

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Kahn v The Dewey Group 9/8/15

CCP section 998 offers; Offers made by multiple parties; Validity

Plaintiff and Appellant Kahn alleged that from 1996 to 2011, he was a resident of a mobile home park located in San Fernando, California. Sometime prior to 1996, defendants and their predecessors-in-interest had used the land on which the mobile home park sat as an industrial waste disposal site. As a result, the property released hazardous gases to which Kahn had been exposed, causing him to suffer various injuries.

In September 2013, **all 20 defendants** jointly made a statutory offer to compromise pursuant to section 998. Section 998 provides that any party “may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated.” (§ 998, subd. (b).) If the offer is accepted, the court “shall enter judgment accordingly.” If the offer is *not* accepted prior to trial or within 30 days after it is made, whichever occurs first, “it shall be deemed withdrawn.”

Here, defendants' offer, characterized as a "**joint offer of judgment**," provided that defendants "jointly shall pay Brian Kahn the sum of \$75,000 in full and final satisfaction of all monetary claims, including all claims for attorneys' fees and costs," with all parties bearing their own costs and attorneys' fees. Kahn did not accept the offer. Trial commenced in March 2014. On May 1, 2014, the trial court granted a **nonsuit as to 14 defendants**. The court entered a judgment of dismissal as to those defendants on June 3, 2014. The case against the remaining six defendants went to the jury on May 6. After six days of deliberation, the jury advised the court it was deadlocked, and the court declared a mistrial. A retrial of the case against the six defendants remains pending.

On June 26, 2014, the 14 dismissed defendants filed a memorandum of costs, which was superseded by an amended memorandum of costs filed later the same day. The amended memorandum of costs asserted that the 20 defendants collectively had incurred costs of \$358,341, of which the 14 dismissed defendants were seeking 70 percent (14/20ths), or \$250,838. Among the costs the dismissed defendants claimed were expert witness fees of \$206,090, described as 70 percent of the total incurred expert witness fees of \$294,415.

Kahn filed a motion to strike or tax costs. Kahn claimed as follows: "For example, one of the Defendants who joined in the 'Offer to Compromise' was SE Sky Terrace, LLC, the landowner. SE Sky Terrace, LLC, was not dismissed by the Court. If Plaintiff obtains a more favorable judgment against SE Sky Terrace, LLC at retrial than the amount offered in the joint 'Offer to Compromise,'

Plaintiff would be the prevailing party against SE Sky Terrace, [LLC] and Defendants would not be entitled to augmented costs pursuant to CCP 998. **If Defendants wished to send out valid offers that would have avoided this situation, they should have sent out individual offers from each separate Defendant.** Since the offer was made jointly, the only way Defendants may recover augmented costs pursuant to Code of Civil Procedure section 998 is to obtain a defense verdict for all of the joint offerors. Since that has not occurred, the 'Offer to Compromise' is legally ineffective and Defendants are not entitled to augmented costs including the costs of expert witnesses."

The dismissed defendants opposed the motion. They asserted that both prior to and during trial, defense counsel attempted to obtain dismissal of the 14 dismissed defendants on the ground that there was no colorable claim against them. After a nonsuit was granted in their favor, the dismissed defendants sought costs, including expert witness fees, premised on the section 998 offer served September 20, 2013. The dismissed defendants contended the costs memorandum was timely served and Kahn did not object to any particular item of costs. As to Kahn's contentions that the offer to compromise was ineffective or the request for expert witness fees was premature, the dismissed **defendants urged that California law permits joint offers if defendants are "united in interest and were sued on a theory of joint and several liability" or "it is possible to determine whether a more favorable judgment was received as to each defendant."** In the present case, the joint section 998 offer was valid and enforceable because Kahn alleged all defendants were jointly and severally liable

and “any subsequent trial involving the remaining Defendants would not change the result achieved by the dismissed Defendants, which was a judgment of dismissal entered in their favor.”

