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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT POPE et al., Plaintiffs and Appellants, v. THE OAKS OF CALABASAS HOMEOWNERS ASSOCIATION, Defendant and Respondent.	B237442 (Los Angeles County Super. Ct. No. LC088601)

APPEAL from a judgment of the Superior Court of Los Angeles County, James A. Kaddo, Judge. Affirmed.

Garfield & Tepper and Scott J. Tepper for Plaintiffs and Appellants Robert Pope, Michelle Agul, David L. Cherin, Mojgan V. Cherin and Ravi Sawhney.

Freedman Weisz and Mitchell B. Stein for Plaintiff and Appellant Myer Solovy.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, Marc E. Rohatiner and Stephen M. Levine for Defendant and Respondent.

Plaintiffs and appellants Robert Pope, Michelle Agul, Ravi Sawhney, Myer Solovy, and David L. Cherin and Mojgan V. Cherin as trustees of the David and Mojgan Cherin Family Trust filed a first amended complaint for declaratory relief against defendant and respondent The Oaks of Calabasas Homeowners Association challenging the amount of a monthly assessment.[1] Respondent cross-complained against Pope for declaratory relief, indemnification, and damages. Following a court trial, judgment was entered declaring the appropriate assessment was $163.98. The cross-complaint was dismissed as moot. Respondent was found to be the prevailing party.

This appeal is from the judgment and postjudgment order.[2] Appellants contend the ruling on the assessment was erroneous as a matter of law and not supported by substantial evidence. They further contend the prevailing party ruling was an abuse of discretion. We conclude the trial court did not err or abuse its discretion, and substantial evidence supports the judgment.

FACTS[3]

Background

Appellants were homeowners in The Oaks of Calabasas, a planned community of 557 residential lots (the "development"). Respondent operated the development.

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[1] The assessment amount when the complaint was filed was $176.05. It was reduced by respondent during the trial to $163.98.

[2] In a postjudgment order, the trial court ordered the judgment to reflect an award of costs and attorney fees.

[3] In accordance with the rules of appellate procedure, we state the facts in the light most favorable to the judgment. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 532, fn. 1.)

Appellants owned homes on Lots 21, 22, 23, and 24, located at the top of a long, steep roadway named Prado de Los Ciervos ("Lot 29").

When appellants or their predecessors[4] purchased their lots from the builder or developer, they believed Lot 29 would be a private driveway owned by them. The top of the hill afforded exceptional views, and if they owned Lot 29, would afford appellants privacy. However, Lot 29 was conveyed to respondent.

In 2003, Pope asked the developer to install a gate at the bottom of Lot 29 to restrict access. In 2004, a neighbor sued to stop installation of the gate. Appellants were not parties in that litigation. Appellants brought suit against respondent, and others, to have the gate installed and title to Lot 29 conveyed to appellants. The neighbor's litigation was settled by a monetary settlement. In July 2006, appellants' lawsuit was settled by the parties' "Mutual Release" and "Declaration of Phase of Development and Declaration of Covenants, Conditions and Restrictions" ("Phase Declaration"). Pursuant to the settlement, a gate limiting access to Lot 29 would be installed, but ownership of Lot 29 would remain with respondent and appellants would pay an assessment relating to Lot 29. Access through the entry gate and upon Lot 29 would be limited to appellants and respondent and to government entities, utility providers, and Lot 20, which possessed an easement.

The Assessment

The gate and phone intercom system were installed in May 2007. Initially, respondent's property manager issued a monthly assessment of $11, which was not approved by respondent's board of directors and was unauthorized. The $11 included a cost for the asphalt roadway. Appellants paid this amount without protest until

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[4] Hereinafter, appellants and their predecessors will be referred to as appellants.

September 2009. Beginning in October 2009, a board-approved monthly amount of $176.05 was assessed and back assessments were demanded.[5]

Trial Court's Ruling

The court made oral findings that there was "no ambiguity [in the Phase Declaration] and if there was an ambiguity, it was resolved in favor of . . . defendant and against . . . plaintiffs[.]" Appellants "received a non-exclusive use and enjoyment in and to Lot 29. [¶] Now we should not be fooled by the use of the word non-exclusive. That is non-exclusive vis-à-vis the four plaintiffs. However, it was exclusive as far as the other homeowners of the Calabasas Homeowners Association. There was a gate that could be operated remotely; it had an electric connection. I called it they had a de facto right to the roadway. [¶] Also the document is further very clear, that they are responsible for the expenses. It said and even in parenthesis, included the word reserves. And this is what the plaintiffs were trying to get away from."

