CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Sanford v Rasnick 4/25/16

CCP section 998 Offer to Compromise; Validity of Term Requiring Settlement Agreement and Release

On June 13, 2011, Sanford was injured when a car driven by 17-year-old Jacy ran a stop sign and struck his motorcycle. The car was owned by Jacy's father, William. On February 20, 2013, Sanford filed suit against the Rasnicks.

The trial court initially set the case for trial for December 1, 2014, the effect of which was that the discovery cutoff, including expert discovery, was calculated from that date. The parties disclosed experts in September 2014 and all discovery, including expert discovery, closed on November 1, 2014, by which date all expert depositions had been concluded.

On December 24, 2014, after discovery had closed and after the last deposition had concluded, the Rasnicks served a section 998 offer. It provided in its entirety as follows:

"Defendants, JACY LEANN RASNICK and WILLIAM RASNICK hereby offer, pursuant to CCP §998, to compromise all of the claims, allegations and actions of plaintiff CHARLES STEVEN SANFORD for $130,000 in exchange for each of the following:

"1. The entry of a Request for Dismissal, with prejudice, of the entire action (including any and all complaints, cross-complaints or actions filed by any party against or as to these defendants) and/or a finding that this compromise was entered into and constitutes a good faith settlement or compromise as to any cross-complainants; and

"2. The notarized execution and transmittal of a written settlement agreement and general release. Each party will bear their own fees, costs and expenses.

"This offer will expire in 30 days or the commencement of trial, whichever is sooner, unless earlier withdrawn.

"Any acceptance of this offer must be made by a written statement, signed by counsel for the accepting party (or party, if in pro per), that the offer is accepted on the terms and conditions stated above. Acceptance may be made by signing the Acceptance of Offer to Compromise below and returning it to counsel for the offering party."

Neither the offer itself nor any other communication from counsel for the Rasnicks purported to apportion the $130,000 offer amount between them. Nor did any communication from the Rasnicks' counsel ever disclose any of the terms that they planned to put into the "written settlement agreement" required as a condition to accepting their offer.

The offer lapsed, and the case proceeded to trial, which began on March 24, 2015. The jury returned a special verdict finding Jacy negligent and setting Sanford's damages at $143,795. The jury also found Sanford to be 20 percent at fault, reducing the net award to Sanford to $115,036. Adding Sanford's recoverable pre-offer costs, the total judgment would be some $122,000—less than the 998 offer.

Following entry of judgment, on May 8, Plaintiff Sanford, as prevailing party, filed a memorandum of costs (cost bill) seeking $7,881.25. On May 19, the Defendant Rasnicks filed their cost bill seeking $28,150.02. This included all of their post-offer costs and their expert witness fees as penalties under section 998, and also deposition costs for the expert deposition of Robert Cargill, taken on November 20, 2014, apparently under the theory that this was a recoverable post-offer cost because the court reporter delayed sending out the invoice for that deposition until after the 998 offer.

On or about May 21, the Rasnicks filed their motion to tax, objecting to essentially every item on Sanford's cost bill. On June 1, Sanford filed his motion

to tax. Sanford **objected to the validity of the 998 offer** and requested that the Rasnicks' cost bill be stricken in its entirety. Alternatively, Sanford objected to the Rasnicks' application to recover some of their pre-offer deposition costs, their private investigators' fees, and the fees they claimed they had paid to two withdrawn experts.

On June 11, both sides filed their oppositions to the motions to tax. Included within the Rasnicks' opposition were authenticated copies of the receipts and invoices supporting the claimed costs.

On June 23, the trial court issued its tentative rulings, both favorable to the Rasnicks. Sanford contested both tentative rulings, and argument was held on June 24. The argument was quite lengthy, in the course of which Sanford's counsel went to great lengths to attempt to demonstrate where, and why, the tentative rulings were wrong. On or about June 24, the trial court issued its order on the Rasnicks' motion to tax costs. It reads as follows:

"The Motion to Tax Costs was set for hearing on 06/24/2015 at 02:30 PM in Department 522 before the Honorable Dennis Hayashi. The Tentative Ruling was published and was not contested.

"IT IS HEREBY ORDERED THAT:

"The tentative ruling is affirmed as follows: The Motion of Defendants and Judgment Debtors to Tax the Memorandum of Costs of Plaintiff and Judgment Creditor Charles Stephen Sanford, pursuant to Rule of Court 3.1700, is GRANTED as follows:

"1. Defendants' Motion to Tax Plaintiff's **claimed filing fees for his motions in limine** (Item 1), in the sum of $120.00, is GRANTED. Defendants correctly note that Plaintiff did not submit any evidence supporting his claim that he incurred these fees. In addition, Plaintiff is not authorized to recover these fees because he did not obtain a judgment more favorable than the CCP § 998 Offer to Compromise served by Defendants on December 24, 2014. See CCP § 998(c)(1).