The trial court denied Kahn’s motion to strike or tax costs. The court found that the 14 dismissed defendants were entitled to recover their expert witness fees. The court reasoned as follows:

“It appears that this CCP § 998 offer was made on behalf of all Defendants jointly for the sum of \$75,000 to Plaintiff. The fact that six of the Defendants included on the CCP § 998 offer remain in the case pending retrial does not render the offer invalid. This joint offer was valid because the Defendants were alleged to be jointly and severally liable (at least for economic damages under Proposition 51) and also because the offer of joint liability imposed upon each Defendant the risk of being jointly liable for non-economic damages under Proposition 51. . . .

“Because Plaintiff failed to obtain a more favorable judgment or award as against the above dismissed Defendants, they are entitled to recover all post-offer costs, plus all expert witness fees actually incurred and reasonably necessary, before and after the settlement offer in the court’s discretion. Thus, the fact that Defendants may have claimed costs for all of their expert witness fees from the inception of the case is not improper.

“As to Plaintiff’s claim that if he obtains a more favorable judgment than the \$75,000 offer at the retrial as against any of the six remaining Defendants, such as SE Sky Terrace, LLC, Defendants are representing to the Court that the amount of expert witness fees was \$294,415.18 and that the \$206,090.64 represents an apportionment of those fees for 14 of 20 defendants. . . .

“Here, the Court in its discretion will award the dismissed Defendants \$206,090.64 in witness fees, which Defendants represent as an apportionment of those witness fees . . . for 14 of 20 defendants. The remaining six defendants are not being awarded their pro rata portion of the expert witness fees.”

The dismissed defendants served notice of entry of an amended judgment, which included the award of costs, on October 21, 2014. Kahn timely appealed, raising two issues, including the following:

When all defendants make a joint pretrial offer to compromise pursuant to section 998, and then judgment is entered in favor of some defendants while the case remains pending against other defendants, can the prevailing defendants recover expert witness fees under section 998?

Except as otherwise expressly provided by statute, a prevailing party “is entitled as a matter of right to recover costs.” (§ 1032, subd. (b).) Recoverable costs generally do not include the fees of expert witnesses not ordered by the court. (§§ 1032, 1033.5, subd. (b)(1).) Such expert witness fees are recoverable in some circumstances, however, when a more favorable judgment for the

defendant follows a plaintiff's rejection of a pretrial section 998 settlement offer, thus triggering section 998's cost-shifting provisions. (See *Martinez*, at p. 1019)

As relevant here, section 998, subdivision (c)(1), provides: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court . . . , in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

"The policy behind section 998 is 'to encourage the settlement of lawsuits prior to trial.' . . . Section 998 aims to avoid the time delays and economic waste associated with trials and to reduce the number of meritless lawsuits." (*Martinez*, at p. 1019) On its face, section 998 does not address offers to compromise made by or to multiple parties: It refers to an offer made by "*a* defendant," not by "defendants." It also does not facially address multiple judgments, referring in the singular to "*a* more favorable judgment." Although section 998 thus is silent as to multiple party offers and judgments, courts have held that at least in some circumstances, section 998 can apply to joint offers and/or multiple judgments. **The cases have taken at least two approaches to the issues of joint offers and multiple judgments.**

1. The “Absolute Prevailing Party” Approach

In *Winston Square Homeowner’s Assn. v. Centex West, Inc.* (1989)

213 Cal.App.3d 282 (*Winston Square*), a homeowner’s association sued the developer and subcontractors of a townhouse development for alleged construction defects, including drainage problems. Prior to trial, all defendants jointly made an offer pursuant to section 998 to settle the case for \$500,000; the homeowner’s association rejected the offer. The parties then settled all issues of the lawsuit except for those relating to drainage.

The trial court bifurcated the trial of the drainage issues and, following a first phase, concluded that all drainage claims were barred by the statute of limitations. As relevant here, judgment was entered against the homeowner’s association and in favor of Wilsey & Ham (Wilsey), the drainage subcontractor. Wilsey also sought and was awarded its expert witness fees pursuant to section 998.

