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Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING JUDGE WALTER L. BLACKWELL, III, NO. 150. | NOTICE OF FORMAL PROCEEDINGS |

To Walter L. Blackwell, III, a judge of the San Bernardino County Superior Court from January 3, 1995, to the present:

Preliminary investigation pursuant to Rules of the Commission on Judicial Performance, rules 109 and 111, having been made, the Commission on Judicial Performance has concluded that formal proceedings should be instituted to inquire into the charges specified against you herein.

By the following allegations, you are charged with conduct prejudicial to the administration of justice that brings the judicial office into disrepute and improper action within the meaning of Article VI, section 18 of the California Constitution providing for removal, censure, or public or private admonishment of a judge or former judge, and providing for barring a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court, to wit:

COUNT ONE

From January 1970 until you took judicial office in January 1995, you were an active member of the State Bar of California.

You were employed by Fidelity Federal Bank ("Fidelity") from approximately 1974 until July 1988, holding the positions of general counsel and executive vice president. Upon the termination of your employment, you entered into a separation, consulting, and settlement agreement with Fidelity. Pursuant to the agreement, you were to receive severance and consulting payments from Fidelity from July 1988 through October 22, 1989. You received these payments as agreed.

Fidelity inadvertently sent you eight checks after October 22, 1989. Even though you were not entitled to the money, you cashed the eight checks, as follows: on November 2, 1989, you negotiated a check dated October 31, 1989, in the amount of $3,030.36; on November 17, 1989, you negotiated a check dated November 15, 1989, in the amount of $3,030.36; on December 4, 1989, you negotiated a check dated November 30, 1989, in the amount of $3,030.36; on December 18, 1989, you negotiated a check dated December 15, 1989, in the amount of $3,030.36; on January 4, 1990, you negotiated a check dated December 29, 1989, in the amount of $3,030.36; on January 16, 1990, you negotiated a check dated January 15, 1990, in the amount of $2,714.81; on February 2, 1990, you negotiated a check dated January 31, 1990, in the amount of $2,714.81; on February 16, 1990, you negotiated a check dated February 15, 1990, in the amount of $2,714.81. You did not notify Fidelity that you had received and cashed these checks.

In approximately October 1989, former Fidelity officer James Taylor became involved in litigation involving Fidelity. Fidelity initially agreed to pay Taylor's attorney fees, and Taylor retained you to represent him. However, a dispute arose which resulted in Fidelity refusing to pay the attorney fees for your representation of Taylor. In approximately November 1989, you filed suit against Fidelity for approximately $15,000 in attorney fees and one million dollars in punitive damages, in Walter L. Blackwell, III v. Citadel Holding Corporation, et al., Los Angeles Superior Court, East District, Case No. EAC 077585. (The "Blackwell action.")

Negotiations ensued between you and attorneys for Fidelity. Fidelity eventually agreed to settle the Blackwell action by paying you approximately $15,000. You told Fidelity that you would agree to accept a settlement for that amount only upon the condition that Fidelity agree to a general release of all claims against you known and unknown. When asked during settlement negotiations if you knew of any claims Fidelity might have against you, you falsely answered no. You knew that Fidelity had a potential claim against you for cashing the inadvertently issued checks. Attorneys negotiating on behalf of Fidelity were unaware of the inadvertently issued checks.

Fidelity agreed to the general release. During the course of the negotiations, Fidelity had sent you a check in the amount of $10,162 and another check in the amount of $4,910 ("settlement checks"), which you had been holding. The total of the two settlement checks was agreed upon as the monetary settlement. You executed the settlement agreement in the Blackwell action on January 23, 1990. On January 26, 1990, you negotiated the settlement checks.

In approximately February 1992, Fidelity discovered that they had inadvertently issued the eight checks to you and requested that you return the money. You refused to return any of the money. In approximately October 1992, Fidelity sued you under Fidelity Federal Bank v. Walter L. Blackwell, III, San Bernardino Superior Court, case no. SCV 00718. On March 1, 1994, the case proceeded to a non-jury trial. On June 3, 1994, the court filed a Statement of Decision. A judgment was entered against you in the amount of $32,000, plus interest and costs.

