LIU, J.

3

S200944

Supreme Court Case No. ________
2nd Civil No. B226665

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RAYMOND MARTINEZ AND GLORIA MARTINEZ,
Plaintiffs and Respondents,

vs.

BROWNCO CONSTRUCTION COMPANY, INC.,
Defendant, Appellant and Petitioner.

After a decision of the Court of Appeal for the State of California
Second Appellate District, Division One
Case Number B226665
On Appeal from the Superior Court of the County of Los Angeles
The Honorable Elihu Berle, Case No. KC050128

PETITION FOR REVIEW

LINDAHL BECK LLP
George M. Lindahl (SBN 061905)
Laura H. Huntley (SBN 166119)
660 S. Figueroa Street, Suite 1500
Los Angeles, CA 90017-3457
Tel. (213) 488-3900
Fax. (213) 486-9883
Electronic Mail: lhuntley@lindahlbeck.com
Attorneys for Defendant, Respondent and Petitioner
BROWNCO CONSTRUCTION COMPANY, INC.

Supreme Court Case No. ________
2nd Civil No. B226665

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RAYMOND MARTINEZ AND GLORIA MARTINEZ,
Plaintiffs and Respondents,

vs.

BROWNCO CONSTRUCTION COMPANY, INC.,
Defendant, Appellant and Petitioner.

After a decision of the Court of Appeal for the State of California
Second Appellate District, Division One
Case Number B226665
On Appeal from the Superior Court of the County of Los Angeles
The Honorable Elihu Berle, Case No. KC050128

PETITION FOR REVIEW

LINDAHL BECK LLP
George M. Lindahl (SBN 061905)
Laura H. Huntley (SBN 166119)
660 S. Figueroa Street, Suite 1500
Los Angeles, CA 90017-3457
Tel. (213) 488-3900
Fax. (213) 486-9883
Electronic Mail: lhuntley@lindahlbeck.com
Attorneys for Defendant, Respondent and Petitioner
BROWNCO CONSTRUCTION COMPANY, INC.

TABLE OF CONTENTS

Page(s)

I. ISSUE PRESENTED FOR REVIEW 1

II. WHY REVIEW SHOULD BE GRANTED 1

III. FACTUAL AND PROCEDURAL BACKGROUND 7

IV. LEGAL DISCUSSION 11

A. Interpretation of the Language of Section 998 12

B. Encouragement of Settlement 21

C. Preference for "Bright Line" Rules 26

IV. CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

State Cases

Barella v. Exchange Bank, 84 Cal.App.4th 793 (2000) 5
Bennett v. Brown, 212 Cal.App.2d 685 (1963)... 14
Distefano v. Hall, 263 Cal.App.2d 380 (1968)................................. passim
Elite Show Services, Inc. v. Staffpro, Inc., 119 Cal.App.4th 263 (2004)...... 4
Hutchins v. Waters, 51 Cal.App.3d 69 (1975).. 4
Long v. Chronicle Publishing Co., 68 Cal.App. 171 (1924) 15
Menees v. Andrews, 122 Cal.App.4th 1540 (2004) 12, 29
One Star, Inc. v. Staar Surgical Company, 179 Cal.App.4th 1082 (2009)
.... passim
Palmer v. Schindler Elevator Operation, 108 Cal.App.4th 154 (2003)
.... passim
Poster v. Southern Cal. Rapid Transit Dist. (1990) 52 Cal.3d 266 .. 5, 26, 27
Ray v. Goodman, 142 Cal.App.4th at 83 (2006).. 24
T. M. Cobb Co. v. Superior Court, 36 Cal.3d 273 (1984) .... passim
Weber v. Pinvan, 9 Cal.2d 226 (1937).. 4
Westamerica Bank v. MBG Industries, Inc., 158 Cal.App.4th 109 (2007)
.... 5, 12, 29
Wilson v. Wal-Mart Stores, Inc., 72 Cal.App.4th 382 (1999) .... passim

Out of State Cases

Abrams–Rodkey v. Summit County Children Servs. (Ohio App. 9 Dist.2005) 163 Ohio App.3d 1, 9, 836 N.E.2d 1 .... 19, 20
Norca Corp. v. Tokheim Corp. (1996) 227 A.D.2d 458, 458–459, 643 N.Y.S.2d 139 19

TABLE OF AUTHORITIES
(continued)

Page(s)

State Statutes

Code of Civil Procedure §997 .... 14, 31
Code of Civil Procedure §998 .... passim
Code of Civil Procedure §998(b)(2) 20
Code of Civil Procedure §998(c) .... passim
Code of Civil Procedure §1033.5(c) 9
Civil Code Section 3291 .... 31, 32
Cal. Rules of Court, Rule 8.500(b)(1) 7

Other Authorities

§ 43; 1 Corbin on Contracts (rev. ed. 1993) § 2.20, pp. 226–227 .... 19, 20

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of California:

Brownco Construction Company, Inc., respondent and defendant below on the issues presented by this Petition, respectfully petitions this Court to review the certified for publication decision of the Second Appellate District, Division 1 in *Raymond and Gloria Martinez v. Brownco Construction Company, Inc.*, filed on February 10, 2012, a copy of which is attached as Exhibit "1."

I. ISSUE PRESENTED FOR REVIEW

When a party elects to serve a series of offers to compromise under Code of Civil Procedure Section 998, does each successive offer extinguish the preceding offer such that offer made last in time is the operative offer for purposes of the cost-shifting provisions of Section 998(c)?

II. WHY REVIEW SHOULD BE GRANTED

The Second Appellate District, Division 1, held in its certified for publication opinion in *Raymond and Gloria Martinez v. Brownco Construction Company, Inc.* (hereinafter *Martinez*) that where a plaintiff serves a series of offers to compromise under Code of Civil Procedure Section 998, each new offer does not extinguish the preceding offer and, consequently, the offer made last in time is not necessarily the operative offer for purposes of the cost-shifting provisions of Section 998(c). Based

upon the rationale employed by the Second Appellate District, Division 1, a plaintiff may delve back in time to any Section 998 offer made during the pendency of the lawsuit that was met or exceeded in its efforts to shift expert fees and costs to a defendant under Section 998(c).

The recent decision in *Martinez* is in direct conflict with each of the previous appellate decisions to address this issue. *See*, *Wilson v. Wal-Mart Stores, Inc.*, 72 Cal.App.4th 382, 392 (1999); *Palmer v. Schindler Elevator Operation*, 108 Cal.App.4th 154, 157 (2003); *Distefano v. Hall,* 263 Cal.App.2d 380, 385 (1968); *One Star, Inc. v. Staar Surgical Company*, 179 Cal.App.4th 1082, 1089 (2009). Each of these previous published decisions embraced the long-standing legal principal that where successive Section 998 offers are made, the earlier offers are extinguished by service of a subsequent offer. *See*, *Wilson*, 72 Cal.App.4th at 392 ; *Distefano,* 263 Cal.App.2d at 385; *Palmer*, 108 Cal.App.4th at 157; *One Star*, 179 Cal.App.4th at 1089. Each of these decisions relied, in whole or part, on the decision in *T. M. Cobb Co. v. Superior Court*, 36 Cal.3d 273, 279 (1984), wherein this Court held because "... section 998 involves the process of settlement and compromise and [,] since this process is a contractual one, it is appropriate for contract law principles to govern the offer and acceptance process under Section 998."

