

LEXSEE 2006 CAL. APP. UNPUB. LEXIS 10323

AMERICAN ENVTL. SAFETY INST. v. P&G DISTRIB. CO.

B186515

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION FOUR**

2006 Cal. App. Unpub. LEXIS 10323

November 16, 2006, Filed

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC334309. Mary Thornton House, Judge.

DISPOSITION: Affirmed.

COUNSEL: Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, Theodora P. Berger, Assistant Attorney General, Susan S. Fiering and Edward G. Weil, Deputy Attorneys General, for Objector and Appellant.

The Carrick Law Group and Roger Lane Carrick; Edward Howard for Plaintiff and Respondent.

Orrick, Herrington & Sutcliffe, Norman C. Hile, Margaret Carew Toledo and John M. Murray for Defendants and Respondents.

JUDGES: MANELLA, J.; WILLHITE, Acting P.J., SUZUKAWA, J. concurred.

OPINION BY: MANELLA

OPINION

BACKGROUND

Respondent American Environmental Safety Institute (AESI) commenced this action June 1, 2005, by filing a complaint for injunctive relief and civil penalties against respondents Procter & Gamble Distributing [*2] Company and Procter & Gamble Manufacturing Company (Procter & Gamble). Notice of the action was served upon the Attorney General the same day.

The complaint alleges that Procter & Gamble's toothpaste contains lead, which is officially listed by the State of California as a carcinogenic chemical known to cause reproductive damage. It is further alleged that Procter & Gamble knows that its toothpaste contains lead and that use by consumers exposes them to the substance, but it has failed to provide the warning required by Proposition 65, despite service by AESI of a 60-day notice of violation.¹

¹ See *Health and Safety Code section 25249.6*, and our discussion of Proposition 65, *infra*. All further statutory references will be to the Health and Safety Code, unless otherwise stated.

On June 2, 2005, AESI filed a motion for court approval of its settlement with Procter & Gamble. The consent judgment did not require any warnings on product labels. Procter & Gamble represented [*3] that more than 90 percent of the trace amounts of lead in its products is derived from hydrated silica, a naturally-occurring mined material used as an abrasive in toothpaste, and that none is contributed by manufacturing equipment or packaging. The consent judgment provides that Procter & Gamble will use reasonable efforts to ensure that no lead is added during the manufacturing

process.

Procter & Gamble maintained that its products were safe if used as directed, but agreed that within 60 days, it would reduce the lead specification for hydrated silica purchased from suppliers from 10 parts per million to 7.5 parts per million, and would test the first shipment received under the new specification. It agreed that if hydrated silica as newly specified became commercially unavailable, it would make every effort to use hydrated silica with the lowest level of lead feasible.² It also agreed to consult with its suppliers and potential suppliers to determine whether lead can be further reduced, to explore alternative technologies for lead reduction, and to implement a lead reduction plan as soon as feasible. Any lead remaining after Procter & Gamble has taken all required actions will [*4] be deemed "naturally occurring" within the meaning of *section 12501 of title 22 of the California Code of Regulations*.³

2 "Feasible" is defined in the agreement as "reasonable," considering the availability, reliability, and cost of hydrated silica with lower levels of lead, as well as the performance, taste, safety, efficacy, and stability of the product as a whole and of each ingredient, the lawfulness of any alternative, and "other reasonable considerations."

3 That regulation provides that chemicals which are naturally occurring in food do not constitute an "exposure" for purposes of *section 25249.6*, which provides, in turn: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in [s]ection 25249.10."

The consent judgment provides for reporting, disclosure, [*5] and the provision of samples for testing over a three-year period. Procter & Gamble agreed that in lieu of statutory penalties and restitution, it would pay a total of \$ 387,500, as follows: \$ 325,518.52 to AESI, to be used for compliance monitoring and costs already incurred; \$ 27,467.48 in costs; and \$ 34,514 in attorney fees. Any disputes relating to performance, enforcement, interpretation, or validity would be resolved by arbitration.