"2. Defendants' Motion to Tax Plaintiff's **claimed deposition costs** (Item 4) in the sum of $4,328.30 is GRANTED. Plaintiff must provide the Court and Defendants with documentation to support his claim that such fees were incurred.

"3. Defendants' Motion to Tax Plaintiff's **claimed costs of making models, exhibits and blowups** (Item 11), in the sum of $127.66, is GRANTED. Plaintiff must provide the Court and Defendants with documentation to support his claim that such fees were incurred. In addition, Plaintiff is not authorized to recover these fees because he did not obtain a judgment more favorable than the CCP § 998 Offer to Compromise served by Defendants on December 24, 2014. See CCP § 998(c)(1).

"4. Defendants' Motion to Tax Plaintiff's **claimed costs incurred in participating in mediation and for delivering papers in connection with motions** (Item 13), in the sum of $1,646.53, is GRANTED. The costs and expenses described in Item 13 of the memorandum of costs are not allowed. See CCP § 1033.5(a)."

Sanford timely appealed from both orders. Citing numerous cases, the Justices set forth the general principles in *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 773–774 :

" '**Section 1033.5, enacted in 1986, codified existing case law and set forth the items of costs which may or may not be recoverable in a civil action.' An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if 'reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.'** (§ 1033.5, subd. (c)(2).)

"If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, **if the items on the cost bill are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs**. Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is

reviewed for abuse of discretion. However, because the right to costs is governed strictly by statute, a court has no discretion to award costs not statutorily authorized."

The Defendant Rasnicks' 998 offer is set forth in full above. **Plaintiff Sanford contends it does not meet the requirements of section 998 for two separate, and independent, reasons: (1) it does not apportion the offer between defendants; and (2) it improperly contains a request for a "Settlement Agreement."** The First DCA addressed the second point, so it did not address the first.

The effect of a valid 998 offer that is not accepted is to establish a fee shifting procedure, shifting some post-offer costs upon a party's refusal to settle. The relevant portion of Code of Civil Procedure section 998 provides as follows: "**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 or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover *postoffer* 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." (Code Civ. Proc., § 998, subd. (c)(1).)

If the party who prevailed at trial obtained a judgment less favorable than a pretrial settlement offer submitted by the other party, then the prevailing party may not recover its own post-offer costs and, more, must pay its opponent's post-offer costs, including potentially expert witness costs. (§ 998, subd. (c)(1).)

The rules governing 998 offers have been distilled in *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 799–800: "In interpreting section 998, this court has placed squarely on the offering party the burden of demonstrating that the offer is a valid one under section 998. The corollary to this rule is that a section 998 offer must be strictly construed in favor of the party sought to be subjected to its operation. Further, **while the statute contemplates that an offer made**

pursuant to its terms may properly include nonmonetary terms and conditions, the offer itself must, nonetheless, be *unconditional*. Thus, for example, an offer to two or more parties, which is contingent upon all parties' acceptance, is not a valid offer under the statute. Finally, our Supreme Court has held that the legislative purpose of section 998 is generally better served by 'bright line rules' that can be applied to these statutory settlement offers—at least with respect to the application of contractual principles in determining the validity and enforceability of a settlement agreement.

Here, as quoted, **the 998 offer required that Sanford agree to enter into a "settlement agreement and general release.**" Sanford claimed that such condition invalidated the offer. The trial court disagreed, citing one case: *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259. The Rasnicks rely on *Linthicum v. Butterfield* and also on *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, both of which are cited in the Rasnicks' argument that "Case Law Specifically Allows for Settlement Agreements/Releases as a Term in a Section 998 Offer to Compromise." The case law does allow for releases. (See *Linthicum v. Butterfield,* at p. 270; *Goodstein v. Bank of San Pedro,* at p. 905)

But a release is not a settlement agreement, and the Rasnicks have cited no case, and the Justices have found none, holding that a valid 998 offer can include a settlement agreement, let alone one undescribed and unexplained.

The Rasnicks apparently attempt to explain their offer as being standard in the automobile insurance defense context. In their words: "As commonly set forth in automobile, insurance defense cases, the Rasnicks' section 998 offer in this case, if accepted, required Sanford to sign a document entitled 'Settlement Agreement and Release' and execute a Dismissal of the entire action with prejudice." Or, as the Rasnicks put it at another point, their 998 offer "is a standard, insurance defense offer that requires that Sanford execute a document entitled 'settlement agreement and release' along with a Dismissal . . . ."