The trial court found, inter alia, that your failure to disclose, during settlement negotiations in the Blackwell action, that you had cashed inadvertently issued checks was "an intentional concealment of a material fact, unknown to the plaintiff which the defendant was under a duty to disclose, when specifically asked. To make matters worse the defendant even refused to return the money from two checks which were issued and cashed <u>after</u> the execution of the settlement agreement. [¶] The only missing element to constitute outright fraud is detrimental reliance by plaintiff." The court further found that your "acts of receiving, cashing and steadfastly refusing to return the amount of the checks when demanded constitutes malice and fraud." The Statement of Decision is attached hereto and incorporated by reference.

In an unpublished opinion filed May 14, 1997, in case no. E014999, the Court of Appeal, Fourth District, Division Two, upheld the judgment of the trial court. The opinion is attached hereto and incorporated by reference.

Your conduct as alleged herein was in violation of Business and Professions Code, section 6106, and is conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

YOU ARE HEREBY GIVEN NOTICE, pursuant to Rules of the Commission on Judicial Performance, rule 118, that formal proceedings have been instituted and shall proceed in accordance with Rules of the Commission on Judicial Performance, rules 101-138.

Pursuant to Rules of the Commission on Judicial Performance, rules 104(c) and 119, you must file a written answer to the charges against you within twenty (20) days after service of this notice upon you. The answer shall be filed with the Commission on Judicial Performance, 101 Howard Street, Suite 300, San Francisco, California 94105. The answer shall be verified and shall conform in style to subdivision (c) of rule 15 of the Rules on Appeal. The notice of formal proceedings and answer shall constitute the pleadings. No further pleadings shall be filed and no motion or demurrer shall be filed against any of the pleadings.

This notice of formal proceedings may be amended pursuant to Rules of the Commission on Judicial Performance, rule 128(a).

BY ORDER OF THE COMMISSION ON JUDICIAL PERFORMANCE

DATED: June 24, 1998

[signature]

CHAIRPERSON

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO, CENTRAL DIVISION

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| FIDELITY FEDERAL BANK, a Federal Savings Bank,<br>Plaintiff,<br>v.<br>WALTER L. BLACKWELL, III,<br>Defendant. | CASE NO. SCV 00718<br>STATEMENT OF DECISION |

This cause came on regularly for trial on March 1, 1994, in Department 10 of the above entitled court, before the Honorable Carl E. Davis, Judge, presiding, sitting without a jury. Plaintiff FIDELITY FEDERAL BANK appeared by their attorney, Michael A. Taitelman. Defendant WALTER L. BLACKWELL, III, was present and appeared by his attorney, Roger Meadows. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, the court now renders its findings and decision as follows:

Plaintiff and defendant, who was a former employee, entered into a severance agreement by the terms of which plaintiff was to receive semi-monthly payments of $4,000.00 (less tax withholding for his credit). The evidence is clear that through mistake and inadvertence defendant received eight more checks than he was entitled to in the amount of $4,000.00 each, which he cashed.

In this action the Plaintiff seeks the refund of the amount of the eight checks through causes of action for conversion and for money had and received.

The defendant claims entitlement of the checks under a general release executed by him and plaintiff in an unrelated matter. In that matter, he had sued plaintiff for attorney fees for services rendered to another former employee of the bank. After protracted negotiations that matter was settled for the amount of $15,000.00 plus a waiver of all future claims. Defendant claims this settlement agreement entitles him to keep the overpayments pursuant to the purported waiver. He further contends that the claim for conversion states no cause of action and that the claim for money had and received is time barred.