The trial court approved the agreement and adopted

the consent judgment, which was entered with the court's written findings on August 9, 2005.⁴ The court found that no penalties were warranted, and the payment of \$ 325,518.52 to AESI in lieu of penalties furthers the remedial purposes of the statute by providing funds for compliance monitoring, as well as future enforcement activities pursuant to Proposition 65 in a manner consistent with the private enforcement mechanism and funds allocation scheme established by sections 25192 and 25249.7 et seq. The court further found that the amount of the payment and the amounts paid on account of attorney fees and costs were reasonable and appropriate.

4 The notice of entry of judgment served by counsel for AESI states that the trial court adopted its tentative ruling with minor changes. The trial court orally adopted the tentative ruling granting the motion to approve the consent judgment, but did not incorporate the ruling into the judgment.

[*6] On August 22, 2005, AESI and Procter & Gamble stipulated to an "ORDER AMENDING RULING ON ENTRY OF REVISED CONSENT JUDGMENT," by inserting a sentence in the tentative ruling. The Attorney General, who had appeared and objected to the settlement, filed a timely notice of appeal on October 5, 2005. AESI filed a timely notice of cross-appeal on October 31, 2005.

We issued an order to show cause why AESI's cross-appeal should not be dismissed on the ground that it is not aggrieved by the judgment.⁵ On August 25, 2006, after considering the parties' supplemental briefs on the issue, we dismissed the cross-appeal and allowed AESI to file a new respondent's brief.

5 See *Code of Civil Procedure section 902*.

DISCUSSION

1. Overview of Proposition 65 and Relevant Amendments

Proposition 65 was an initiative measure that added the Safe Drinking Water and Toxic Enforcement Act of 1986 to the Health and Safety Code as chapter 6.6, sections 25249.5 through 25249.13. As relevant here, [*7] *section 25249.6* provides: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving

clear and reasonable warning to such individual, except as provided in [s]ection 25249.10." ⁶ The chemicals known to cause cancer or reproductive toxicity are those on a list published by the Governor and prepared according to specified criteria. (§ 25249.8.) The list is published at *California Code of Regulations, title 22, section 12000*, and includes lead.

6 Section 25249.10 exempts exposures governed by federal law that preempts state authority, exposures listed within 12 months, and exposures which pose no significant risk, based on enumerated factors and scientific evidence.

As originally enacted and as later amended, Proposition 65 provides for enforcement by the Attorney General, district attorneys, city attorneys, or by any person acting in the public [*8] interest if, after proper notice to the public attorneys and the violators, the applicable government agencies fail to commence or diligently prosecute an action. (§ 25249.7, subs. (c) & (d).) ⁷ Remedies include injunction and civil penalties of up to \$ 2,500 per day for each violation in addition to any other penalty allowed by law. (§ 25249.7, subs. (a) & (b)(1).)

7 The Legislature has amended the measure four times. (See, e.g., Stats. 1999, ch. 599, § 1; Stats. 2001, ch. 578, § 1; Stats. 2002, ch. 323, § 1; Stats. 2003, ch. 62, § 185 [nonsubstantive changes].)

In 2001, the Legislature became concerned that private enforcers were abusing Proposition 65 by filing frivolous lawsuits. (*DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 970.) Although the drafters of the measure created it to protect the public, they were aware there was a danger that private enforcement actions could become a nuisance in their own right and, accordingly, included safeguards patterned [*9] after the federal Clean Air Act. ⁸ (*Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, 1206, 1210, fn. 17 (*Consumer Defense Group*), citing *Yeroushalmi v. Miramar Sheraton* (2001) 88 Cal.App.4th 738, 749 (*Yeroushalmi*).) Nevertheless, prior to 2001, there were instances of abuse, including what amounted to attempts "by a professional Proposition 65 plaintiff" to "shake down" targeted businesses. (*Consumer Defense Group, at p. 1210*, citing *Yeroushalmi, at pp. 746-747*.)

8 See 42 United States Code section 7401 et seq.

To reduce the number of meritless actions, the Legislature amended section 25249.7. (*DiPirro v. American Isuzu Motors, Inc.*, *supra*, 119 Cal.App.4th at p. 970; Stats. 2001, ch. 578, § 1.) Among other things, the amended enforcement provision required the private enforcer to serve upon the Attorney General a "certificate of merit" prior to filing an action, as well as a [*10] report meeting certain requirements prior to judgment or settlement; and it required a noticed motion for court approval of settlements involving consideration to be given by the defendant, in which the Attorney General was permitted to appear and participate without intervening in the case. (Stats. 2001, ch. 578, § 1; see § 25249.7, subs. (d)(1), (f)(1), (f)(4), & (f)(5).)