As most experienced trial lawyers and judges appreciate, the terms of a settlement agreement can be the subject of much negotiation. And the terms can be problematical. For example, settlement agreements typically contain a **waiver of all claims "known and unknown**," a provision that has been held to

invalidate a section 998 offer. (See *McKenzie v. Ford Motor Company* (2015) 238 Cal.App.4th 695, 70.)

The terms of a settlement agreement can, and frequently do, implicate the **protection of lienholders**, which could be involved here, where there was a medical lien. Indeed, this subject is so important that **attorneys risk personal liability if they "settle around" known liens.** (*Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302, 305) And the State Bar may impose discipline upon an attorney who purposely disregards a valid lien. (*Kennedy v. State Bar* (1989) 48 Cal.3d 610, 617–618)

Finally, and as every lawyer who has settled a case will appreciate, the issue as to Civil Code section 1542 in a release can be the subject of much discussion.

Here, **the required "settlement agreement" was not described or revealed, Sanford having no understanding what he would have to agree to. In the words of Sanford's brief, he was "left to guess at what terms the Rasnicks might insist upon, and he had to accept or reject the offer *without knowing what those terms were.*** This omission made it essentially certain that, had Sanford accepted their offer, the parties would have wound up in a disagreement over what terms could be included in the settlement agreement."

Sanford sums up with this: "The consequences of what the Rasnicks are asking the Court to do here should not be overlooked. Were the State's appellate courts to start allowing section 998 offers to condition acceptance upon the offeree's agreement, sight-unseen, to enter into a settlement agreement, havoc would ensue. Disputes would erupt and become routine over what offerors can and cannot place into these jack-in-the-box settlement agreements hidden in their 998 offers. And what's worse, *the trial courts would be powerless to adjudicate them.* Such a ruling would generate scores of appeals of trial court rulings on post-trial cost motions. The Court should decline the Rasnicks' invitation to open a Pandora's box of post-trial litigation and appeals by injecting needless uncertainty and inviting gamesmanship into what is a relatively settled area of the law. The Court should rule that the Rasnicks' placement of a 'settlement

agreement' requirement in their section 998 offer invalidated the offer." The Justices agreed.

Sanford's opening brief argued that the trial court erred in taxing his costs in several particulars. Following briefing, the parties resolved some of the issues, so Sanford's reply brief **addresses the only two issues that remain: the rulings taxing some attorney service charges and his share of the fee in a court-ordered mediation.**

To recap, the trial court ruled as follows: "Defendants' Motion to Tax Plaintiff's claimed costs incurred in participating in mediation and for delivering papers in connection with motions (Item 13), in the sum of $1,646.53, is GRANTED. The costs and expenses described in Item 13 of the memorandum of costs are not allowed. See CCP § 1033.5(a)." Sanford contends this was error.

Under section 1033.5, "An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if 'reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.' " (*Ladas,* at p. 774.)

Neither subdivision (a) nor (b) states whether attorney service charges for court filings and deliveries or mediators' fees are allowable or not. Thus, these costs fall within the "discretionary category," subdivision (c)—that is, they are allowable if in the court's discretion they were "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation."

As indicated from the order, and as apparently confirmed at the hearing below—where the court did not respond to Sanford's counsel's request to have the court explain how its discretion was exercised—the court did not exercise any discretion. This was error. As recently confirmed in *Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 97: a "failure to exercise discretion is 'itself an abuse of discretion.' (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515.

Moreover, the trial court's statement that these two items of costs "are not allowed" is wrong, as many cases have held, including in *Ladas, supra,* 19 Cal.App.4th at p. 776, where the First District upheld a trial court's allowance of attorney service messenger and delivery charges, and in *Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1207–1209, where the same Appellate Court upheld a trial court's exercise of discretion to award mediation expenses as costs under subdivision (c).

Here, the trial court never exercised any discretion on either of those two cost items because it erroneously believed it had no discretion to award these costs. And it reached that conclusion because it could not find either item listed among the costs allowable under subdivision (a) of section 1033.5. That ruling was error.

The Rasnicks' response is that the "trial court properly exercised its discretion in denying" the costs. We read the record differently, that the trial court not only did not exercise its discretion, but that it ruled that these costs could not be recovered. This is simply wrong.

The orders are reversed, and the matter remanded to the trial court (1) to enter a new order granting Plaintiff/Appellant Sanford's motion to tax the Defendant/Respondent Rasnicks' costs; and (2) to conduct a new hearing on the issue of the recoverability of the attorney service costs and the mediator's fee in accordance with the law. Sanford shall recover his costs on appeal.