The court rejects defendant's contention that the checks were included in the negotiation and settlement of the fee dispute. The evidence is clear that these were never discussed or in contention during those negotiations. The suggestion that they were somehow included in the language releasing defendant from all claims "known and unknown" is implausible. Although this particular claim may have been unknown to the plaintiff, it was perfectly well known to the defendant, who suppressed its existence. The court believes the testimony of Mr. Evans and Mr. Perry that they specifically asked the defendant if he knew of any other claims. The defendant demurred, saying that he did not trust the bank. The court finds this to be an intentional concealment of a material fact, unknown to the plaintiff which the defendant was under a duty to disclose, when specifically asked. To make matters worse the defendant even refused to return the money from two checks which were issued and cashed <u>after</u> the execution of the settlement agreement.

The only missing element to constitute outright fraud is detrimental reliance by plaintiff. According to the evidence, plaintiff was not induced to conclude the settlement based upon defendant's assurance of no claims. They were perfectly willing to pay him what he demanded unaffected by consideration of the yet undiscovered overpayments. Nor did the concealment induce the overpayments originally.

Defendant also points to a reference in the settlement agreement that ". . . Blackwell shall retain and cash the checks previously received . . ." and contends that this refers to the eight checks here in issue. In the context of the negotiations for the settlement agreement, this provision clearly refers to two checks previously sent to defendant as proposed payment for his fee--not to the eight severance checks. As previously noted, two of the eight were received and cashed after the settlement agreement was executed which belies any suggestion. Furthermore, the defendant previously cashed six other checks which, therefore, could not possibly be subject to being retained or cashed.

Defendant claims his assertions during negotiation of the settlement agreement are inadmissible as privileged under the provisions of Civil Code section 47(2) (litigation privilege).

This claim is unfounded also. The assertions are not the basis of the causes of action against him, rather they are part of the proof of plaintiff's causes of action. ". . .(E)ven if liability cannot be founded upon a judicial communication, it can be proved by such a communication . . .", White v. Western Title Ins. Co., 40 Cal.3d 870, 888.

Defendant contends that the claim for conversion does not state a cause of action because the severance checks, having been cashed and processed through regular banking channels, were in plaintiff's possession before any demand was made for their return. This theory has been rejected by the courts. Acme Paper Co. v. Goffstein, 125 Cal.App.2d 175; McCafferty v. Gilbank, 249 Cal.App.2d 569, 576; Fabricon Products v. United California Bank, 264 Cal.App.2d 113.

As to the contention that the cause of action for money had and received is time barred, the court finds that the controlling statute of limitations is Code of Civil Procedure section 338(d), three years. Agair Inc. v. Shaeffer, 232 Cal.App.2d 513; Shain v. Sresovich, 104 Cal. 402. Therefore, that cause of action is not time barred.

For the foregoing reasons judgment will be for the plaintiff in the amount of $32,000.00, principal, plus interest thereon from October 31, 1989, and court costs.

The court further finds by clear and convincing evidence that defendant's acts of receiving, cashing and steadfastly refusing to return the amount of the checks when demanded constitutes malice and fraud. However, the court has no evidence before it of the financial condition of the defendant to assess actual punitive damages (Adams v. Murakami, 54 Cal.3d 105) and therefore awards the nominal sum of $500.00.

Plaintiff is directed to prepare the judgment.

DATED: JUN 03 1994

CARL DAVIS

CARL DAVIS
Judge of the Superior Court

. . . . . . . . COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO

NAME OF MUNICIPAL OR JUSTICE COURT DISTRICT OR OF BRANCH COURT, IF ANY

CENTRAL DISTRICT

TITLE OF CASE (ABBREVIATED)

FIDELITY FEDERAL BANK v. WALTER L. BLACKWELL III

## DECLARATION OF SERVICE BY MAIL

My (business/residence) address is Office of the County Clerk, Courthouse Annex, 351 North Arrowhead Avenue, San Bernardino, California 92415-0240

I hereby declare that I am a citizen of the United States, over the age of 18, a resident of/employed in/the above named County, and not a party to nor interested in this proceeding. On the date shown below, I deposited in the United States mail at San Bernardino ____________, California, a sealed envelope (postage prepaid) which contained a true copy of the attached:

(NAME OF DOCUMENT) STATEMENT OF DECISION

which was addressed as follows: Date of Mailing: June 3, 1994

Name and Address of Persons Served:

MICHAEL A. TAITELMAN, ESQ.
ALSCHULER, GROSSMAN & PINES
1880 CENTURY PARK EAST
12TH FLOOR
LOS ANGELES, CA 90067-1694

ROGER R. MEADOWS, ESQ.
MEADOWS & SHAEFER
386 S. GORDON ST.
POMONA, CA 91766

At the time of mailing this notice there was regular communication between the place of mailing and the place(s) to which this notice was addressed.