2. Attorney General's Standing to Appeal

AESI contends that the Attorney General may not appeal from the judgment, because it was a consent judgment. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 400 (*Norgart*).) We disagree. A consent judgment may be appealed by a party who did not, in fact, consent to the judgment. (See *In re Marriage of Brockman* (1987) 194 Cal.App.3d 1035, 1045, 240 Cal. Rptr. 96.)

AESI points out that the right to appeal is governed solely by statute, primarily *Code of Civil Procedure section 904.1* (see *Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645), and that *section 904.1* does not list "consent judgment" as an appealable judgment. *Code of Civil Procedure section 904.1* [*11] , *subdivision (a)(1)*, does, however, list "judgment" and provides that appeal may be taken from a judgment that is final. A consent judgment is a judgment. (*Norgart, supra*, 21 Cal.4th at pp. 399-400.) It is "a judgment entered by a court under the authority of, and in accordance with, the contractual agreement of the parties [citation], intended to settle their dispute fully and finally [citation]." (*Id. at p. 400*.)

The "rule" that consent judgments are not appealable is not one which affects the appellate court's subject-matter jurisdiction, as AESI suggests. (*Norgart, supra*, 21 Cal.4th at pp. 399-400.) It is not a jurisdictional rule of nonappealability, but simply the rationale for the court to refuse to entertain an appeal by a party to a consent judgment, because "'by consenting to the judgment or order the party expressly waives all objection to it, and . . . has abandoned all opposition or exception to it.' [Citation.]" (*Id. at pp. 400-401*.) Had the Attorney General been a party who consented to the

judgment, he would be foreclosed from appealing it. (*Ibid.*) As AESI acknowledges, however, the [*12] Attorney General did not consent to the judgment; in fact, he objected to it.

AESI also contends that the Attorney General has no standing to appeal, because he was not a party to the proceedings below, and had no right to appear as a party in a Proposition 65 enforcement action brought by citizen enforcers. The same contention has been rejected by two appellate courts, both of which held that when the Attorney General appears as permitted by section 25249.7, subdivision (f)(5), he has standing to appeal. (See, e.g., *Consumer Defense Group, supra*, 137 Cal.App.4th at pp. 1204-1206; *Consumer Cause, Inc. v. Johnson & Johnson (2005) 132 Cal.App.4th 1175, 1179, fn. 3.*)

We decline AESI's invitation to disagree with these authorities. Section 25249.7, subdivision (f)(5), allows the Attorney General to appear and participate in any settlement proceeding without intervening in the case.⁹ However, AESI's interpretation of the provision would require the Attorney General to intervene if he wished to participate. A statute which allows appearance and participation without intervening would be negated by construing it to deny the right to participate [*13] fully. "The Attorney General's right to 'participate' in a 'proceeding' would be meaningless if it carried no inherent right to appeal." (*Consumer Defense Group, supra*, 137 Cal.App.4th at p. 1205.) We avoid constructions which render statutory language useless or meaningless. (*Hartford Fire Ins. Co. v. Macri (1992) 4 Cal.4th 318, 326.*) We rejected the contention in AESI's motion to dismiss the appeal, and we reject it again. We turn to the Attorney General's contentions.

⁹ An intervenor has standing to appeal. (*Corridan v. Rose (1955) 137 Cal.App.2d 524, 528.*)

3. Attorney General's Contentions

The Attorney General contends that the judgment must be reversed because it fails to provide a procedure to assure that the payment of \$ 325,518.52 would be used to further the purposes of Proposition 65. He also contends that the trial court erred in finding that the attorney fee award was reasonable, as required by section 25249.7, subdivision (f)(4)(B), without [*14] an express finding that the settlement resulted in a significant public

benefit. The Attorney General's final contention is that the order filed August 22, 2005, amending the court's ruling on the motion for approval of the settlement, should be vacated as void.