In reaching its holding in *Martinez*, the Second Appellate District, Division 1, did not conclude that the facts before it were

distinguishable from the earlier appellate decisions which addressed the issue of the effect of successive offers to compromise under Section 998. Rather, after acknowledging that the holdings in *Wilson*[1] and *Distefano*[2] supported the trial court's ruling that Gloria Martinez's second Section 998 offer extinguished her earlier offer for purposes of the cost-shifting provisions of Section 998(c), the Second Appellate District, Division 1, declined to follow these long-standing decisions stating that the reasoning in these cases was "unpersuasive." In so holding, the Second Appellate District, Division 1, has created an irreconcilable split of authority on this issue among the First, Second and Third Appellate Districts. In addition, although not discussed in the opinion, *Martinez* is in direct conflict two recent published decisions issued by different divisions of the Second Appellate District in *Palmer*[3] and *One Star*[4].

Offers to Compromise under Code of Civil Procedure Section 998 are a strategic device routinely utilized by litigants. Consequently, the published decision *Martinez* will have a pervasive and far reaching negative impact on courts and litigants throughout the State of California. Section

---

[1] 72 Cal.App.4th at 392.

[2] 263 Cal.App.2d at 385.

[3] 108 Cal.App.4th at 157.

[4] 179 Cal.App.4th at 1089.

998 exposes a party to potential liability for enhanced costs in an action which was previously nonexistent. Consequently, it is universally accepted that Section 998 "must be strictly construed in favor of the persons sought to be subjected to their operation." *Hutchins v. Waters,* 51 Cal.App.3d 69, 72-73 (1975) citing *Weber v. Pinvan*, 9 Cal.2d 226, 229 (1937). While Section 998 was enacted for the laudable purpose of encouraging pre-trial settlements, the legislature's chosen method for accomplishing this goal is by punishing a non-settling party with what often can be a dramatically increased cost award. *Elite Show Services, Inc. v. Staffpro, Inc.*, 119 Cal.App.4th 263, 268 (2004). As a consequence, to date this Court and the courts of appeal have consistently held that the legislative purpose of section 998 is generally best served by "bright line rules."[5] As succinctly stated by the Second Appellate District in *Palmer*, supra:

---

[5] *See Wilson, supra*, 72 Cal.App.4th at 391 ("the purpose of section 998 is generally better served by a bright line rule in which the parties know that any judgment will be measured against a single valid statutory offer-i.e., the statutory offer most recently rejected-regardless of offers made earlier in the litigation"); *Poster v. Southern Cal. Rapid Transit Dist.,* 52 Cal.3d 266, 272 (1990) ("purpose of § 998 is best served by "bright line rule ... under which a section 998 offer is not revoked by a counteroffer and may be accepted by the offeree during the statutory period unless the offer has been

Instead of the rule urged by Palmer, we adopt the bright-line rule urged by defendants and utilized by the trial court: A later offer under section 998 extinguishes any earlier offers, regardless of the validity of the offers. This rule best serves the statutory purpose of encouraging settlement of lawsuits prior to trial (*T.M. Cobb Co. v. Superior Court, supra*, 36 Cal.3d at p. 280) by providing offerees with clear direction as to what offers must be accepted on pain of enhanced fees and prejudgment interest. (*See Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 272 [276 Cal.Rptr. 321, 801 P.2d 1072] [purpose of § 998 is best served by "bright line rule ... under which a section 998 offer is not revoked by a counteroffer and may be accepted by the offeree during the statutory period unless the offer has been revoked"].)

---

revoked"); *Westamerica Bank v. MBG Industries, Inc.*, 158 Cal.App.4th 109, 129 (2007); *Barella v. Exchange Bank*, 84 Cal.App.4th 793, 799 (2000).

108 Cal.App.4th at 158-159 [emphasis added]. The holdings in *Wilson, Distefano, Palmer* and *One Star* have long provided litigants with just such a "bright line rule" – a subsequent offer under section 998 extinguishes any earlier offers.

By refusing to follow the decisions in *Wilson, Distefano, Palmer* and *One Star*, the Second Appellate District, Division 1, has created confusion and uncertainty for attorneys, litigants and courts. As discussed above, the prior published decisions of the First, Second and Third Appellate Districts follow what is often referred to as the "*Wilson* rule" which provides that where successive Section 998 offers are made, the earlier offers are extinguished by service of a subsequent offer. Accordingly, for more than 40 years litigants and their attorneys were safe in the knowledge that a single, straightforward "bright line" rule would be applied to successive Section 998 offers – the last offer in time was the operative offer for purposes of the cost-shifting provisions of Section 998(c). This well-settled rule has long informed both offerors and offerees of the consequences of making and responding to Offers to Compromise under Section 998. With the published decision in *Martinez*, all certainty is lost. Courts faced with a request for enhanced costs where successive Section 998 offers are made will have to choose between two divergent, irreconcilable holdings as to the effect of the successive offers. Consequently, attorneys and litigants will have to "guess" which line of

authority a particular trial judge with employ when evaluating a subsequent offer to compromise under Section 998.

In sum, the Second Appellate District, Division 1, has created an unacceptable, irreconcilable split of authority on this issue which will undoubtedly cause uncertainty and confusion for attorneys, litigants and courts throughout the state. As a consequence, review of the *Martinez* decision is necessary to "secure uniformity of decision" and to "settle an important question of law." (Cal. Rules of Court, Rule 8.500(b)(1).)

III. FACTUAL AND PROCEDURAL BACKGROUND

Raymond Martinez was injured when an electrical panel he and a co-worker were dismantling at the Saint-Gobain Calmar factory in Industry, California exploded on June 2, 2005. [JA 002.] On March 1, 2007, Raymond Martinez filed the present action against Brownco for personal injuries he sustained in the June 2, 2005 incident contending that metal dust from Brownco's demolition work caused the electrical panel to explode. [JA 001.] His wife, Gloria Martinez, also claimed loss of consortium. [JA 007-008.] Brownco disputed the Martinez's claims and asserted that the explosion was caused when Raymond Martinez and his co-worker left an un-taped copper wire hanging loose in an electrified panel while they were working on it. [JA 010-015, 581, 592.] Brownco answered the Complaint on May 18, 2007. [JA 010-015.]

On August 30, 2007, a mere three months after Brownco answered the Complaint, Raymond Martinez served Brownco with a Section 998 offer to compromise in the amount of $4,750,000. [JA 114-116.] Gloria Martinez concurrently served a Section 998 offer to compromise her loss of consortium claim for $250,000. [JA 110-112.] These combined offers constituted a collective demand for Brownco's $5,000,000 insurance policy limits. At that juncture, all that was known about the accident was that Raymond Martinez had initially suffered a significant burn injury at a location where Brownco had been performing demolition activities. [JA 001-009, 110-112, 114-116, 592.] In fact, as of the time the Section 998 offers were served Brownco's experts had not yet even had an opportunity to examine the electrical panel that was involved in the accident. [JA 592.]