I declare under penalty of perjury the foregoing to be true and correct.

Dated 6-3-94 by Dene A. Linthicco

Title Secretary/Court Clerk

NOT FOR PUBLICATION

**COURT OF APPEAL, FOURTH DISTRICT**

**DIVISION TWO**

**STATE OF CALIFORNIA**

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COURT OF APPEAL FOURTH DISTRICT

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| FIDELITY FEDERAL BANK,<br>Plaintiff and Appellant,<br>v.<br>WALTER L. BLACKWELL, III,<br>Defendant and Appellant. | E014999<br>(Super.Ct.No. SCV 00718)<br>O P I N I O N |

APPEAL from the Superior Court of San Bernardino County. Carl E. Davis, Judge. Affirmed in part; reversed in part with directions.

Alschuler, Grossman & Pines, Frank Kaplan and Michael A. Taitelman for Plaintiff and Appellant.

Meadows & Schaefer and Roger R. Meadows for Defendant and Appellant.

Defendant Walter L. Blackwell III appeals from judgment in favor of plaintiff Fidelity Federal Bank (Fidelity) in Fidelity's action for conversion and for money had and received. Blackwell contends (1) the evidence was insufficient to support the judgment because the trial court erred in finding a conversion and (2) a release entered into between the parties in another lawsuit barred Fidelity's causes of action. We reject these contentions. In his reply brief, Blackwell adds the contention that the $500 award of punitive damages should be reversed because there was no evidence adduced to support the award. We conclude that the award of punitive damages must be reversed. In a cross-appeal, Fidelity contends the trial court erred in denying its request for contractual attorney fees. We find Fidelity's position meritorious, and we reverse the order denying Fidelity its fees.

## FACTS AND PROCEDURAL BACKGROUND

From 1974 until July 1988, Blackwell worked at Fidelity as its vice president and general counsel. In June 1988, he entered into a separation, consulting, and settlement agreement (the separation agreement) under which he resigned his employment effective July 5, 1988. The separation agreement provided that he would receive semi-monthly severance payments of $4,000 through October 22, 1989.

Through inadvertence and mistake, Fidelity sent Blackwell eight additional checks totaling $32,000 between October 31, 1989, and February 15, 1990, after the severance payments were supposed to have ceased. Blackwell promptly negotiated each check upon receiving it.

Meanwhile, in October 1989 James Taylor, the former president and chief executive officer of Fidelity, retained Blackwell to represent him at his deposition in a lawsuit between Citadel Holding Corporation (Citadel) and a former director of Fidelity. Citadel was the holding company of Fidelity and the owner of all of Fidelity's stock. Citadel agreed to pay Blackwell's fees in his representation of Taylor. Those fees totaled about $15,000.

In early November 1989, a dispute arose between Citadel and Blackwell concerning the payment of his fees. Citadel was dissatisfied with Blackwell's representation of Taylor and therefore refused to pay Blackwell's fees. On November 22, 1989, Blackwell filed a lawsuit against Citadel (hereafter, the Blackwell action) for the collection of those fees.

Blackwell began discussing settlement of the Blackwell action with Godfrey Evans, senior vice president and general counsel of Citadel and Fidelity. On December 21, 1989, Evans sent Blackwell a letter enclosing a check in the amount of $10,162 in an attempt to resolve the lawsuit. In response, Blackwell sent Evans a letter and draft settlement agreement. In the letter, Blackwell stated, "I am certain that you did not intend that I simply apply the check to the outstanding balance owed, but you must have intended that the check would be in settlement of our dispute. Therefore, I will hold the check uncashed until the matter is resolved."