4. Request for Conditions on the Use of Settlement Funds

The statute confers no express right to monetary relief other than penalties, costs, and attorney fees. (See § 25249.7, subs. (a), (b) & (j).) Although the Attorney General does not contend that the parties were precluded from agreeing to a monetary recovery in lieu of penalties, he asserts that in order to ensure that the payments would be used to further the purposes of Proposition 65, the trial court had a duty to insert some binding mechanism in the judgment to ensure expenditure in "an identifiable, accountable manner," to be supervised by the court. He suggests that the propriety of the intended use of the fund should be assessed under the "fluid recovery" standard for the distribution of large damage awards, as described in *State of California v. Levi Strauss & Co. (1986) 41 Cal.3d 460, 224 Cal. Rptr. 605.*

Once the trial court has approved [*15] the settlement of a Proposition 65 action, our task is to review the approval for a clear abuse of discretion. (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America (2006) 141 Cal.App.4th 46, 59 (CAG).*) "So long as the trial court adheres to correct legal criteria, our review is circumscribed and deferential; this court should accord '[g]reat weight' to the trial court's judgment and review it only for an abuse of discretion. [Citation.] 'To the extent that it appears the trial court's decision was based on improper criteria or rests upon erroneous legal assumptions, these are questions of law warranting our independent review.' [Citation.]" (*Id. at p. 60, fn. omitted.*) "Discerning the legal requirements for approval of a Proposition 65 consent judgment is a question of law, subject to de novo review. [Citation.]" (*Id. at pp. 60-61.*)

The Attorney General contends that the abuse of discretion standard is inapplicable here, suggesting that the court failed to act within the law by "declin[ing] even to consider imposing any limits on the plaintiff's award, constructing an erroneous theory under which such limits [*16] could not be imposed in this case, but could only be sought by the Attorney General in another case."

The Attorney General refers to remarks in the trial court's tentative ruling which suggest that the court was

of the opinion that it had no jurisdiction to grant his request to impose conditions upon the consent judgment, because the Attorney General was not a party to the action. The tentative was adopted as the court's ruling, but it was not incorporated into the judgment. Remarks made by a judge prior to judgment, whether written or oral, are "no part of the record on appeal and cannot be considered by the court in any manner or for any purpose. [Citations.]" (*DeCou v. Howell* (1923) 190 Cal. 741, 751.) "A fundamental principle of appellate review is that a judgment correct in law will not be reversed merely because given for the wrong reason; we review the trial court's judgment, not its reasoning. [Citations.]" (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 64.)

Although we do not consider the trial court's reasons, we find the court's refusal to impose conditions upon the consent judgment to be a correct one. "The jurisdiction of the court [*17] to grant any particular relief depends . . . on the scope of the complaint and the issues made or which might have been made under it . . ." (*Wright v. Rogers* (1959) 172 Cal.App.2d 349, 367.) Further, if the complaint states a cause of action in someone, but not in the party seeking the relief, it confers no jurisdiction over the cause of action. (See *Parker v. Bowron* (1953) 40 Cal.2d 344, 351.) This is because "[e]very action must be prosecuted in the name of the real party in interest . . ." (*Code Civ. Proc.*, § 367.)¹⁰ Thus, standing is a jurisdictional prerequisite to obtaining affirmative relief. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438, 261 Cal. Rptr. 574.)

¹⁰ *Code of Civil Procedure* section 367 provides exceptions for executors, trustees, and minors under 12. (See *Code Civ. Proc.*, §§ 369, 374.)

In any action [*18] brought on behalf of the Attorney General personally, he is the real party in interest; but in an action brought by the Attorney General on behalf of the people of the State of California, the people are the real party in interest. (See *Van de Kamp v. Gumbiner* (1990) 221 Cal.App.3d 1260, 1290, 270 Cal. Rptr. 907.) The Attorney General's objection to the settlement was filed on his own behalf, as he is permitted to do under section 25249.7, subdivision (f)(5). The Attorney General was also authorized to bring an enforcement action in the name of the people of the State of California, but declined to do so. (§ 25249.7, subd. (c).) AESI, who did not have the right under the statute to sue on behalf of the people, filed its complaint on its own

behalf in the public interest. (See § 25249.7, subd. (d).) Thus, AESI was plaintiff in this action, and it was the only party with standing to recover any relief within the scope of the issues raised by the averments of the complaint. (See *Parker v. Bowron*, *supra*, 40 Cal.2d at p. 351; *Code Civ. Proc.*, § 367.)