The homeowner’s association appealed the judgment and costs award. Among the issues it raised on appeal was Wilsey’s entitlement to expert witness fees under section 998. The homeowner’s association contended that because there was never a trial on damages or a judgment for damages against which the joint section 998 offer could be measured, the trial court erred in awarding Wilsey its witness fees

The Court of Appeal disagreed, concluding that because Wilsey was an “absolute prevailing party,” it was entitled to recover its witness fees under section 998. The court explained: “Joint offers by more than one defendant fall within the provisions of section 998 when defendants are united in interest and are sued on a theory of joint and several liability. (*Brown v. Nolan* (1979) 98 Cal.App.3d 445, 451; see also *Stiles v. Estate of Ryan* (1985) 173 Cal.App.3d 1057, 1066.) Here, all defendants were not united in interest. Nevertheless, the application of section 998 appears appropriate in this case. Though the joint offer did not break down the offer as to particular areas of damage or defendants, Wilsey received a judgment in its favor. Wilsey was an *absolute prevailing party*—it was completely absolved of any liability. As Wilsey contends, the subsequent settlement between plaintiff and the other defendants on issues other than drainage was irrelevant as far as Wilsey was concerned. The trial court did not err when it allowed Wilsey to recover its expert witness fees as costs.”

2. The “Comparison” Approach

In several cases, courts have adopted an approach to evaluating joint section 998 offers that is very different than *Winston Square’s* “absolute prevailing party” approach.

a. *Offers jointly made by plaintiffs*

Fortman v. Hemco, Inc. (1989) 211 Cal.App.3d 241 (*Fortman*) involved a section 998 offer jointly made by two plaintiffs. There, a child, Nichole, sustained extensive permanent injuries when she was ejected from her parents' jeep as a result of a defective vehicle door. Nichole and her mother sued several defendants, including Hemco. Prior to trial, Nichole and her mother jointly made an offer to Hemco pursuant to section 998 to settle the case for \$1 million; Hemco declined to respond to the offer.

By the time the case went to a jury, as a result of settlements and voluntary dismissals, only Nichole and Hemco remained in the case. The jury returned a verdict finding Hemco 25 percent liable for Nichole's injuries, and awarded her damages of more than \$23 million, of which approximately \$17 million was for economic losses and \$6 million was for noneconomic losses. The court entered judgment on the jury verdict and awarded Nichole pretrial interest pursuant to Civil Code section 3291 based on the section 998 offer.

Hemco appealed, contending that the section 998 offer was invalid because it was made jointly by Nichole and her mother. In support, Hemco cited *Randles v. Lowry* (1970) 4 Cal.App.3d 68 (*Randles*), which held a joint offer a "nullity" because it was made by a defendant to three plaintiffs without designating how it should be divided among them. The *Fortman* court declined to apply *Randles* to conclude that the section 998 offer was ineffective to support the award of

prejudgment interest. It explained: “In our case, Hemco would have us apply the rule of *Randles*, that joint offers are a nullity, without examining the reason for the rule. The reason, as both *Randles* and a subsequent decision illustrate, is that in those cases it could not be determined after trial whether the individual plaintiffs received more than they would have received had the offer to compromise been accepted. In our case, however, it is absolutely clear that Nichole received a greater amount in damages after trial than she would have received had Hemco accepted the joint offer even if the entire amount of the offer, \$1 million, is attributed to her. Nichole’s mother dismissed her action, leaving Nichole as the sole plaintiff for purposes of damages. Moreover, Nichole’s \$23 million-plus award leaves no doubt in anyone’s mind that her recovery far exceeded the statutory offer. Under these facts, therefore, we decline to mechanically apply *Randles*.”

The court adopted a similar analysis in *Stallman v. Bell* (1991) 235 Cal.App.3d 740 (*Stallman*) to conclude that a joint offer by two plaintiffs supported an award of expert witness fees under section 998. There, the plaintiffs (an individual and a decedent’s estate) made a joint section 998 offer to several defendants, who did not accept it. After the plaintiffs received a judgment in their favor, the trial court awarded them costs, including expert witness fees. Defendants appealed, contending that the section 998 offer was void from its inception because it was made jointly by the individual plaintiff and the decedent’s estate. *Stallman* disagreed and affirmed, noting that although the section 998 offer was joint, the jury’s award was also joint. Accordingly,