Evans believed the draft agreement contained a release that was too broad for the simple fee dispute. Accordingly, Evans edited the draft settlement agreement and returned it to Blackwell with a letter stating, "'I believe your initial draft settlement agreement is extremely broad and unnecessary for the resolution of our legal fee dispute. I am not aware of any other claims asserted against you and, therefore, I am not prepared to recommend the release of any and all claims that I am not aware of.'" Blackwell had by then received and cashed four of the inadvertently issued severance checks totaling $16,000.

On January 9, 1990, Blackwell rejected the changes Evans had suggested to the settlement agreement, stating, "'Apparently you are intent on asserting other claims against me.'" Evans testified he had no idea what Blackwell was referring to, and Evans asked Blackwell what he meant. Blackwell specifically told Evans he did not know of any claims Fidelity might have against him, but rather he had a general fear of Fidelity.

Evans sent Blackwell a letter enclosing an additional check for $4,910, which, together with the earlier check for $10,162, represented the total amount of the fees Blackwell claimed he was owed for the representation of Taylor. Blackwell agreed not to cash the check until the lawsuit was settled.

Ralph Perry III, outside counsel to Citadel and Fidelity, took over the negotiations with Blackwell. During their discussions, Blackwell repeatedly told Perry he was concerned that Fidelity might assert some nonspecific other claim against him. Perry told Blackwell several times that he was unaware of any such claims, and Perry asked Blackwell whether he knew of any such claims. Blackwell responded that he was not.

The parties agreed to a settlement of the Blackwell action on January 18, 1990. The settlement agreement included a general release provision which stated, "1. Mutual Releases. [¶] Citadel, Fidelity Federal [et al.] release Blackwell and Blackwell [et al.] release Citadel and Fidelity . . . from any and all claims or causes of action any party has had or now has against the other, . . . [¶] 2. Waiver of Future Claims. [¶] This Agreement is a full, final, and general release and each party, except as expressly excepted herein, expressly waives any rights under Calif. Civil Code § 1542 which provides as follows: [¶] A general release does not extend to the claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

The settlement agreement also stated, "Blackwell shall retain and cash the checks previously received." Evans and Perry understood that language to refer to the checks for $10,162 and $4,910 proffered in settlement of the Blackwell action. Both were unaware that Blackwell had received and cashed six checks for $4,000 each after payments under the separation agreement were to have ceased. Blackwell testified he believed that the language of the settlement agreement entitled him to keep all the checks he had received. Thereafter, Blackwell cashed the $10,162 and $4,910 checks. He later received and cashed two more inadvertently issued checks.

Craig Parkin, Taylor's nephew, testified that Blackwell had stated he knew he was not entitled to keep the checks he was receiving from Fidelity, and he was going to insist on a broad release in the settlement agreement so he could use it against Fidelity if Fidelity discovered the overpayments. Blackwell thought a computer error was responsible, and he thought the whole situation was funny. However, Taylor testified that no such conversation had occurred in his presence.

On February 18, 1992, Fidelity discovered the inadvertent payments to Blackwell, and demanded the return of the money. Blackwell refused. Blackwell contended the release provision in the settlement agreement precluded Fidelity's claim to repayment. In October 1992, Fidelity filed suit against Blackwell for conversion and for money had and received.

Following trial, the court concluded, "The evidence is clear that [the inadvertently issued checks] were never discussed or in contention during those negotiations. The suggestion that they were somehow included in the language releasing defendant from all claims 'known and unknown' is implausible. Although this particular claim may have been unknown to plaintiff, it was perfectly well known to the defendant, who suppressed its existence. The court believes the testimony of Mr. Evans and Mr. Perry that they specifically asked defendant if he knew of any other claims. The defendant demurred, saying that he did not trust the bank. The court finds this to be an intentional concealment of a material fact, unknown to the plaintiff which the defendant was under a duty to disclose, when specifically asked."