Two and a half years later, on the eve of trial, Raymond Martinez served Brownco with a reduced Section 998 offer to compromise in the amount of $1,500,000. [JA 102-104.] Gloria Martinez concurrently served a Section 998 offer to compromise her loss of consortium claim for $100,000. [JA 106-108.] These offers, in the collective amount of $1,600,000, represented a 68% reduction of the Martinezes' prior Section 998 offers to compromise. [JA 102-108, 110-116.]

On March 29, 2010, the jury rendered a compromise verdict finding Raymond Martinez 10% at fault, his employer Saint-Gobain

Calmar 40% at fault and Brownco 50% at fault for the June 5, 2005 accident. [JA 042-045.] The trial court entered judgment on the special verdict on June 15, 2010. [JA 046-050.] The net judgment in favor of Raymond Martinez was $1,646,674. [JA 49.] The net judgment in favor of Gloria Martinez was $250,000. [JA 49.]

Following entry of the judgment, Raymond and Gloria Martinez jointly filed a Memorandum of Costs seeking to recover $561,257.14 in litigation costs and expert fees. [JA 051.] On July 13, 2010, Brownco filed a Motion to Tax Costs. [JA 075-324.] Brownco moved to tax the expert fees plaintiffs paid to Brownco's experts as each of these experts was deposed prior to Raymond Martinez's February 8, 2010 C.C.P §998 Demand. [JA 076-077, 083-087.] Brownco moved to tax the fees paid to 14 expert witnesses Raymond Martinez utilized during the pendency of the action to the extent that these fees (1) were incurred prior to prior to Raymond Martinez's February 8, 2010 C.C.P §998 Demand and (2) were not reasonably necessary to the conduct of the litigation nor reasonable in amount pursuant to C.C.P. §1033.5(c) as certain of the experts were not utilized at trial (Eskridge, Barden, Grossman and Simons). [JA 077, 088-091.]

On August 10, 2010, Brownco's Motion to Tax came on for hearing before the Honorable Elihu Berle. [JA 620-621; Reporter's Transcript ("RT") 1-44.] Judge Berle taxed the expert fees claimed in the

amount of $188,536.86, allowing only the $64,577.45 incurred after Raymond Martinez's February 8, 2010 Section 998 Demand. [JA 620.] Judge Berle also taxed the expert fees claimed for taking the depositions of Brownco's experts in the amount of $10,609.90. [JA 620.] Relying on the decision in *Wilson v. Wal-Mart Stores, Inc.*, 72 Cal.App.4th 382 (1999), the trial court held that Gloria Martinez could not recover expert fees incurred between August 30, 2007 and February 8, 2010 because her second offer to compromise extinguished her prior offer for purposes of the cost-shifting provisions of Section 998(c). [RT 37-39.] The court issued its Minute Order on the Motion to Tax Costs on August 10, 2010. [JA 620-621.] The August 10, 2010 Minute Order contained some minor errors which were corrected by Nunc Pro Tunc Order dated October 5, 2010. [JA 628-629.] On that same date, October 5, 2010, the Court executed the Order for Judgment on Costs. [JA 630-632.]

On September 14, 2010 Brownco filed its Notice of Appeal of the Order on its Motion to Tax Costs (on issues not raised by this Petition). [JA 622-624.] On September 29, 2010, Raymond and Gloria Martinez filed their Notice of Cross-Appeal. [JA 632-634.]

On February 10, 2012, the Second Appellate District, Division 1, issued a published decision reversing the trial court's order taxing the expert fees incurred prior to February 8, 2010. (Exhibit "1.")

IV. LEGAL DISCUSSION

Review should be granted because the published decision in *Martinez* has created a conflict among the courts of appeal concerning the effect of successive Offers to Compromise under Code of Civil Procedure Section 998. Prior to the publication of the *Martinez* opinion, litigants and their attorneys were safe in the knowledge that a single, straightforward "bright line" rule would be applied to successive Section 998 offers – the last offer in time was the operative offer for purposes of the cost-shifting provisions of Section 998(c). This well-settled rule has long informed both offerors and offerees of the consequences of making and responding to Offers to Compromise under Section 998. With the published decision in *Martinez*, all certainty is lost.

For more than 40 years, courts of appeal have consistently held that where successive Section 998 offers are made, the earlier offers are extinguished by service of a subsequent offer. *See*, *Wilson, supra,* 72 Cal.App.4th at 392; *Distefano, supra,* 263 Cal.App.2d at 385; *Palmer*, *supra,* 108 Cal.App.4th at 157; *One Star*, *supra,* 179 Cal.App.4th at 1089. This "bright line" rule is consistent with the judicial policies underlying Section 998, is consistent with principals of contract law and is consistent with principals of statutory construction and, therefore, was properly applied by the trial court to Gloria Martinez's multiple offers to compromise under Section 998. By refusing to follow the well-reasoned

and legally sound decisions in *Wilson, Distefano, Palmer* and *One Star,* the Second Appellate District, Division 1, has not only created confusion and uncertainty, but it has also endorsed a rule which is fraught with pitfalls and invites the very gamesmanship courts have uniformly rejected. *See, Wilson, supra,* 72 Cal.App.4th at 391; *Westamerica Bank v. MBG Industries, Inc.,* 158 Cal.App.4th at 129; *Menees v. Andrews,* 122 Cal.App.4th 1540, 1544 (2004).

The decisions of the First, Second and Third Appellate Districts which hold that where successive Section 998 offers are made, the earlier offers are extinguished by service of a subsequent offer, are based upon several consideration's: (1) general principles of contract law, (2) encouragement of settlement, and (3) a preference for "bright line" rules.

A. Interpretation of the Language of Section 998

While the plain language of Section 998 is silent as to the effect of a subsequent offer to compromise, this Court has held that because "... section 998 involves the process of settlement and compromise and [,] since this process is a contractual one, it is appropriate for contract law principles to govern the offer and acceptance process under section 998." *T. M. Cobb, supra*, 36 Cal.3d at 279. In *T. M. Cobb Co.,* this Court specifically described the question of whether a subsequent statutory offer extinguishes a prior offer as one that "can only be answered by turning to general principles of contract law," citing with approval the decision in

Distefano v. Hall, supra, 36 Cal.3d 380. In each succeeding published decision to address the effect of a subsequent offer to compromise under Section 998 on a prior offer for purposes of cost-shifting, California appellate courts have uniformly turned to principals of contract law for guidance.[6]

In *Distefano*, the Court of Appeal was confronted with a factual scenario wherein defendants made a series of Offers to Compromise[7]. 36 Cal.3d 380. In *Distefano*, the defendants made their first statutory offer to compromise (in the amount of $20,000) before the first trial conducted in the case. This offer was not accepted. Four years later, they made a second statutory offer to compromise (in the amount of $10,000) prior to the retrial. 263 Cal.App.2d at 384-385. The judgment in plaintiff's favor on retrial was greater than defendants' second offer, but less than the defendants' first offer. *Id.* at p. 383. On appeal, the defendants sought to invoke the predecessor statute to section 998, arguing that "... when plaintiff refused to accept their first offer, they acquired a vested right to avoid paying plaintiff's costs in the event his verdict was less than" the

---

[6] *See, Wilson, supra*, 72 Cal.App.4th at 392; *Palmer, supra*, 108 Cal.App.4th at 157; *One Star, supra*, 179 Cal.App.4th at 1089.

