judgment on the grounds Warner had informed this court that Warner's appeal on the declaratory relief claims was defensive. Coppola argued the appeal had not reversed Coppola's judgment on the declaratory relief claims because those claims were not addressed in the opinion. The trial court rejected Coppola's arguments, entered judgment, and Coppola moved for a new trial on the same grounds it had objected to the judgment. Coppola also moved to strike Warner's cost memorandum on the grounds Warner had not appealed from the cost award to Coppola in the prior appeal and Warner was not the prevailing party.

At the new trial hearing, the court stated, "I had to do what the court of appeals indicated.... The way I read the decision, they reversed the entire mater, and the matter was concluded, and I should enter judgment in favor of Warner Bros. and that was the end of it."The court denied Coppola's motions.

DISCUSSION

Coppola argues that there is no basis in the language of the opinion which would provide for Warner to receive judgment in its favor on the declaratory relief claims. Rather, the opinion must be read as a whole as an aid to interpret the disposition. He argues the judgment is internally inconsistent and therefore violates due process because and no time did Warner seek summary adjudication of the declaratory relief claims, nor did it bring those claims to trial. However, Coppola argues the current judgment has the effect of granting summary judgment to Warner on those claims, which is reversible error as a matter of law. Further, he contends that because on remand the trial court failed to specifically declare the rights and obligations of the parties under the contracts, the judgment must be reversed. He contends that in opposition to the petition for rehearing, Warner represented to the court that it had not appealed fully from the underlying judgment, but rather only appealed the declaratory relief claims to the extent they deprived it of its defense to the interference claims. Lastly, he contends because Warner's appeal was only a partial appeal of the judgment, the cost award in favor of Warner must be reversed and the cost award in favor of Coppola that was entered at the conclusion of trial must be reinstated.

Warner contends that the directive of the prior opinion decreed that judgment be entered in its favor, and that the trial court, in following that directive, did not enter judgment on the declaratory relief claim. Rather, the declaratory relief claims are now unresolved, and Coppola is free to pursue them in a future action. Warner points out that an appeal from the judgment is deemed to include an appeal from the cost order, and thus a separate appeal is not necessary.[FN5]

FN5. Warner has moved to strike portions of Coppola's reply brief in this appeal that request this court to recall the remittitur in the prior appeal. We denied Coppola's motion for recall of the remittitur in the prior appeal (No. B126903) and therefore grant Warner's motion to strike.

A. Our Prior Opinion Did not Reverse the Declaratory Relief Claims.

***5** When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and must be followed. Any material variance from the directions is unauthorized and void. (*Hampton v.. Superior Court* (1952) 38 Cal.2d 652, 655-656, 242 P.2d 1, *In re Candace P.* (1994) 24 Cal.App.4th 1128, 1131, 30 Cal.Rptr.2d 1.)"Where a reviewing court has remanded a matter to the trial court with directions '... the trial court ... is bound to specifically carry out the instructions of the reviewing court.... [A]ny material variance from the explicit directions of the reviewing court is unauthorized and void.' " (*Coffee-Rich, Inc. v. Fielder* (1975) 48 Cal.App.3d 990, 998, 122 Cal.Rptr. 302.)Where the trial court fails to follow appellate directions, the judgment may be challenged on appeal. (*Hampton v. Superior Court, supra,* 38 Cal.2d at p. 656, 242 P.2d 1.) Our task as reviewing court is to ascertain whether there was a material variance in the trial court's execution of the prior appellate ruling. We will examine the appellate opinion as a whole to determine the intent of the judgment or order. We will not disturb a subsequent trial court judgment after remand for an immaterial departure from its directions in the prior appeal. (*In re Candace P., supra,* 24 Cal.App.4th at pp. 1131-1132, 30 Cal.Rptr.2d 1.)

Where the directions to the trial court are ambiguous, we will interpret them in accordance with the views, reasoning, and holdings expressed in the opinion as a whole. (*Lesny Development Co. v. Kendall* (1985) 164 Cal.App.3d 1010, 1021, 210 Cal.Rptr. 890.)Thus, *Frankel v. Four Star International, Inc.* (1980) 104 Cal.App.3d 897, 902, 163 Cal.Rptr. 902, held directions to the trial court for " 'clarification of the findings of fact supporting the amount of the damages' " did not support mere affirmance of the original damage award. Rather, in light of the opinion's discussion of the methodology to be used to compute damages and its statement that " 'we are unable to respond to the contentions of the parties addressed to the amount of the damages' " due to the lack of requested specific factual findings, the trial court was required to re-examine the evidence already introduced and in accord with the prior opinion's instructions. (*Frankel v. Four Star International, Inc., supra,* at p. 903, 163 Cal.Rptr. 902.)In *Coffee-Rich,* the trial court entered three inconsistent findings of fact. The appellate court found that two employed a definition not within the statutory scheme at issue, and the third employed a correct definition and was determinative. (*Coffee-Rich, Inc. v. Fielder, supra,* 48 Cal.App.3d at p. 996, 122 Cal.Rptr. 302.)The appellate court discussed in detail the problems with the various findings, and in its disposition stated that " '[t]he judgment is reversed and remanded with directions to modify the findings of fact, conclusions of law and the judgment ... in terms consistent with this opinion.' " (*Id.* at p. 997, 122 Cal.Rptr. 302.)On remand, the trial court entered a completely new finding. The appellate court found this exceeded the scope of the

remittur. "The remand contained no direction that the trial court make new findings, particularly no new finding inconsistent with [one of the old findings] approved by the reviewing court." (*Id.* at p. 998, 122 Cal.Rptr. 302.)