The court entered judgment in favor of Fidelity in the amount of $32,000 plus interest and costs. In addition, the court awarded Fidelity $500 as punitive damages. After trial, Fidelity moved for an award of contractual attorney fees. The court denied the motion.

## DISCUSSION

### I. Substantial Evidence Supports the Judgment

Blackwell contends the evidence was insufficient to support the trial court's finding of a conversion, and thus the judgment must be reversed. If a ruling or decision of the trial court is correct upon any applicable legal theory, it must be sustained regardless of the reasons the trial court stated for its decision. (*D'Amico* v. *Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) Here, Fidelity's complaint stated two causes of action: conversion and money had and received. Blackwell attacks the sufficiency of the evidence to sustain only the court's finding of conversion. On undisputed evidence in the record, the judgment was sustainable on the cause of action for money had and received.

An action for money had and received lies to recover money paid by mistake. (See *First Nationwide Savings* v. *Perry* (1992) 11 Cal.App.4th 1657.) At trial, Blackwell contended such a cause of action was barred by the statute of limitations. However, "'[a] quasi-contract action, in the form of a common count for money had and received, to recover money obtained by fraud (waiver of tort) or mistake, is governed by the fraud statute.' (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 451, p. 482; *Shain* v. *Sresovich* (1894) 104 Cal. 402 [38 P. 51].)" (*Id.* at p. 1670; see also *Creditors Collection Service* v. *Castaldi* (1995) 38 Cal.App.4th 1039, 1043.) Here, the trial court expressly found that the statute of limitations did not bar Fidelity's cause of action for money had and received, and on appeal, Blackwell does not contest that finding. Thus, we need not address Blackwell's challenge to the sufficiency of the evidence to support the trial court's finding of conversion; a valid independent basis exists to support the judgment.

## II. The Release Provision Does Not Bar Fidelity's Claims Against Blackwell

Blackwell argues that the release provision of the settlement agreement precluded Fidelity's claim for return of the overpayments. The trial court found that Blackwell concealed his receipt and cashing of the checks during the settlement negotiations with Fidelity and affirmatively misrepresented to Fidelity that he knew of no claims against him.

The mere recital in a release that the protection of section 1542 is waived is not controlling; it is a question of fact for the trier of fact whether the releaser intended to discharge certain claims. (*Leaf* v. *City of San Mateo* (1980) 104 Cal.App.3d 398, 411.) The rule that a releaser is bound by the clear provisions of the release applies only when there is no evidence of misconduct or unfairness on the part of the releasee. (*DuBois* v. *Sparrow* (1979) 92 Cal.App.3d 290.) "'[I]f the releaser was under a misapprehension, not due to his own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releaser. [Citations.] Under such circumstances it is unnecessary to effect a rescission of the release, and no question of notice to rescind or of restoration of consideration received arises. [Citations.]'" (*DuBois*, *supra,* at p. 298.)

Here, the trial court found that Blackwell had induced a misapprehension on the part of Fidelity as to the scope of the release. Blackwell had denied knowing of any claims Fidelity might have against him, even though Blackwell knew Fidelity had a valid claim for recovery of money paid by mistake. The release was binding only to the extent intended by Fidelity. (See *DuBois* v. *Sparrow, supra*, 92 Cal.App.3d at p. 298.) Thus, the trial court found that under the circumstances, the release did not apply to Fidelity's claim. On appeal, we uphold this factual finding based on substantial evidence in the record.

<u>III. Punitive Damages Award Must Be Reversed</u>

Blackwell contends the trial court erred in awarding $500 in punitive damages to Fidelity because the record contains no evidence to support an award of punitive damages. (*Adams* v. *Murakami* (1991) 54 Cal.3d 105.)

*Adams* established the rule that if there is no evidence in the record of the defendant's financial resources, the award of punitive damages is excessive as a matter of law and must be reversed. (*Adams* v. *Murakami, supra*, 54 Cal.3d at pp. 114-115.) The plaintiff has the burden of producing such evidence. (*Chavez* v. *Keat* (1995) 34 Cal.App.4th 1406, 1410.) Here, although defendant's conduct certainly justified an award of exemplary damages, Fidelity failed to provide any evidence to support such an award. We conclude the award of punitive damages must be reversed.