A court may enter a consent judgment and "may retain jurisdiction [*19] over the parties to enforce the settlement until performance in full of the terms of the settlement." (*Code Civ. Proc.*, § 664.6.) We have been referred to no authority, however, that would allow the court to go beyond granting or denying a motion to approve a settlement, by changing the terms of the settlement, thereby denying the parties' right to a trial on the issues.

The Attorney General suggests that authority for the imposition of additional conditions upon a settlement agreement is found in the guidelines developed by the Attorney General and adopted under authority of section 25249.12, as *California Code of Regulations, title 11, section 3203, subdivision (b)*. Those guidelines provide:

"(b) Where a settlement provides additional payments to an entity in lieu of a civil penalty (including, for example, funds for environmental activities, public education programs, and funds to the plaintiff for additional enforcement of Proposition 65 or other laws), such payments may be a proper 'offset' to the penalty amount or cy pres remedy, but are only proper if the following requirements are met:

"(1) The funded activities [*20] have a nexus to the basis for the litigation, i.e., the funds should address the same public harm as that allegedly caused by the defendant(s) in the particular case.

"(2) The recipient should be an entity that is accountable, i.e., is able to demonstrate how the funds will be spent and can assure that the funds are being spent for the proper, designated purpose.

"(3) If the entity receiving the funds will in turn make grants of funds to other entities for specified purposes, the method

of selection of the ultimate recipient of settlement funds must be set forth in the settlement agreement or in a separate public document referenced in the agreement. The selection procedure may vary depending on the facts of the particular case, but must give significant weight to a prospective grantee's ability to perform the funded task and its reliability and accountability." (*Cal. Code Regs., tit. 11, § 3203.*)

Regulations enacted under statutory authorization are accorded the "dignity of statutes." (*Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 10.*) However, the purpose of the guidelines is to "assist the parties [*21] in fashioning settlements to which the Attorney General is unlikely to object, and assist the courts in determining whether to approve settlements." (*Cal. Code Regs., tit. 11, § 3200.*) Thus, the guidelines are just that -- guidelines -- and do not establish jurisdictional authority to grant the relief sought by the Attorney General.

We conclude that the trial court was not required or authorized in this case to fashion additional conditions and impose them upon the settling parties, but was limited to granting or denying the motion to approve the settlement, the only matter before the court for decision at the time. Thus, the ruling was not based on improper criteria or erroneous legal assumptions, and we review the court's exercise of its discretion to approve or disapprove the proposed settlement. (See *CAG, supra*, 141 Cal.App.4th at p. 59.)

The court's discretion in approving a consent judgment will be upheld if supported by substantial evidence. (*Terry v. Conlan (2005) 131 Cal.App.4th 1445, 1454.*) The Attorney General contends that a review of the evidence is unnecessary, because the facts were undisputed. "Appellants [*22] often mistakenly assume that, if the evidence against the judgment greatly preponderates, a reversal is proper because of the absence of a substantial conflict. [P] The test, however, is not whether there is substantial conflict, but rather whether there is substantial evidence in favor of the respondent. If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed." (9 Witkin, Cal.

Procedure (4th ed. 1997) Appeal, § 364, p. 414, italics omitted.)

The Attorney General also contends that a review of the evidence is unnecessary because the trial court made no "evidence-based" findings. We disagree. The trial court's express findings indicate that the court was guided by the provisions of the statute and the guidelines, and that it considered the declarations of AESI's president and its attorney, along with 135 pages of exhibits in support of the motion, as well as the terms of the proposed consent judgment. The Attorney General submitted over 200 pages of evidence in opposition to the motion.