“there is but a single verdict to be compared to a single offer, and from this comparison it can be clearly determined whether or not the [plaintiffs] received a more favorable judgment.” Because the joint offer “does not prevent a determination of whether plaintiffs received a more favorable judgment,” it was valid and plaintiffs were properly awarded expert witness fees under section 998.

b. Offers jointly made by defendants

In *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141 (*Persson*), the plaintiff sued his former business partner and a corporation on a variety of tort theories. Before trial, the individual defendant and the corporate defendant made an offer under section 998 to allow judgment to be taken against them, jointly and severally, in the amount of \$500,000. Plaintiff declined the offer. Following a jury trial, judgment was entered (a) in favor of plaintiff and against the individual defendant for \$306,000, and (b) in favor of the corporate defendant.

The corporate defendant filed a motion under section 998 for fees because the plaintiff failed to recover more than the \$500,000 offered. The trial court denied the motion, ruling that defendants’ section 998 offer was invalid because it was “ ‘a joint and several offer for multiple defendants and did not separate out and distinguish between them and the separate causes of action applicable to each.’ ” Accordingly, the trial court said, the plaintiff “ ‘was not in a position to evaluate the offer.’ ”

The Court of Appeal reversed, concluding that defendants' section 998 offer was not rendered invalid by the fact that it was jointly made. The court explained that for a joint section 998 offer to be valid, the offeree must be able to evaluate the likelihood of receiving a more favorable verdict at trial. The joint nature of the present offer did not prevent the plaintiff from fairly evaluating it: "It is incomprehensible why a plaintiff would be unable to evaluate an offer in which each defendant offers to have judgment taken against him, jointly and severally, in a stated amount, even if one defendant has no liability on one of the plaintiff's claims. The plaintiff need only assess the chances of recovery on each of his claims, no matter which defendant is liable, and add them together. If the joint offer exceeds that amount, the plaintiff should accept it. In this case, plaintiff had only to assess his chances of recovering more than \$500,000 on all of his claims against both defendants. . . . The evaluation is straightforward, as is the ability to determine after trial whether the offer was more favorable than the judgment."

The court also rejected the plaintiff's contention that the joint offer placed him in an untenable position because he had to "either take the unapportioned offer 'or perhaps risk paying enormous post-offer attorneys' fees to only one of the Defendants.'" The court explained: "There is no such risk. The offer was joint, and plaintiff could not accept the offer as against one defendant and not the other. Even if, after trial, one defendant were found to have no liability, *that*

defendant could not claim post-offer costs against plaintiff unless the other defendant's liability was also less than the offer, since the offer was a joint offer."

C. *The "Comparison" Approach Is More Consistent with the Statutory Purpose of Encouraging Reasonable Settlements and Avoiding Gamesmanship*

Where the language of section 998 does not provide "a definitive answer for a particular application of its terms," courts have been directed to adopt a construction consistent with the policies section 998 seeks to further. (*Martinez*, at p. 1020.) The "comparison" approach best does so, as the Second DCA explained.

Policy of encouraging reasonable settlements. The policy behind section 998 is to " 'encourage the settlement of lawsuits prior to trial' . . . by providing 'a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer.' (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.) At the same time, the potential for statutory recovery of expert witness fees and other costs provides parties 'a financial incentive to make reasonable settlement offers.' "

Whether a settlement offer is "reasonable" for section 998 purposes is determined by comparing the settlement offer against the offeree's actual recovery. "As explained, the Legislature sought to encourage settlement by

affording the benefit of enhanced costs to parties who make reasonable settlement offers and imposing the burden of those costs on offerees *who fail to obtain a result better than they could have achieved by accepting such offers.*" (Martinez, at p. 1025)

Where an offer is jointly made by a group of defendants, the Justices conclude the relevant comparison for section 998 purposes is of (a) the offer made by the group of defendants, and (b) the recovery obtained *against that same group of defendants*. That is, if two or more defendants jointly make an offer to settle, the "reasonableness" of that offer cannot be determined by comparing the judgment entered against fewer than all of the offering defendants. Instead, the offer must be compared to the judgment (or judgments) obtained against *all* defendants. The "comparison" approach thus is consistent with the policy section 998 seeks to further because it permits the offering party to recover its expert witness fees *only* if the offer and judgment concern the same parties, such that the judgment reveals whether the offer was reasonable.