[7] Section 998, enacted in 1971, replaced section 997 which was the operative statute in *Distefano*.

amount of the first offer. *Id.* at p. 384. The Court of Appeal disagreed stating:

> We agree that the Legislature enacted section 997 of the Code of Civil Procedure for the purpose of encouraging the settlement of litigation without trial (*Bennett v. Brown*, 212 Cal.App.2d 685, 688 [28 Cal.Rptr. 485]). But we cannot attribute to the Legislature an intention to give less than full effect to the parties' reappraisals of the merits of their respective positions where a case has been tried, appealed and reversed for retrial. Under such circumstances, an offer of compromise made before the second trial pursuant to section 997 should clearly supersede that made before the first trial. To deny the parties this flexibility would actually discourage settlements and defeat the very purpose of the act. Furthermore, the theory of section 997 is that the process of settlement and compromise is a contractual one, and the applicable principles are those relating to contracts in general (11 Cal.Jur.2d, § 2, p. 3). The trial court's reasoning here is in accord with the general rules on offers-any new offer communicated prior to a

> valid acceptance of a previous offer, extinguishes and replaces the prior one (*Long v. Chronicle Publishing Co.*, 68 Cal.App. 171 [228 P. 873]).

Id. at 385.

In *Wilson, supra,* the court of appeal applied the reasoning in *T. M. Cobb Co.* and *Distefano,* to factual circumstances near identical to the facts presented in *Martinez* and reaffirmed that where successive Section 998 offers are made, the earlier offers are extinguished by service of the subsequent offer. 72 Cal.App.4th 382. In *Wilson,* a personal injury plaintiff served an initial Section 998 offer to compromise in the amount of $150,000. *Id.* at 387. This offer was not accepted and was "withdrawn" by operation of law pursuant to Section 998 (b)(2). Approximately 16 months later, the plaintiff served a second Section 998 offer to compromise in the amount of $249,000. *Id.* At trial, the jury rendered a verdict in favor of plaintiff in the amount of $175,000. *Id.* Following the verdict, the plaintiff in *Wilson* sought to recover her expert fees arguing that her "'first Section 998 offer is controlling for all purposes." *Id.* at 388. The Court of Appeal disagreed. To those ends, the court in *Wilson* discussed the holding in *Distefano* that a second offer to compromise should supersede the earlier offer stating:

> We find the reasoning of *Distefano* persuasive and applicable to the instant action. *Distefano* recognizes

> that which Wilson overlooks; there is an evolutionary aspect to lawsuits and the law, in fairness, must allow the parties the opportunity to review their respective positions as the lawsuit matures. The litigants should be given a chance to learn the facts that underlie the dispute and consider how the law applies before they are asked to make a decision that, if made incorrectly, could add significantly to their costs of trial.

Id. at 390.

The record below is clear that Martinezes engaged in precisely the type of reappraisal contemplated by the court in *Distefano* and acknowledged in *Wilson*. In *Martinez*, Gloria Martinez served her initial Section 998 offer to compromise a mere three months after Brownco answered the Complaint. [JA 010-015, 110-112.] This offer was served concurrently with her husband's Section 998 offer to compromise in the amount of $4,750,000. [JA 114-116.] While Gloria and Raymond Martinez served separate offers as is required to be effective under Section 998, their concurrent offers were collectively a demand to settle the entire action for $5,000,000 – Brownco's insurance policy limits. [JA 110-112, 114-116.] At that juncture, all that was known about the accident was that Raymond Martinez had initially suffered a significant burn injury at a location where Brownco had been performing demolition activities. [JA

001-009, 110-112, 114-116, 592.] In fact, as of the time the Section 998 offers were served Brownco's experts had not yet even had an opportunity to examine the electrical panel that was involved in the accident. [JA 592.]

Over the ensuing 2 ½ years, the landscape of the case altered significantly. Raymond Martinez had a very favorable recovery and significant issues related to causation and Brownco's potential culpability became apparent. [RA 11:9-14, 23:4-10; JA 381-382.] As a consequence, it was extremely unlikely that the Martinezes would recover equal to or in excess of their early Section 998 offers in the collective amount of $5,000,000. For that reason, Raymond Martinez reduced his Section 998 offer to compromise to $1,500,000 on the eve of trial. [JA 102-104, RA 11:9-14.] Gloria Martinez simultaneously reduced her offer to compromise her loss of consortium claim to $100,000. [JA 106-108.] These reduced Section 998 offers to compromise represent a common tactical decision made by both plaintiffs and defendants to reevaluate their prospects at trial after discovery is complete and experts deposed, and to issue a Section 998 offer to compromise that reflects that reassessment. In short, the Martinezes recognized that they were extremely unlikely to recover equal to, or in excess of, their early Section 998 offers. As a consequence, they issued new offers that constituted an amount they believed they could meet or exceed at trial and which, if accepted, would be adequate to compensate them for their alleged injuries. There is simply no other strategic reason for

a plaintiff to make a subsequent, reduced Section 998 offer (or for a defendant to make an increased Section 998 offer). This process of reevaluation and reassessment is consistent with the purpose of Section 998 as it encourages parties to realistically evaluate the merits of their respective cases and make Section 998 offers that reflect careful consideration.

Thus, the trial court's conclusion that Gloria Martinez's February, 2010 Section 998 offer extinguished her earlier Section 998 offer is consistent with the principle expressed in *Wilson* that in fairness "litigants should be given a chance to learn the facts that underlie the dispute and consider how the law applies before they are asked to make a decision that, if made incorrectly, could add significantly to their costs of trial." *Id.*

In reversing the trial court, Second Appellate District, Division 1, disagreed with the holdings in *Distefano* and *Wilson* that a second offer to compromise should supersede the earlier offer and in incorrectly concluded that principals of contract law "compel the opposite result". In reaching this erroneous conclusion, the Second Appellate District, Division 1, acknowledged general principals of contract law stating:

> An offer is revoked by communication from the offeror of its intention not to enter into the proposed

> contract. (*Id.*, § 42.) The manifestation of such an intention may be express, as when the offeror explicitly revokes the offer, or implied, as when the offeree "takes definite action inconsistent with an intention to enter into the proposed contract." (*Id.*, § 43; 1 Corbin on Contracts (rev. ed. 1993) § 2.20, pp. 226–227.) The making of a second offer involving the same subject matter but with terms different from those of the first offer constitutes a definite action inconsistent with an intention to enter into the contract as originally proposed and terminates the offeree's power to accept the terms of the original offer. (1 Corbin on Contracts, supra, § 2.20, p. 229; *Abrams–Rodkey v. Summit County Children Servs.* (Ohio App. 9 Dist.2005) 163 Ohio App.3d 1, 9, 836 N.E.2d 1 ["a later-made offer will revoke a previous offer to the extent that the offers are inconsistent"]; Norca Corp. v. Tokheim Corp. (1996) 227 A.D.2d 458, 458–459, 643 N.Y.S.2d 139 [same].)