The trial court expressly found as follows:

"The Parties' [*23] agreement that no civil penalties are warranted is in accord with the criteria set forth in [section] 25249.7[, subdivision] (b)(2), in that payments totaling \$ 325,518.52 in lieu of such penalties to American Environmental Safety Institute furthers the remedial purposes established under the statutes as set forth in the Complaint by providing funds for its compliance monitoring of this Consent Judgment, as well as for its future investigational and enforcement activities regarding toxic chemicals and Proposition 65, in a manner that is consistent with the private enforcement mechanism and funds allocation scheme established by [section] 25192 and [section] 25249.7 et seq." ¹¹

¹¹ Section 25192 provides for the apportionment of any penalties recovered. See also section 25249.12, subdivision (c).

The Attorney General contends that the trial court was required to find that the payment of \$ 325,518.52 would be used to further the purposes of Proposition 65, and that there is no evidence to support [*24] such a finding. The statute does not require such a finding, and does not even mention payments in lieu of penalties, although the guidelines suggest that the court require some assurance that the funds will be spent for the proper, designated purpose. (*Cal. Code Regs., tit. 11, § 3203, subd. (b)(2).*) ¹²

12 Although the Attorney General compares the agreed-upon payment to "fluid recovery," which was held to be unauthorized in private actions brought under *Business and Professions Code section 17200* (see *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 137), he does not contend that AESI and Procter & Gamble were prohibited from *agreeing* to a monetary recovery other than penalties, costs, and attorney fees. We observe that by providing guidelines for such recoveries, the Attorney General indicates that he does not interpret Proposition 65 as precluding the parties from entering into a settlement calling for other monetary payment in lieu of penalties. "[A]dministrative regulations are generally accorded great weight in construing initiative measures." (*Yeroushalmi, supra*, 88 Cal.App.4th at p. 745, citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 246, 149 Cal. Rptr. 239.)

[*25] Assuming for discussion that such a finding is required, we must also assume that it is implied in the judgment, and that the trial court made the finding in favor of respondents. (See *Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1734.)¹³ "A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal. Rptr. 65, italics omitted.) When the standard of review is abuse of discretion, it is the appellant's burden "to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citations.] (*Id. at p. 566.*)

13 Although section 25249.7, subdivision (f)(4), requires only three findings -- that any required warning comply with the statute, that attorney fees be reasonable, and that any penalty be reasonable -- the judgment will be reversed if it affirmatively appears from the record that the court failed to consider the fairness of all the terms of the consent judgment, or that it approved

the settlement despite the unfairness in one or more of its terms. (See *CAG, supra*, 141 Cal.App.4th at pp. 62-64.)

[*26] We must also presume that the evidence sustains the implied finding, and it is the Attorney General's burden to establish that there is no substantial evidence to support the challenged finding. (See *Foreman & Clark Corp. v Fallon* (1971) 3 Cal.3d 875, 881, 92 Cal. Rptr. 162.) To satisfy that burden, he was required to set forth in his brief all material evidence upon the point, not merely his own, and by failing doing so, he has forfeited the contention. (*Ibid.*)

Included in the evidence the Attorney General has failed to summarize, as AESI points out, was the declaration of its attorney, who stated that the fund would be used in the manner outlined in a letter sent to the Attorney General prior to the hearing on the motion. The letter states that AESI is a nonprofit corporation which undertakes or uses others' scientific research to provide public education regarding environmental and public health hazards and to redress violations of the Safe Drinking Water and Toxic Enforcement Act of 1986. Thirty percent of the fund would be used for monitoring and enforcement of this consent judgment, and to underwrite investigations and litigation against other toothpaste [*27] manufacturers.

The letter states that AESI has negotiated three prior consent judgments under Proposition 65, and is currently pursuing a case against makers of tattoo ink containing lead, arsenic, and other toxic metals. Fifteen percent of the fund will be used for the investigation costs of such other Proposition 65 investigations and litigation. The letter also states that Deborah A. Sivas, AESI president and chair of the board of directors, teaches environmental law at Stanford University and volunteers her time to AESI, which will use 25 percent of the fund to hire professional staff and pay overhead, such as rent and insurance. Finally, the letter stated that AESI had given grants in the past, but once it completed formulating a new grant-making policy, 30 percent of the payment in lieu of penalty would fund grants to persons or entities for research or advocacy regarding human exposure to toxic chemicals.