In the written statement of decision, the court found that, pursuant to the settlement of the prior action, Lot 29 "became a de facto private roadway with a private gate and private access. [¶] Section 3 of [the Phase Declaration] provides: 'every owner shall have a non-exclusive easement for use and enjoyment in and to Lot 29.' [¶] Section 2 of that document provides that the owners irrevocably and unconditionally consent to the establishment and operation of the Phase Development created by [the Phase Declaration] and provides that the 'full costs and expenses (including reserves) of any additional service or facility shall be fully paid by all the owners.' [¶] Based on the language of the [Phase Declaration], the surrounding circumstances when that document was signed and the subsequent conduct of the parties, it is clear that the full costs and expenses include electricity for the operation of the gate and intercom system, telephone

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[5] In the summer of 2009, the board demanded a monthly assessment of $540.20, but, after input from appellants, reduced this amount to $176.05.

service for the intercom, street cleaning, electricity for the lights on the streets, and a reserve allocation for replacement of gate, fencing, intercom/phone, gate operators, guardrails and asphalt."

The court found that respondent board's assessment of $176.05 was based in part on a May 2009 study by Association Reserves, Inc., a specialist in setting reserves for community associations such as respondent. The board later determined the correct amount was $163.98, after concluding one of the components should not have been included in the assessment. The collective monthly amount $531.12 calculated by Association Reserves, Inc., for reserves "is an appropriate and reasonable amount." "The additional non-reserve costs . . . that form the basis of the . . . [a]ssessment are appropriate and reasonable. On the basis of the reserve and non-reserve elements, the appropriate and reasonable initial . . . [a]ssessment effective October 1, 2007 is $163.98 per month per residence."

In a judgment filed September 27, 2007, the court declared that, effective October 1, 2007, the correct monthly assessment was $163.98. The court decreed appellants take nothing by their complaint and the cross-complaint is moot. Respondent was found to be the prevailing party, entitled to recover costs and attorney fees. The court awarded costs of $15,244.19 and attorney fees of $137,000.00.[6]

DISCUSSION

I. The Trial Court Correctly Interpreted The Phase Declaration

Appellants contend that, pursuant to the plain meaning of section 2.2 of the Phase Declaration, they are not required to pay for anything but the entry gate/intercom. Appellants contend that if the contract is ambiguous, extrinsic evidence does not support

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[6] There is no contention concerning the amount of the award of costs and attorney fees.

the trial court's interpretation that appellants are responsible for all costs associated with the private roadway.

Interpretation of a contract is reviewed de novo. (See *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 70-71.) The rules of contract interpretation "'require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. [Citations.]' [Citation.] It is the mutual intention of the parties at the time the contract is formed that governs interpretation." (*American Internat. Underwriters Ins. Co. v. American Guarantee & Liability Ins. Co.* (2010) 181 Cal.App.4th 616, 622.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.)

"In the absence of conflicting parol evidence, the interpretation of a written contract is essentially a judicial function subject to independent review on appeal. [Citation.] A trial court's threshold determination as to whether there is an ambiguity permitting the admission of parol evidence is also a question of law subject to independent review. [Citation.] If parol evidence is admissible, and the competent parol evidence is in conflict, the construction of the contract becomes a question of fact. However, if the parol evidence is not conflicting, the appellate court will independently construe the writing." (*Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1443.)

II. Plain Meaning

Recital D of the Phase Declaration states: "The Property consists of Lots 21, 22, 23, 24, and 29 and a gated entryway which presently restricts access from the Development to the Property. Lots 21, 22, 23, and 24 are improved with single-family residences and Lot 29 consists of a paved interior roadway for vehicular traffic,

landscaping and irrigation devices and an electronically-controlled entry gate. It is the express mutual intent of each of Declarant [respondent] and the Owners [of Lots 21 through 24] that all access to the Property through such gated entryway will be restricted to Declarant, the Owners, public agencies requiring access for public safety purposes or due to existing access rights and, for the limited purposes expressly set forth herein, the record and beneficial owner of Lot 20 of Tract 35596-05."

Recital E of the Phase Declaration states: "Pursuant to and in strict accordance with Section 6.10 of the Master Declaration, [Declaration of Covenants, Conditions and Restrictions (The Oaks of Calabasas)], each of Declarant and the Owners desire to establish and impose a Phase of Development upon and consisting of the Property and each and every portion thereof and all amenities located thereon and establish covenants, conditions and restrictions upon the Property and each and every portion thereof, which will constitute a general scheme for the management of the Property."