Martinez Opinion, p. 14 [emphasis added]. The Second Appellate District, Division 1, then incorrectly describes Gloria Martinez's first offer to

compromise as a "lapsed offer" stating "a lapsed offer has no enduring contractual effect." *Martinez* Opinion, p. 14.

In fact, Gloria Martinez's first offer to compromise was not a "lapsed offer" with "no enduring contractual effect." Pursuant to Code of Civil Procedure Section 998(b)(2), when Gloria Martinez's early offer to compromise was not accepted by Brownco within 30 days it was deemed withdrawn by operation of law. While this meant that Brownco no longer had a statutory right to accept the offer, the statutorily imposed benefits and burdens endured. It was these statutorily imposed benefits and burdens that were extinguished when Gloria Martinez served a second offer to compromise because the service of a second offer "constitutes a definite action inconsistent with an intention to enter into the contract as originally proposed." *Martinez* Opinion, p. 14 [emphasis added], *citing* 1 Corbin on Contracts, supra, § 2.20, p. 229; *Abrams–Rodkey v. Summit County Children Servs.* (Ohio App. 9 Dist.2005) 163 Ohio App.3d 1, 9, 836 N.E.2d 1 ("a later-made offer will revoke a previous offer to the extent that the offers are inconsistent"). Thus, the conclusion of the Second Appellate District, Division 1, in *Martinez* that principals of contract law "compel the opposite result" from the conclusions reached in *Wilson* and *Distefano*, is simply incorrect.

B. Encouragement of Settlement

It is universally accepted that the purpose of Section 998 is the encouragement of pretrial settlement. Often numerous factors impact a parties' decision to make or accept a settlement offer – whether made pursuant to Section 998 or otherwise. In *Wilson*, the plaintiff argued for the same result endorsed by the Second Appellate District, Division 1, in *Martinez.* In short, the plaintiff in *Wilson* argued that to reach any conclusion other than that the her prior, exceeded offer was the operative offer for purposes of the cost-shifting provisions of Section 998(c) would discourage settlement. *Wilson, supra*, 72 Cal.App.4th at 389-390. The Third Appellate District disagreed:

> Wilson's argument overlooks a second point. Although settlements achieved earlier rather than later are beneficial to the parties and thus to be encouraged, our public policy in favor of settlement primarily is intended to reduce the burden on the limited resources of the trial courts. The trial of a lawsuit that should have been resolved through compromise and settlement uses court resources that should be reserved for the resolution of otherwise irreconcilable disputes. While Wilson contends that the interpretation she

> urges would support the public policy in favor of settlement, in some cases it might not. The factual situation before us is a good example. A plaintiff might be encouraged to maintain a higher settlement demand on the eve of trial and refuse to settle a case that should otherwise be settled if the plaintiff finds comfort in the knowledge that, even if the plaintiff receives an award less than his or her last demand, the plaintiff might still enjoy the cost reimbursement benefits of section 998 so long as the award exceeded a lower demand made by the plaintiff sometime during the course of the litigation. The reverse might be true of the defendant. "Rolling the dice" then becomes somewhat less risky and we note that lawsuits are not often settled by reducing the risk of trial.

Id. at 390-391 [emphasis added].

Under the facts of *Martinez*, a holding that Gloria Martinez's first offer to compromise was not extinguished by her later offer would not have encouraged settlement and would not have reduced the burden on the trial court. In *Martinez*, Gloria Martinez's early August 30, 2007 Section 998 offer to compromise was coupled with her husband's Section 998 offer

to compromise in the amount of $4,750,000. [JA 110-112, 114-116.] Whether Brownco accepted her offer or not, the case would have still proceeded forward as Brownco did not accept her husband's offer of $4,750,000. [JA 097.] Brownco's decision to allow Raymond Martinez's offer of $4,750,000 to expire was obviously correct as he recovered only one-third of that amount at trial. [JA 114-116, 48-50.] Moreover, neither Brownco, nor any other similarly situated defendant, would have accepted an offer of $250,000 to settle a wife's loss of contortion claim leaving the husband's personal injury claim still pending knowing that whatever monies were paid would be used as a "war chest" to pursue his far more significant claims. In short, Gloria Martinez's August 30, 2007 Section 998 offer was a quintessential "no risk" offer for which there was little, or no, expectation that it would be accepted.

Moreover, even if Brownco had accepted Gloria Martinez' early offer, the main case would have still proceeded to trial, taken the same amount of time, required the same expert testimony, and constituted the same burden on the court system as Brownco did not accept Raymond Martinez's $4.75 million offer. As a consequence, under the circumstances of *Martinez*, the purpose of Section 998 – to foster the public policy in favor of settlement with the goal of reducing the burden on the limited resources of the trial courts - would not have been accomplished by virtue

of the acceptance of Gloria Martinez's early Section 998 offer to compromise.

In concluding that the reasoning in *Wilson* and *Distefano* regarding the encouragement of settlement was "unpersuasive in this case," the Second Appellate District, Division 1, provided absolutely no discussion of the facts or circumstances surrounding the offers made by Gloria Martinez, i.e., her earlier offer was part of a collective $5 million policy limits demand made three months after Brownco answered the Complaint and before discovery was conducted or that it was served in conjunction with her husband's $4.75 million offer which was three times the amount he received at trial. Instead, the court concluded, without any explanation or discussion, that to deprive her of cost-shifting benefits based upon her early offer of would dissuade plaintiffs from making a later offer and discourage settlement.

The Court of Appeal's, conclusion that to deprive Gloria Martinez of cost-shifting benefits based upon her early offer would dissuade plaintiffs from making successive declining offers is bellied by the very facts in *Martinez*[8]. The bright line rule in *Wilson* had been in place for

---

[8] It is also inconsistent with the facts of *Palmer, supra*, 108 Cal.App.4th 154; *One Star, supra*, 179 Cal.App.4th 1082; *Ray v. Goodman, 142 Cal.App.4th 83, 91 (2006).*

more than 10 years prior to Gloria Martinez issuing her second Section 998 offer. 72 Cal.App.4th 382. Moreover, the holding in *Wilson*, that a subsequent offer extinguishes any prior offer under Section 998, had been reaffirmed by three subsequent published decisions prior to Gloria Martinez issuing her second Section 998 offer. *See, Palmer, supra*, 108 Cal.App.4th at 157; *One Star, supra*, 179 Cal.App.4th at 1089; *Ray, supra*, 142 Cal.App.4th at 91. Thus, Gloria Martinez had to have been aware that, based upon the prevailing case law, by serving a second Section 998 offer her original offer would be extinguished. Despite the obvious consequences, she served a second, reduced offer on the eve of trial. Her reasons for doing so are clear from the record.

As discussed above, these reduced Section 998 offers to compromise represented a common tactical decision made by both plaintiffs and defendants to reevaluate their prospects at trial after discovery is complete and experts deposed, and to issue a Section 998 offer to compromise that reflects that reassessment. In short, the Martinezes recognized that they were extremely unlikely to recover equal to, or in excess of, their early Section 998 offers. As a consequence, they issued new offers that constituted an amount they believed they could meet or exceed at trial and which, if accepted, would be adequate to compensate them for their alleged injuries. There is simply no other strategic reason for

a plaintiff to make a subsequent, reduced Section 998 offer (or for a defendant to make an increased Section 998 offer).