The Attorney General fails to summarize or discuss AESI's declarations, but contends that there was insufficient proof that AESI would do as it claimed with the money, and points to his own showing that AESI had

failed to file reports required of charitable trusts by *Government Code section 12586* [*28], that AESI claimed an exemption to the reporting requirement in 2002 and 2003, that it filed its 2001 tax return over two years late, and that its tax returns provided insufficient information. Among the declarations the Attorney General fails to mention is the responsive declaration of Sivas, in which she states that all AESI's tax returns were filed according to the instructions of its certified public accountant, that although some were filed late, all have been filed properly, and that she believed she had complied with any reporting requirements, but would consult with a different accountant and use some of the funds to hire professional staff.

In essence, the Attorney General's contention is that the trial court should not have believed AESI and should have considered only the Attorney General's evidence. In reviewing for substantial evidence, however, we defer to the trial court's resolution of credibility issues and resolve all conflicts in favor of the successful party. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925, 101 Cal. Rptr. 568.) We ordinarily look only at the evidence supporting the successful party, and disregard the contrary showing. [*29] (*Ibid.*) "Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true and that unfavorable discarded as not having sufficient verity, to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel* (1944) 25 Cal.2d 520, 527.)

In this case, we do not examine all the evidence, because the Attorney General has failed to summarize it. "A reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact, and it is not the province of such a court to search the record in order to ascertain whether it contains evidence which will support a contention made by either party to an appeal." (*Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 356.) Thus, we presume that the record contains sufficient evidence to sustain the judgment. (See *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

5. Attorney Fee Award

The Attorney General contends that the trial court erred in finding that the attorney fee award [*30] was reasonable, as required by section 25249.7, subdivision

(f)(4)(B); in particular, he asserts that the judgment must be reversed because the trial court failed to find that the settlement resulted in a significant public benefit.

The Attorney General relies upon the requirements of *Code of Civil Procedure section 1021.5* (the private attorney general statute), under which attorney fees are recoverable only upon the motion of the prevailing party, showing that "(a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." (*Code Civ. Proc.*, § 1021.5.)

We do not agree that the private attorney general statute provided the jurisdictional basis for the recovery of attorney fees in this case. Attorney fees are recoverable in an action when authorized by contract, statute, or law. (*Code Civ. Proc.*, § 1033.5 [*31], *subd. (a)(10)*.) In this case, judgment was entered according to the parties' contractual agreement, which included an attorney fee provision. (See *Norgart, supra*, 21 Cal.4th at p. 399; *Code Civ. Proc.*, § 664.6.) Thus, the jurisdictional basis for the recovery of attorney fees was not *Code of Civil Procedure section 1021.5* or other statute; it was contractual; and the only condition imposed by Proposition 65 upon the recovery of attorney fees by contract is that they must be "reasonable under California law."

The guidelines set forth in *California Code of Regulations, title 11, section 3201*, provide a standard to measure the reasonableness of attorney fees awarded in settlements under which the basis for the award is provided by *Code of Civil Procedure section 1021.5*. (See, e.g., *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 395 [motion by class member for attorney fees incurred in objecting to settlement].) As to contractual attorney fees, however, the guidelines state: "Where [*32] there is a different or additional basis for an award of fees, parts of these guidelines may not apply. Since the Legislature has mandated that the court must determine that the attorney's fees in all settlements of Private Proposition 65 actions must be 'reasonable under California law,' the fact that the defendant agreed to pay the fee does not automatically render the fee reasonable. The fact that the

fee award is part of a settlement, however, may justify applying a somewhat less exacting review of each element of the fee claim than would be applied in a contested fee application." (*Cal. Code Regs., tit. 11, § 3201.*)

One appellate court has measured the attorney fee provision in a Proposition 65 settlement against the standards applied to awards under *Code of Civil Procedure section 1021.5*, as enunciated in *Serrano v. Priest (1977) 20 Cal.3d 25, 49, 141 Cal. Rptr. 315*. (See, e.g., *Consumer Defense Group, supra, 137 Cal.App.4th at p. 1219.*) That court did not hold, however, that settlements must adhere to those standards; it used them as a reference to confirm its conclusion that [*33] the "settlement represents the perversity of a shakedown process in which attorney fees are obtained by bargaining away the public's interest in warnings that might actually serve some public purpose." (*Ibid.*)