IV. Fidelity Was Entitled to An Award of Contractual Attorney Fees

On July 25, 1994, Fidelity filed a motion for attorney fees under Civil Code section 1717. Fidelity stated that the dispute between it and Blackwell involved a contract including a provision that entitled the prevailing party to attorney fees. Fidelity contends the trial court erred in denying its request for attorney fees.

The settlement agreement in the Blackwell action contained an attorney fee provision, as follows: "If litigation is instituted to enforce any aspect of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and costs." In his answer to Fidelity's complaint, Blackwell unsuccessfully asserted affirmative defenses based on the release provision of the settlement agreement. Fidelity argued it was thus entitled to its attorney fees incurred in litigating the issues pertaining to the settlement agreement. Fidelity provided a declaration stating it had apportioned its fees and was requesting only those fees allocable to the settlement agreement issues.

Under Civil Code section 1717, when an action "'involves' a contract, and one of the parties would be entitled to recover attorney fees under the contract if that party prevails in its lawsuit, the other party should also be entitled to attorney fees if it prevails, even if it does so by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract." (*North Associates* v. *Bell* (1986) 184 Cal.App.3d 860, 865.) Other cases have enlarged upon this principle. In *Reynolds Metals Co.* v. *Alperson* (1979) 25 Cal.3d 124, 129, the court held that a nonsignatory defendant who had been sued on a contract as if he were a party to it was entitled to attorney fees when the plaintiff would have recovered its attorney fees if it had prevailed. In *Milman* v. *Shukhat* (1994) 22 Cal.App.4th 538, 544-545, the court held that Civil Code section 1717 applied even though the plaintiffs had sought declaratory relief and the defendants prevailed by successfully arguing the nonexistence of notes containing an attorney fee provision. The rationale of these cases is that Civil Code section 1717 is intended to insure mutuality of access to attorney fees, and it would be inequitable to deny fees to one who successfully defends against a meritless lawsuit or who successfully defeats a meritless defense based on a contract. (*North Associates* v. *Bell, supra,* 184 Cal.App.3d at p. 865.)

Here, Blackwell attempted to deny liability based on a contract which the court held was inapplicable. Fidelity was forced to incur attorney fees litigating whether the settlement agreement entitled Blackwell to keep the checks and whether Fidelity had released Blackwell from all claims to those checks. If Blackwell had prevailed in his defense, he would have been entitled to attorney fees based on the provision for such fees in the settlement agreement.

Under the equitable principles of Civil Code section 1717, Fidelity was entitled to an award of reasonable attorney fees. The matter will be returned to the trial court for a determination of the amount of such fees.

## DISPOSITION

The award of punitive damages is reversed and the matter is returned to the trial court for a determination of reasonable attorney fees to be awarded to Fidelity. In all other respects, the judgment is affirmed. Plaintiff shall recover costs on appeal.

NOT FOR PUBLICATION

/s/ Ward
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ McKinster
J.

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JUL 14 1998

Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br><br>JUDGE WALTER L. BLACKWELL, III,<br>INQUIRY NO. 150 | **ACKNOWLEDGMENT OF SERVICE OF THE NOTICE OF FORMAL PROCEEDINGS** |

I, THOMAS C. BRAYTON, on behalf of my client, the Honorable Walter L. Blackwell, III, hereby waive personal service of the Notice of Formal Proceedings in Inquiry No. 150 and agree to accept service by mail. I hereby acknowledge receipt of a copy of the Notice of Formal Proceedings by mail and, therefore, that Judge Blackwell has been properly served pursuant to Rules of the Commission on Judicial Performance, Rule 118(c).

Dated: July 10, 1998.

JONES, MAHONEY, BRAYTON & SOLL

By: Thomas C Brayton
Thomas C. Brayton
Attorneys for Judge Walter L. Blackwell, III, Respondent