Section 2.1 of the Phase Declaration provides: "Pursuant to and in strict accordance with Section 6.10 of the Master Declaration, Declarant and each of the Owners do hereby irrevocably and unconditionally elect to constitute and establish the Property[7] as a Phase of Development for the purpose of providing for the delivery of additional services to the Owners to operate and maintain the gated entryway which presently restricts access from the Development to the Property and operate and maintain all improvements on Lot 29[.]"

Section 2.2 of the Phase Declaration provides: "Each and all of the Owners . . . irrevocably and unconditionally consent to the establishment and operation of the Phase of Development created hereby. The full cost and expense (including reserves) of any additional service or facility for this Phase of Development shall be fully paid by all of the Owners in such Phase of Development pursuant to the Phase of Development

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7 "Property" is a defined term, as follows. "'Property' shall mean and refer collectively to each and all of Lots 21 through 24, inclusive, and Lot 29 . . . ."

Assessments to be levied and collected by [respondent] pursuant to and in accordance with the Master Declaration."

The Phase Declaration defines "Phase of Development Assessments" as "those [a]ssessments charged to and collected from the Owners in accordance with Sections 3.11[8] and 6.10[9] of the Master Declaration and the provisions of this Declaration, for the purpose of financing the expenses incurred or to be incurred in connection with this Phase of Development."

Section 4.7 of the Phase Declaration provides: "The provisions of this Declaration shall be liberally construed to effectuate its purpose of imposing and establishing a Phase of Development for the Property."

We conclude the trial court correctly found no ambiguity and correctly declared the plain meaning of the Phase Declaration. The language is clear and explicit that appellants must pay all costs associated with the private roadway. As the language is not ambiguous, parol evidence will not be considered.

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8 Section 3.11 of the Master Declaration states: "Pursuant to this Declaration, the Association shall charge and collect the Phase of Development Assessments in order to finance the cost and operation of any additional service or facility located within a particular Phase of Development or benefitting solely Owners within a particular Phase of Development."

9 Section 6.10 of the Master Declaration states: "The purpose of this Section is to provide Declarant . . . or particular groups of Owners with the right to establish and maintain additional services and/or facility(ies) for a particular Phase of Development. [¶] Notwithstanding any other provisions(s) in this Declaration, Declarant . . . or the Owners in any Phase of Development shall have the right to establish additional service(s) (including, but not limited to, employing security guards, manned security entrance, custodian) or facility(ies) (including, but not limited to, entry driveway security mechanism) for a Phase of Development subject to the following provisions: [¶] . . . [¶] (2) The full cost and expense (including reserves) of any additional service or facility for a Phase of Development shall be fully paid by all of the Owners in such Phase of Development pursuant to Phase of Development Assessments levied and collected by the Association. [¶] . . . [¶] (5) . . . . Phase of Development Assessments may not be used to cover any operating expenses of the Association other than those for which the Phase of Development Assessments are being collected."

The assessment is defined as the charge to satisfy the expenses incurred in connection with the Phase of Development. As set forth in recital D, the Phase of Development was impressed on Lot 29 and appellants' lots to provide the owners of Lots 21, 22, 23, and 24 [Lots 21 through 24 and Lot 29 are hereinafter referred to collectively as the "Property"] with restricted access to and through the Property from the development. Under section 2.1, this would be done by providing services to operate a restricted, gated entryway and to maintain all improvements on Lot 29. The asphalt road is an improvement on Lot 29. Plainly, the Phase of Development expenses include the expenses of the gated entryway and the expenses of the road. Under section 2.2, appellants are responsible for the full operating and reserve costs of the Phase of Development services.

Appellants contend the term "additional service" in sections 2.1 and 2.2 means "new" service, and, they argue, since the only new service is the gate, their responsibility is limited to the costs associated with the gate. This interpretation is contrary to the language and meaning of the contract. The purpose of the Phase of Development is to provide appellants with a service that is additional to services that were previously provided to them as homeowners in the Development: restricted access to their lots by means of a private roadway. The gate provides the restriction, and the roadway provides the access. Moreover, this interpretation is required by the language of section 2.2, which provides that the additional services are to operate and maintain both the gate and the roadway of Lot 29. This interpretation is fully consistent with the use of the term "additional service" in sections 3.11 and 6.10 of the Master Plan. The additional services ("security guards, manned security entrance, custodian") or facilities ("entry driveway security mechanism") described in section 6.10 are examples, not an exhaustive list. A phase of development establishing an area that the membership at large is excluded from would involve other services and facilities.