In sum, the holding of the Court of Appeal that to deprive Gloria Martinez of the cost-shifting benefits based upon her early offer would dissuade plaintiff from making successive declining offers ignores the practical realities of litigation and the effect of a party's reevaluation of its prospects at trial on the issuing of subsequent Section 998 offers.

C. <u>Preference for "Bright Line" Rules</u>

While Section 998 was enacted for the laudable purpose of encouraging pre-trial settlements, the legislature's chosen method for accomplishing this goal is by <u>punishing</u> a non-settling party with what often can be a dramatically increased cost award. *Elite Show Services, supra,* 119 Cal.App.4th at 268. As a consequence, to date this Court and the courts of appeal have consistently held that the legislative purpose of section 998 is generally best served by "bright line rules."[9] The court in *Wilson* explained:

---

[9] *See Wilson, supra,* 72 Cal.App.4th at 391; *Poster v. Southern Cal. Rapid Transit Dist.,* 52 Cal.3d 266, 272 (1990) ("purpose of § 998 is best served by "bright line rule ... under which a section 998 offer is not revoked by a counteroffer and may be accepted by the offeree during the statutory period unless the offer has been revoked"); *Westamerica Bank v. MBG Industries,*

> In addition to the above considerations, the legislative purpose of section 998 is generally better served by a bright line rule in which the parties know that any judgment will be measured against a single valid statutory offer-i.e., the statutory offer most recently rejected-regardless of offers made earlier in the litigation. (*See Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 272 [276 Cal.Rptr. 321, 801 P.2d 1072] [favoring "bright line" rule in interpreting section 998].) Wilson's argument that the proper measure should be her first offer could logically be extended to a rule that a party is entitled to section 998 costs if it does better at trial than it would have under any offer made at anytime before judgment. While a rule such as that arguably might promote settlement in some cases, its potential for mischief, or at least confusion, is apparent.

Id. at 391 [emphasis added]. Consequently, the court in *Wilson* concluded that a "bright line rule" that where successive Section 998 offers are made,

---

Inc., 158 Cal.App.4th 109, 129 (2007); *Barella v. Exchange Bank*, 84 Cal.App.4th 793, 799 (2000).

the earlier offers are extinguished by service of the subsequent offer, was appropriate. *Id.* Notably, when it crafted the "bright line rule" the *Wilson* court assumed *arguendo* a factual scenario in which a party obtained a more favorable judgment than multiple prior offers, and found the "bright line rule" should nevertheless be applied. *Id.* at 91.

The conclusion reached by the Third Appellate District in *Wilson* has been endorsed by other Divisions of the Second Appellate District. See *Palmer*, *supra*, 108 Cal.App.4th at 158-159; *One Star*, *supra*, 179 Cal.App.4th at 1094-1095. The Second Appellate District, Division 7, in *Palmer*, *supra,* similarly reasoned:

> Instead of the rule urged by Palmer, we adopt the bright-line rule urged by defendants and utilized by the trial court: A later offer under section 998 extinguishes any earlier offers, regardless of the validity of the offers. This rule best serves the statutory purpose of encouraging settlement of lawsuits prior to trial (*T.M. Cobb Co. v. Superior Court, supra*, 36 Cal.3d at p. 280) by providing offerees with clear direction as to what offers must be accepted on pain of enhanced fees and prejudgment interest. (*See Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 272 [276 Cal.Rptr. 321,

> 801 P.2d 1072] [purpose of § 998 is best served by "bright line rule ... under which a section 998 offer is not revoked by a counteroffer and may be accepted by the offeree during the statutory period unless the offer has been revoked"].)

108 Cal.App.4th at 158-159 [emphasis added].

In short, the well-reasoned and widely accepted *Wilson* "bright line rule," when applied to the facts of *Martinez*, mandated the finding made by the trial court that Gloria Martinez's February, 2010 Section 998 offer extinguished her earlier offer for cost-shifting purposes under Section 998. [JA 106-108, 110-112.]

In declining to follow *Wilson*, the Second Appellate District, Division 1, states in *Martinez* that its holding that a plaintiff may go back in time to the earliest offer to compromise that was met or beaten to invoke the cost shifting provisions of Section 998(c) is similarly a "bright line" rule. The Court of Appeal also boldly contends that its "bright line" rule was "installed by the Legislature itself." *Martinez* Opinion, p. 16. While the rule proposed in *Martinez* may also be a "bright line" rule, it is fraught with the potential for abuse and parties taking unfair advantage by "gaming the system." *See, Wilson, supra,* 72 Cal.App.4th at 391; *Westamerica Bank v. MBG Industries, Inc., supra,* 158 Cal.App.4th at 129; *Menees v. Andrews, supra,* 122 Cal.App.4th at 1544. For example, what is to prevent

a plaintiff from serving monthly declining Section 998 offers over the course of litigation, with the hope that he/she will meet or exceed one of the ten or more offers served. Conversely, a defendant could serve a series of strategic successively increasing Section 998 in the hope that he/she might match or beat one of the offers made at trial. In fact, under the *Martinez* holding the very gamesmanship employed by the plaintiff in *Wilson* would be permissible. In discussing the potential for gamesmanship if subsequent offers do not extinguish the earlier offers, the Court of Appeal in *Wilson* noted:

> The factual situation before us is a good example. A plaintiff might be encouraged to maintain a higher settlement demand on the eve of trial and refuse to settle a case that should otherwise be settled if the plaintiff finds comfort in the knowledge that, even if the plaintiff receives an award less than his or her last demand, the plaintiff might still enjoy the cost reimbursement benefits of section 998 so long as the award exceeded a lower demand made by the plaintiff sometime during the course of the litigation. The reverse might be true of the defendant. "Rolling the dice" then becomes somewhat less risky and we note

that lawsuits are not often settled by reducing the risk

of trial.

72 Cal.App.4th at 391.

Moreover, there is no support in the statute or legislative history for the statement by Second Appellate District, Division 1, that its "bright line" rule was "installed by the Legislature itself." In fact, the legislative record suggests the opposite is true. As this Court previously recognized, the plain language of Section 998 is silent as to the effect of a subsequent offer to compromise on the prior offers. *T. M. Cobb, supra*, 36 Cal.3d at 279. However, at least one statute enacted after Section 998 arguably suggests that the Legislature is in agreement with the statutory interpretation first employed in *Distefano*, and later in *Wilson*, *Palmer* and *One Star*.

First, Code of Civil Procedure Section 998 was enacted in 1971 and replaced its similar predecessor, Code of Civil Procedure Section 997. This was three years after the decision in *Distefano* which held that a later offer to compromise should clearly supersede any prior offer. 263 Cal.App.3d at 385. Consequently, if the Legislature had any disagreement with, or concern about, the holding in *Distefano*, it could have been addressed when Section 998 was enacted. It was not.

Eleven years later, the Legislature enacted Civil Code Section 3291 which provides:

> If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from <u>the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure</u> which is exceeded by the judgment . . .