The "absolute prevailing party" approach, in contrast, does not require the comparison of a joint offer and a joint judgment. Instead, it permits an offering party who submits a joint offer to recover witness fees under section 998 so long as that party has "absolutely prevailed" against the offeree—without regard to the recovery against the other offerors.

The flaw in the “absolute prevailing party” approach is well illustrated by the present case. Here, 20 defendants made a joint offer to settle this case for \$75,000. To evaluate the reasonableness of that offer, Kahn had to “assess the chances of recovery on each of his claims, no matter which defendant is liable, *and add them together*. If the joint offer exceeds that amount, the plaintiff should accept it.” (*Persson*, at p. 1170) Here, however, there is not yet a final judgment between Kahn and all 20 defendants, against which the joint settlement offer can be measured. As a result, all we can determine at this juncture is that the offer made by 20 defendants exceeds Kahn’s recovery against 14. Neither the Justices nor the trial court thus can evaluate whether the offer exceeded the judgment, and the award of expert witness fees therefore was premature.

Defendants suggest that the premature award of section 998 witness fees is not unfair because defendants tried repeatedly, but unsuccessfully, to “obtain the dismissal of the subset of defendants comprising individual persons, family trusts, and several unrelated business entities, on the grounds that there was never a colorable claim against these individuals and entities.” Whatever the merits of defendants’ claim factually, it has no relevance legally. *Defendants*, not Kahn, controlled the form in which their settlement offer was made. **If some defendants believed Kahn did not have a colorable claim against them, they were free to make a separate offer to Kahn.** Instead, because all 20 defendants elected to make a joint settlement offer, *defendants must wait until a final judgment has been entered against the same 20 defendants before seeking expert witness fees under section 998.*

Avoiding uncertainty and gamesmanship. The Supreme Court has directed that when interpreting section 998, courts “should assess whether the particular application injects uncertainty into the section 998 process. If a proposed rule would encourage gamesmanship or spawn disputes over the operation of section 998, rejection of the rule is appropriate. . . . In other instances, courts have adopted bright-line rules in order to avoid confusion.” (*Martinez*, at p. 1021)

Interpreting section 998 as defendants suggest would create precisely the opportunity for gamesmanship courts have been directed to avoid. That is, defendants suggest that even if a section 998 offer has been jointly made, particular defendants should be permitted to recover expert witness fees under section 998 if they prevail against the plaintiffs. Such a rule, however, would create an incentive in every multi-defendant case for the defendants to jointly make a low-ball offer that would guarantee individual defendants enhanced costs if any *one* of them were to be dismissed or found not liable. Such a rule would not encourage the making or accepting of reasonable offers—to the contrary, it would encourage defendants to make *unreasonable* offers for the sole purpose of recovering enhanced fees, and would unfairly pressure plaintiffs to accept such offers.

The Appellate Court holds that if multiple defendants jointly make an offer to settle pursuant to section 998, whether the offer exceeds the judgment cannot be determined by comparing it to a judgment (or judgments) entered against

only *some* of the offering defendants. Instead, the offer must be compared to the judgment(s) obtained against *all* defendants. Accordingly, because in the present case no judgment has yet been entered with regard to six of the 20 defendants on whose behalf the section 998 offer was made, the trial court erred in awarding expert witness fees to the 14 dismissed defendants.

The judgment is reversed insofar as it awards expert witness fees to the 14 dismissed defendants under section 998, and is otherwise affirmed. The trial court is directed to hold in abeyance the dismissed defendants' request for expert witness fees pending entry of final judgments as to all defendants. At such time as final judgments have been entered as to all defendants, the parties should be given the opportunity to submit amended briefs on the section 998 expert witness fees issue, and the trial court should redetermine that issue consistent with the views expressed in this opinion. Kahn is awarded his appellate costs.

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