III. Substantial Extrinsic Evidence Supports The Trial Court's Interpretation

Even if there is ambiguity in the Phase Declaration, the extrinsic evidence was not in conflict and it supports the court's interpretation. If there is conflicting extrinsic evidence, substantial evidence supports the trial court's ruling construing the contract. (See *Fischer v. First Internat. Bank*, *supra*, 109 Cal.App.4th at p. 1443.)

There was evidence that, at the time the Phase Declaration was negotiated, respondent's board of directors understood that the owners of Lots 21, 22, 23, and 24 would be fully responsible for all costs that otherwise would have been costs payable by all homeowners in the development. Then-board member Brian Cameron testified "the Ciervos Street and the areas around it were going to be treated [in the following way:] in exchange for the exclusivity whereby other Oaks residents are not going to be allowed access to it, in exchange for that exclusivity the Ciervos homeowners would assume responsibility for all of the expenses including reserves . . . from the gate on up or actually from the sidewalk on up." No appellant took the position that the asphalt repair and maintenance was not part of the obligations under the Phase Declaration, until they disputed the amount of the assessment by filing suit.[10] This is substantial evidence supporting the trial court's ruling.

IV. The $163.98 Assessment Was Appropriate

Appellants contend the assessment violated Civil Code section 1366.1 because some of the costs in the assessment were still being charged to the community as a whole and several of the costs were inflated. We conclude Civil Code section 1366.1 is inapplicable. In any event, the assessment amount is supported by substantial evidence.

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[10] The evidence that, in 2004, the board approved construction of a controlled access entry gate and designated Prado de Los Pajaros as a driveway, does not create a conflict in the evidence, because the resolution was not implemented and, in any event, occurred two years before the parties agreed to the Phase Declaration.

A. Civil Code Section 1366.1 Does Not Apply

Civil Code section 1366.1 provides: "An association shall not impose or collect an assessment or fee that exceeds the amount necessary to defray the costs for which it is levied."

In section 2.4 of the Phase Declaration, appellants "irrevocably and unconditionally consent[ed] to the initial budget and the initial Phase of Development Assessment for this Phase of Development as established by the [Board of Directors of respondent]."

The trial court found Civil Code section 1366.1 is inapplicable.[11] "In asserting that Civil Code section 1366.1 applies, [appellants] ignore that the amount they agreed to pay was the consideration for the Association to allow [appellants] to have what the other 557 homeowners do not have; a de facto private roadway. The section . . . has no application to a group of owners accepting responsibility for certain categories of expenses in return for valuable consideration." The court stated, "[t]o provide otherwise, the Court would be creating an injustice. [Appellants], having obtained a substantial financial benefit in the enhancement of the value of their homes, want the other 557 owners of [the development] to share in their costs. This is manifestly unfair."

We agree with the trial court that this statute is inapplicable. It does not apply to a homeowner's agreement to pay particular costs, including unconditionally consenting to the assessment established by the board of directors, in exchange for valuable consideration to the homeowner, and appellants cite no case to support a contrary proposition.

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[11] The court also found that "[t]he result outlined herein does not require a determination that the [Phase Declaration] created an 'exclusive common area.' The reference to an 'exclusive common area' contained in the [Phase Declaration] could be stricken and the results in this case would not be different." (Civ. Code, § 1363.07 [grant of exclusive use of a common area to a member of the association].)

As Civil Code section 1366.1 does not apply and appellants consented to the assessment, the amount of the assessment must be upheld.

B. Substantial Evidence Supports $163.98 Was An Appropriate Assessment

In any event, substantial evidence supports the conclusion the amount of $163.98 is appropriate.

1. The Decision to Not Reduce the General Assessment Does Not Render the $163.98 Assessment Excessive

Appellants contend the $163.98 assessment exceeds the amount necessary to pay the costs of Lot 29, in violation of Civil Code section 1366.1, in that, when Lot 29 was open to the whole community, the whole community paid Lot 29's costs, but now those costs are also included in the Phase Declaration assessment payable by appellants. The contention has no merit. Excluding the duplicate amounts from the community's assessment would save each of the 557 homeowners in the development less than $1.25 per month. Respondent's failure to back out $1.25 from the general assessment does not indicate the Phase Declaration assessment of $163.98 exceeds the costs of Lot 29. Moreover, the $1.25 was allocated to the operating account for respondent's day-to-day expenses, which benefited all homeowners, including appellants. Appellants do not claim the community's general assessment is excessive and should be reduced by $1.25.