***6** [1] In the instant case, we find the judgment entered in the trial court at "material variance" with the prior opinion. The language in the prior opinion that the declaratory relief claims were "mooted" and that the privilege defense was "dispositive of the entire litigation," in spite of its apparent clear directive, did not operate to give Warner judgment in its favor on all claims. Given that the opinion in the prior appeal did not even address the issue of the declaratory relief claims except to state that they were "moot," we find this is insufficient to support reversal of the declaratory relief claims on remand. Rather, a close reading of the prior opinion discloses that judgment should be entered for Warner on the interference claims only.

First, the only issue decided by the prior appeal was whether or not Warner's Spira Letter was privileged in the context of the parties' dispute. The prior appeal determined that the letter, as a pre-litigation communication, was protected. However, the issue of the application of the litigation privilege to the interference claims is not co-extensive with the merits of the declaratory relief claims because application of the privilege could be determined without reference to a conclusive ruling on whether the contracts at issue were enforceable. Prior to obtaining a declaratory judgment on the issue of whether the contracts were enforceable, Warner could still be entitled to make a claim of right under them, and assert rights to them in the form of the Spira Letter, and such claims would be privileged, as our prior opinion held. The issue of privilege can be divorced from a judicial determination of the enforceability of the agreements, and therefore, the privileged nature of an assertion of rights under those agreements has no effect on Coppola's declaratory relief action.

Therefore, Coppola's declaratory relief claims are not moot and are not disposed of by the privilege defense to the interference claims. For example, although Warner was exonerated of wrongful interference with Coppola's Columbia contract, what if Coppola decided to market a "Pinocchio" project to another studio? By reversing his declaratory relief claims, the judgment has the effect of setting Warner up to make another ownership claim to "Pinocchio" against Coppola based upon those contracts. The issue will be open to litigation anew; hence the claims are not moot.

Examining the language of the prior opinion, our conclusion is consistent with this language. Neither "dispositive of the entire litigation" nor "moot" means "reversal of the declaratory relief claims."The fact that the claims may have been "mooted" by the holding of the opinion does not mandate their reversal on remand. Rather, an examination of the opinion reveals that the *appeal* from those claims, not the claims themselves, were mooted by the disposition. Similarly, "dispositive of the entire litigation" means that there is nothing more to do on remand except enter the appropriate judgment which, in this case, is for Warner on the interference claims, and Coppola on the declaratory relief action and the cross-complaint.[FN6]

FN6. We thus reject the stricken argument in Coppola's reply brief (see footnote 5, *ante*) that we must recall the remittitur because if the de-

claratory judgment claims are moot, it means Warner did not appeal from them and therefore misrepresented facts to the court in the prior appeal, which would be grounds for remittitur. As is evident from our analysis of the opinion, above, Coppola's logic is flawed; a victory for Coppola on the declaratory relief claims is not inconsistent with a victory for Warner on the interference claims.

B. The Prior Cost Awards Are Vacated.

***7** [2] An appeal from the judgment constitutes an appeal from any underlying cost award. Therefore, the cost award need not be appealed separately. (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 997, 3 Cal.Rptr.2d 654.)The prevailing party at trial is entitled to costs; "prevailing party" is defined to include four categories: (1) the party with the "net monetary recovery," (2) a defendant who is dismissed from the action; (3) a defendant where neither the plaintiff nor the defendant recovers anything; and (4) "a defendant as against those plaintiffs who do not recover any relief against the defendant."[FN7](Code of Civ. Proc., § 1032(a)(4).) "Relief" is defined to include " '[d]eliverance from oppression, wrong or injustice.... [I]t is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hand of a court."(*Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1549, 56 Cal.Rptr.2d 328.)Where a party does not fall into one of these four categories, costs may be awarded at the discretion of the trial court. (*United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 625, 81 Cal.Rptr.2d 708; *Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 105, 45 Cal.Rptr.2d 874.)

FN7. The text of section 1032 reads: " '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).)

In the instant case, neither party prevailed. No one obtained a "net monetary recovery," no one was dismissed as a defendant from either the complaint or cross-complaint, and both sides recovered relief against each other-Coppola on the declaratory relief claims, and Warner on the interference claims. Thus, costs are discretionary with the trial court and on remand, the trial court is directed to determine whether costs are to be awarded and to whom such costs will be awarded.

DISPOSITION

The judgment of the superior court is reversed. The court is directed to enter judgment on the declaratory relief claims in favor of Coppola, and to enter judgment on the interference claims in favor of Warner. All prior cost orders are reversed, and the trial court is directed to determine whether

costs are to be awarded and to whom such costs will be awarded. Appellant to recover costs on appeal.

We concur: JOHNSON, Acting P.J., and WOODS, J.
Cal.App. 2 Dist.,2003.
Coppola v. Warner Bros.
Not Reported in Cal.Rptr.2d, 2003 WL 463611 (Cal.App. 2 Dist.)

END OF DOCUMENT