The Attorney General suggests that *Consumer Cause, Inc. v. Johnson & Johnson, supra, 132 Cal.App.4th at pages 1185-1186*, provides authority for his assertion that a finding of public benefit from the settlement was a prerequisite to approving the agreement to pay attorney fees. There was no attorney fee issue in that case, and no authority supports the Attorney General's position. Indeed, the Attorney General's own guidelines make it clear that while the agreement to pay attorney fees does not automatically render such fees reasonable, the elements of an award under *Code of Civil Procedure section 1021.5* need not be established. (*Cal. Code Regs., tit. 11, § 3201.*)

Thus, the Attorney General has provided no authority, and we have found none, to justify ruling as a matter of law that a finding of public benefit from the settlement is a prerequisite to the approval of an agreement to pay attorney [*34] fees. Moreover, such a ruling would have no effect upon the disposition of this appeal, as the Attorney General has failed to provide a proper substantial evidence analysis to support his claim that "no party produced evidence to allow the court to conclude that plaintiff has achieved any substantial benefit for the public." Without a review of *all* the evidence, it cannot be discerned whether there is *no* evidence on a disputed point. Our obligation to undertake such a review does not arise until the appellant has done so. (*Leming v. Oilfields Trucking Co., supra, 44 Cal.2d at p. 356.*)

6. *Modification of Trial Court's Ruling*

The Attorney General contends that the judgment was modified under the guise of correcting a clerical error pursuant to *Code of Civil Procedure section 473, subdivision (d)*, when in fact, the modification was an impermissible correction of a perceived judicial error in the judgment, rendering the modification void. (See generally *Estate of Burnett (1938) 11 Cal.2d 259, 262.*)

As Procter & Gamble points out, the judgment was not modified. The modification of which the Attorney General complains [*35] was the "STIPULATION AND ORDER AMENDING RULING ON ENTRY OF REVISED CONSENT JUDGMENT." The body of the stipulation clearly states that it is the tentative ruling of the court which is revised by the order. It inserts into the tentative ruling the following sentence: "It should be further noted that the settlement is between the parties and has no impact upon whether or not the People of the State of California or any organization may bring another action to obtain relief against the settling defendants for claims not adjudicated pursuant to paragraph 5 of the Consent Judgment."

Prior to entry of judgment, the trial court orally adopted the tentative ruling as the ruling on the motion to approve the settlement, but the court did not incorporate the ruling into the judgment. ""No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his absolute power to declare his final conclusion . . . by filing the 'decision' (findings of fact and conclusions of law) provided for by . . . the Code of Civil Procedure." [Citation.] [Citation.]" (*Taormino v. Denny (1970) 1 Cal.3d 679, 684, 83 Cal. Rptr. 359.*) The decision [*36] of the court is the judgment, not the oral or written expressions of opinion that precede the judgment. (*Prothero v. Superior Court (1925) 196 Cal. 439, 443.*) Further, "the opinion, though printed in the transcript, is no part of the record on appeal and cannot be considered by the [appellate] court in any manner or for any purpose. [Citations.]" (*DeCou v. Howell, supra, 190 Cal. at p. 751.*) It follows that the "correction" of the court's opinion cannot affect the judgment, and in particular, cannot affect paragraph five. We conclude that there was no judicial error requiring our intervention.

7. *Constitutionality of Legislative Amendments to Proposition 65*

AESI contends that the amendments to Proposition 65, enacted by the Legislature without a referendum, violate *article II, section 10, subdivision (c), of the California Constitution*, which provides: "The Legislature may . . . amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."

Because we affirm the judgment on other grounds, we need not [*37] reach AESI's contention. It "is the long-established rule that an appellate court will not enter upon the resolution of constitutional questions unless absolutely necessary to a disposition of the appeal." (*Bayside Timber Co. v. Board of Supervisors (1971) 20*

Cal.App.3d 1, 5-6, 97 Cal. Rptr. 431.)

DISPOSITION

The judgment is affirmed. Respondents shall have their costs on appeal.

MANELLA, J.

We concur:

WILLHITE, Acting P.J.

SUZUKAWA, J.