2. The Component Costs Are Supported by Substantial Evidence

Appellants contend the costs attributable to reserves for the phone/intercom, asphalt, guard rails, and gate operators are inflated. We disagree with the contention, because substantial evidence supports the costs assessed for these components.

"When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) "It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the [trier of fact]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429)

The reserves component of the $163.98 assessment was based on the evidence of respondent's common interest development reserve study specialist, Robert Nordlund. He testified at length concerning the basis for his opinion that the correct assessment was $163.98, including describing the methodology and database he used to arrive at his estimates. The trial court found Nordlund's evidence credible and adopted his findings. Appellants' contention is nothing more than a request that we reweigh the evidence. That is not our role. Substantial evidence supports the finding.

V. Refund

Appellants contend they are entitled to a judgment in the amount of $2,027.76, consisting of the amount of reduction of the assessment from $176.05 to $163.98. After trial, appellants asked the trial court for a judgment based on the difference between $163.98 and their payment of $176.05 per month so that they would be the prevailing parties. Respondent does not now, and did not in the trial court, dispute appellants are entitled to a refund or credit for the excess payments, and notes there is no evidence appellants have not received a refund or credit. In the reply brief, appellants did not address the refund issue further. Whether a $2,027.76 award to appellants is included or

not in the judgment does nothing to change our view below, that the trial court did not abuse its discretion in concluding respondent, alone, is the prevailing party. We conclude the trial court's omission to include a $2,027.76 refund in the judgment does not require reversal or remand of the judgment.

VI. Appellants Are Not the Prevailing Party

Appellants contend they are the prevailing party on the complaint because they are entitled to a refund of $2,027.76 and Pope is the prevailing party on the cross-complaint because the cross-complaint against him was dismissed. We disagree with the contentions.

The Phase Declaration contains an attorney fees provision: "In the event action is instituted to enforce any of the provisions contained in this Declaration, the party prevailing in such action shall be entitled to recover from the other party thereto as part of the judgment, reasonable attorneys' fees and costs of such suit."

"[Code of Civil Procedure s]ection 1032 is the fundamental authority for awarding costs in civil actions. It establishes the general rule that '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.' [Citation.] . . . [¶] Section 1033.5 of the Code of Civil Procedure . . . specifies the 'items . . . allowable as costs under Section 1032." It lists as one category of costs '[a]ttorney fees, when authorized by . . . [¶] (A) Contract.' [Citation.]" (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1108.) "When any party recovers other than monetary relief[,] the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . ." (Code Civ. Proc., § 1032, subd. (a)(4).)

Civil Code section 1717 provides, in pertinent part: "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to

reasonable attorney's fees in addition to other costs. [¶] . . . [¶] Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. [¶] . . . [¶] (b)(1) The court . . . shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section."

The prevailing party is the party that achieved its litigation objective. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 609; *Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) "'The court's determination a party prevailed on a contract action is an exercise of discretion which should not be disturbed on appeal absent a clear showing of abuse. [Citation.]' [Citations.]" (*Jackson v. Homeowners Assn. Monte Vista Estates-East* (2001) 93 Cal.App.4th 773, 789; see also *Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1153 [a trial court's determination of the prevailing party is reviewed for abuse of discretion and will not be disturbed absent a "clear showing of abuse"].)

The trial court's determination that respondent was the prevailing party on the complaint was not an abuse of discretion. Appellant sued for a declaration that $11 was the maximum amount they could be assessed and that only the costs relating to their use of the gate could be imposed. Appellants did not achieve their litigation objection, as the court ruled that the $11 assessment was incorrect and not binding and all costs associated with the phase development, including operating costs for the gate, intercom, street cleaning, and street lighting, and a reserve for replacement of gate, fencing, intercom/phone, gate operators, guardrails, and asphalt, were recoverable.

The cross-complaint against Pope was based on the contingent claim that, if the trial court determined respondent was bound by the $11 assessment, the reason $11 was the binding assessment was Pope's actions in breach of his fiduciary duty and in excess of his authority. The court's ruling the $11 assessment was not binding rendered the cross-complaint moot. The court ruled, "[t]he cross-complaint is moot by virtue of the decision on the complaint and neither party is the prevailing party." This ruling is not an

abuse of discretion. The cross-complaint was dismissed because the contingency it was based on did not arise, not because Pope demonstrated the cross-complaint lacked merit.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.