CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG
Alternative Dispute Resolution
❖ Resolution Arts Building ❖
2630 J Street, Sacramento, CA 95816
ph: (916) 442-6739 • fx: (916) 442-4107
elong@ernestalongadr.com • www.ernestalongadr.com

Whatley-Miller v Cooper

CCP section 998 offer to Compromise; Tests of Reasonableness

Plaintiffs filed suit in February, 2008, after the death of their husband and father, allegedly the result of medical negligence by Dr. Stark, Dr. Cooper, and Verdugo Hills Hospital. On June 20, 2008, plaintiffs served Dr. Cooper with a statutory offer to compromise in the amount of $950,000.00 pursuant to CCP section 998. In the offer, Plaintiffs agreed to resolve all claims in the complaint against Dr. Cooper and that "each side was to bear its own costs." Plaintiffs also served a document entitled Acceptance of Plaintiffs' Offer to Compromise, which provided: "The Clerk of the Court is hereby authorized and directed to enter Judgment against [Dr. Cooper] on the Complaint of Plaintiffs … in the amount of $950,000.00 pursuant to Plaintiffs' Offer to Compromise which is attached hereto. Costs to be submitted pursuant to cost bill filed by plaintiffs within ten days after entry of said Judgment." The Acceptance provided a place for the signature of Dr. Cooper's attorney and the date. The Offer was never accepted.

The Hospital was dismissed before trial and the jury returned a verdict for Dr. Stark, but was not able to reach a verdict as to Dr. Cooper. In a second trial, the jury returned a verdict for plaintiffs and against Dr. Cooper. The trial court reduced the noneconomic damages from $519,420 to the mandatory statutory limit of $250,000, and entered judgment for plaintiffs in the total amount of $1,437,276, consisting of $1,187,276 in economic damages and $250,000 in noneconomic damages. A new trial motion by Dr. Cooper reduced the award by $238,369 by remittitur to $948,907. On September 9, 2011, an amended judgment in this amount was filed.

On April 22, 2011, plaintiffs' attorney filed a memorandum of costs in the total amount of $530,315.99, of which $108,191 was listed as expert fees, and $411,100.31, listed as prejudgment interest, from the date of the compromise offer on June 20, 2008. Dr. Cooper filed a motion to strike and to tax costs. He contended the offer was extinguished by the first trial and was not made in good faith. He also challenged the expert fees. He also argued the acceptance form was improper, thus failing to meet the procedural requirements of section 998. The trial court denied Dr. Cooper's motions in their entirety, finding the offer was reasonable, the expert expenses were reasonable, and the acceptance complied with the statutory requirements.

On appeal, Defendant Cooper contended the acceptance requirements of CCP section 998 were not met by the offer, and the offer was ambiguous and thus, invalid. The Second Appellate District stated that although the Judicial Council has made a form available for acceptance of a statutory offer, it is clear the form is not the only way to comply with the statute. Section 998(b) provides the acceptance shall be made on the document containing the offer or on a separate document of acceptance, signed by counsel for the accepting party. Compliance with the statute may be satisfied by a statement of the offer and a separate document of acceptance. There is no specification of the specific wording of the acceptance. The only requirement is the acceptance is "in writing" and "signed by counsel for the accepting party."

Defendant argues the language about costs in plaintiffs' offer is ambiguous between the offer and the acceptance documents. The Justices found the offer integrated two documents to form a whole: a combined offer and acceptance proposal. Both documents were served in the same envelope. The offer and acceptance refer to the same amount, $950,000. The offer document clearly states each side is to bear its own costs. The language in the acceptance document did not transform the language of the offer document, nor did it create an ambiguity in the offer. The recital regarding a cost bill stated in the Acceptance document has no force or effect and is surplusage. The Acceptance document did not require Dr. Cooper to pay plaintiffs' costs, nor did it direct the entry of costs in the judgment. The offer specifically said each side is to bear its own costs. The DCA determined the form of the offer and acceptance complied with the statute.

Defendant Cooper also claims the statutory offer is invalid because it was not made in good faith in that plaintiffs served their responses to his discovery requests "only two weeks before serving their Offer. " The Second DCA pointed out that although the statute requires the offer be made in good faith, the requirement of good faith means that the pretrial offer of settlement must be "realistically reasonable under the circumstances of the particular case…" The offer must carry with it some reasonable prospect of acceptance. (*Jones v Dumrichob* (1998) 63 Cal.App.4th 1258) Whether the offer was reasonable depends upon the information available to the parties as of the date the offer was served. (*Westamerica Bank v MBG Industries, Inc.* (2007) 158 Cal.App.4th 109)

Reasonableness generally is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant, and if an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable. (*Elrod v Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692) If the offer is found reasonable by the first test, it must then satisfy a second test: whether plaintiff's information was known or reasonably should have been known to defendant. This second test is necessary because the section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer. (*Elrod*, at p. 699)

In reviewing the reasonableness of a section 998 offer, the trial court's determination is evaluated for an abuse of discretion. The court here found the offer to compromise was made in good faith. The trial court provided considerable detail as to the information available to defendant regarding the decedent's annual income and the financial impact of his death prior to the offer. It noted the offer was within his policy limits. Dr. Cooper maintained the offer did not allow him sufficient time to investigate the facts and evaluate liability and damages. With complex issues, multiple defendants, and issues of apportionment of damages, defendant contends plaintiffs' failure to provide

further information rendered the offer unreasonable.

As detailed by the trial court however, defense counsel for Dr. Cooper had adequate information, even at an early juncture of the case, to evaluate the reasonableness of the offer. Additionally, counsel did not contend that he advised plaintiffs prior to expiration of the offer that he required additional information. Counsel did not describe or identify the information desired nor how much time he needed to evaluate the offer. Counsel did not ask for more time. The Justices found that implicit in the trial court's finding is the conclusion that Dr. Cooper believed he did not need more information or time to determine whether or not to accept the offer.

Finally, the challenge to the costs awarded to plaintiffs as expert fees lacks evidence the amounts paid were not reasonably necessary. The DCA noted the verified memorandum of costs is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the party, and the burden of showing that an item is not properly chargeable or is unreasonable is upon the objecting party. (*Nelson v Anderson* (1999) 72 Cal.App.4th 131) To controvert this evidence, the burden is on the objecting party to present evidence showing the contrary. (*Benach v County of Los Angeles* (2007) 149 Cal.App.4th 836)

The trial court found Dr. Cooper offered no facts to demonstrate that the amounts were unnecessary or unreasonable. Mere argument in the reply memorandum is insufficient to meet his burden of showing the amounts were unreasonable or unnecessary.

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

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