[Emphasis added.] That the Legislature specifically stated in Civil Code Section 3291 that interest would accrue from the first exceeded offer compels the conclusion that the same is not true for cost-shifting provisions of Section 998(c). As a consequence, there is no support for the statement in Martinez that its "bright line" rule was "installed by the Legislature."

IV. CONCLUSION

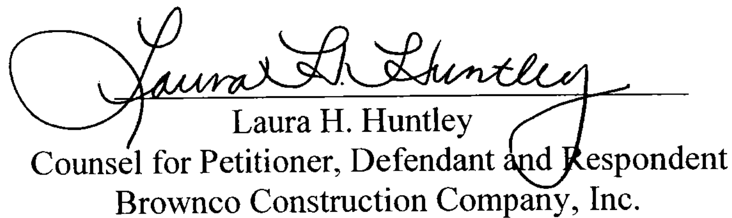
In sum, the bright line rule set forth in *Wilson* and its progeny is consistent with the judicial policies underlying Section 998, is consistent with principals of contract law and is consistent with principals of statutory construction and was, therefore, properly applied to Gloria Martinez's multiple offers to compromise under Section 998 by the trial court.

By refusing to follow the decisions in *Wilson, Distefano, Palmer* and *One Star*, the Second Appellate District, Division 1, has

incorrectly and unjustly exposed Brownco to the potential for significantly increased costs. In addition, by publishing its decision in *Martinez* the Court of Appeal has created a unacceptable, irreconcilable conflict among the authorities to address this issue and will undoubtedly create confusion and uncertainty for attorneys, litigants and courts throughout the State of California.

As a consequence, Brownco Construction Company, Inc. respectfully requests that this Court grant review of the Court of Appeal's decision below to "secure uniformity of decision" and to "settle an important question of law."

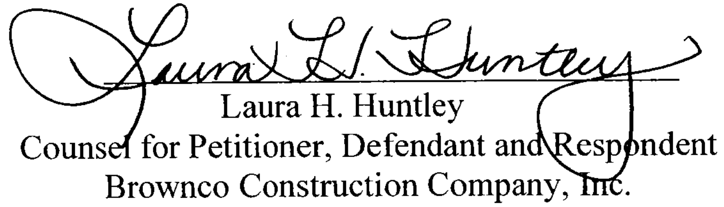
Respectfully submitted,



Laura H. Huntley
Counsel for Petitioner, Defendant and Respondent
Brownco Construction Company, Inc.

CERTIFICATE OF WORD COUNT

I certify that this brief contains 7,429 words, including footnotes. I have relied on the word count feature in the Microsoft Word program used to generate this brief.



Laura H. Huntley
Counsel for Petitioner, Defendant and Respondent
Brownco Construction Company, Inc.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RAYMOND MARTINEZ et al., Plaintiffs and Respondents, v. BROWNCO CONSTRUCTION COMPANY, INC., Defendant and Appellant.	B226665 (Los Angeles County Super. Ct. No. KC050128)

COURT OF APPEAL - SECOND DIST.
FILED
FEB 10 2012
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County. Elihu Berle, Judge. Affirmed in part and reversed in part.

Lindahl Beck, George M. Lindahl and Laura H. Huntley for Defendant and Appellant.

Baker, Burton & Lundy and Albro L. Lundy III for Plaintiffs and Respondents.

____

All parties appeal from an order awarding costs to the plaintiffs following a jury trial. Defendant maintains plaintiffs are not entitled to the cost of presenting an edited video recording of the deposition of a witness or the cost of a PowerPoint presentation used during closing argument. Plaintiff Gloria Martinez contends the court erred in taxing expert witness fees incurred between her successive Code of Civil Procedure section 998 settlement offers.[1] We conclude plaintiffs are entitled to the cost of the video presentation but not the PowerPoint presentation. Gloria is entitled to expert witness costs incurred from the date of her earliest reasonable offer.

BACKGROUND

Raymond Martinez was injured in an electrical explosion at work. He and Gloria, his wife, sued Brownco Construction Company (Brownco), which had performed demolition work at the job site, for negligence and loss of consortium.[2] Brownco answered, alleging that Raymond's and his employer's negligence caused the explosion.

On August 30, 2007, Raymond served on Brownco a statutory offer to compromise pursuant to section 998 in the amount of $4,750,000. Gloria offered to compromise for $250,000. Brownco neither accepted nor rejected the offers, and they were withdrawn by operation of law after a statutory 30-day period had passed. (§ 998, subd. ((b)(2).) On February 8, 2010, Raymond offered to compromise for $1,500,000. Gloria's offer was $100,000. Brownco took no action on these offers either, and they were withdrawn by operation of law when trial began on February 18. (*Ibid.*)

At trial, plaintiffs' theory was that as part of the demolition work, Brownco employees sawed through several vertical electrical conduits (metal tubes carrying electrical wires) directly above a live, high voltage electrical panel, causing metal shavings to fall down through the conduits into the panel. The shavings caused electrical arcs within the panel, creating superheated plasma which then exploded, severely burning Raymond. Brownco's theory was that while disassembling the electrical panel, Raymond

---

[1] All undesignated statutory references will be to the Code of Civil Procedure.

[2] For simplicity, we will henceforth refer to the Martinezes by their first names.

left two live electrical lines unsecured and exposed. The wires came into contact with other parts of the panel, causing arcing that ultimately resulted in the explosion.

Brownco's foreman in charge of the demolition was Dwayne Taylor. Taylor allegedly ignored advice that the proper way to remove the conduits was either to disconnect them or to cut them "beyond the '90'," i.e., at a location beyond a 90 degree bend, so that metal shavings would at worst fall onto the electrical panel's external housing, not down through the conduits to the panel's interior. Plaintiffs took a video recording of Taylor's deposition. Shortly before trial, Brownco notified plaintiffs that Taylor no longer worked for it and could not be found. At trial, plaintiffs presented video excerpts of Taylor's deposition. The deposition testimony of other absent witnesses was read into the record by attorneys.

During closing argument to the jury, plaintiffs' counsel used a PowerPoint presentation that featured several photographic views of the workspace, including the electrical panel, conduits, and signs of arcing, with textual insets setting forth plaintiffs' argument. The presentation also included photographs of Raymond's physical injuries, bullet point lists of the impact his injuries had on his and Gloria's daily lives, and tables showing his economic damages.

In a special verdict, the jury found Raymond to be 10% at fault, his employer 40% at fault, and Brownco 50% at fault. Judgment was entered awarding Raymond $1,646,674 and Gloria $250,000.

After trial, plaintiffs sought $561,257.14 in itemized costs, including $11,956 for editing and presenting video excerpts of Taylor's deposition, $87,282.86 for the PowerPoint presentation used during closing argument, $188,536.86 in expert fees incurred after their first section 998 offers but before their second offers, and $64,555.45 in expert fees incurred after the second set of offers.

Brownco moved to tax the cost items for the video presentation of Taylor's deposition, the PowerPoint, and the $188,536.86 in expert fees incurred between plaintiffs' first and second section 998 offers. It argued the recording of the Taylor deposition was not reasonably necessary for trial, as attorneys could simply have read the

questions and answers into the record, as is normally done when a witness is unavailable for trial and as was otherwise done in this case. Brownco argued the PowerPoint presentation was similarly unnecessary and Gloria was not entitled to expert fees incurred before her second 998 offer to compromise.

Plaintiffs opposed the motion, arguing the Taylor video recording and PowerPoint presentations were reasonably necessary and Gloria should recover all witness fees incurred after her first section 998 offer.

Judge Warren Ettinger, who had presided over the trial, retired before Brownco's motion came on calendar. The motion was heard by Judge Elihu Berle, who agreed with Brownco that Gloria was not entitled to witness fees incurred between her first and second section 998 offers but found plaintiffs were entitled to the costs of editing and presenting the Taylor video and creating and presenting the PowerPoint slides.

Both sides appeal from the ensuing judgment.

DISCUSSION

A. Reasonably Necessary Costs

Brownco contends it was not reasonably necessary for plaintiffs to present Taylor's deposition in video format at trial or to make a PowerPoint presentation during closing argument.

1. Legal Principles

Section 1032 permits an award of costs to a prevailing party. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 128-129.) Section 1033.5 sets forth the items of costs that may or may not be recovered. Subdivision (a) of section 1033.5 itemizes allowable costs, which include: "Taking, video recording, and transcribing necessary depositions." (§ 1033.5, subd. (a).) Subdivision (b) of section 1033.5 itemizes certain items not allowable as costs. An item not specifically allowed under subdivision (a) or disallowed under subdivision (b) nevertheless may be recoverable in the court's discretion. (§ 1033.5, subd. (c)(4).) Only costs that are "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" may be awarded. (§ 1033.5, subd. (c)(2).) If the nonprevailing party objects to an item of costs, the burden

of proof is on the prevailing party to establish the item's reasonable necessity. (*Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 698-699.)

Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court, whose decision is reviewed for substantial evidence. (*Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 39.) When an issue is tried on declarations, the rule on appeal is that declarations favoring the contention of the prevailing party establish the facts stated and all facts reasonably inferable therefrom. (*Ibid.*)

Brownco suggests our review should be de novo because Judge Berle, who presided over the costs hearing, had not presided over trial, leaving him in no better position than we to assess whether a cost item was reasonably necessary. We disagree.

In ruling on a motion to tax costs, the trial court applies the standards set forth in section 1033.5 to the litigation facts and determines whether a particular cost item was reasonably necessary to produce the successful result. Litigation facts include the nature of the action, the underlying facts alleged before and developed during trial, the nature and complexity of legal issues presented, and the practical and procedural steps necessary to present the underlying facts, apply the pertinent law, and reach a successful result. A party seeking costs must establish the litigation facts and persuade the trial court that those facts meet the requirements of section 1033.5. (Evid. Code, § 115; see generally *People v. Dubon* (2001) 90 Cal.App.4th 944, 953-954.) As a practical matter, establishing the litigation facts is most easily accomplished when the bench officer hearing the costs motion also presided over trial, as the parties may rely on the officer's familiarity with the litigation in lieu of an unnecessarily detailed evidentiary showing. If the bench officer did not preside over the trial, the parties' evidence must be more complete. That does not mean a bench officer who did not preside at trial is equally positioned with the appellate court to determine the predicate facts. The appellate court would be in no position, for example, to resolve credibility issues or evidentiary conflicts regarding the litigation facts. That the hearing officer here did not also preside at trial affects only the burden of persuasion, not the standard of review.

2. Video of the Taylor Deposition

Plaintiffs claimed that Taylor, as foreman on the demolition work performed at Raymond's workplace, ordered Brownco employees to cut electrical conduits in a manner that caused the explosion. When Brownco notified plaintiffs' counsel that it would be unable to produce Taylor at trial, plaintiffs had the option of presenting Taylor's deposition testimony by readback or by showing video excerpts. As related by plaintiffs' counsel to Judge Berle at the costs hearing, Judge Ettinger had asked the jury whether they preferred to see deposition testimony "live" on the video screen or have it read from the witness box. The jury indicated that testimony read from the witness box was, in plaintiffs' counsel's words, "a little boring, digital is more interesting." Counsel then chose to present video excerpts of Taylor's deposition. The content of Taylor's testimony—edited or unedited—is not in the record on appeal and as far as we can determine was not related to Judge Berle at the costs hearing.

In a declaration filed for the costs hearing, plaintiffs' counsel stated that he chose to use the edited video because it was an "effective and efficient" method of displaying the evidence and was "reasonably helpful" to the jury. Counsel argued the video was "essential for the Court and the jury to understand the sophisticated and complex analysis of how the accident occurred . . . ."

Judge Berle agreed, stating, "to keep the jurors' attention it would seem to me more reasonable to have the video deposition rather than somebody sitting on the stand and reading a transcript of somebody else's testimony. [¶] First of all, you don't get the same intonation and inflections as the original testimony, you get somebody who is supposed to read the testimony dry. [¶] You don't want an actor on the stand trying to inject his or her own feelings into a dry transcript . . . . [¶] Secondly, it seems to me it would be much more efficient in terms of handling a case to have an edited video where you go directly to the question and answer that has, I assume, been pre-approved by the court if there were any objections, rather than having somebody reading and stopping at objections or turning pages. It saves a lot of time in preparation for a witness aside from making it more interesting. [¶] So I think things have changed from the days of just

reading dry transcript. . . . [¶] . . . [¶] This is a reality of how cases are presented to [jurors]. . . . [T]his is what is the accepted mode of trying cases to us. So it's difficult to suggest that it is not part of the everyday trial work that it should not be covered in the costs." Judge Berle found that the video "helped the trier of fact consider the evidence" and "helped expedite the course of the trial."

On this record, we conclude the award of costs for presenting the Taylor video was not an abuse of discretion. It is undisputed that Taylor, who set in motion the acts ultimately resulting in Raymond's injuries, was a crucial witness. Judge Berle reasonably could have concluded from Judge Ettinger's informal poll of the jury that evaluation of Taylor's demeanor was necessary to the jury's task of determining his credibility. Although the existence of the alternative method of reading aloud the testimony suggests that video editing is not always necessary to the conduct of litigation (*Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1105), on this record we cannot say that Judge Berle's conclusion was arbitrary.

3. PowerPoint Presentation

During closing argument, plaintiffs' counsel made a PowerPoint presentation comprising 134 slides that included blow-ups of exhibits and testimony, most with textual insets setting forth plaintiffs' argument, including the following: "[Brownco employees] Knew and Ignored the Electrical Hazards of the Selective Demolition"; "[Brownco employees] Violated Their Own Safety Rule by Sending Untrained Workers into a High Voltage Area"; "Browneo Chose the Most Dangerous Method to Remove Conduit"; "Unsafe Cutting Caused Contaminated Electrical Panel"; "[Browneo's] Theory is Impossible." Several slides showed Raymond's injuries and discussed his pain and suffering and the financial and psychological impact of the accident. Only four of the slides included in the appellate record were devoid of argument. Plaintiffs attached 16 of the slides to their opposition to Browneo's motion to tax costs and brought all 134 slides to the costs hearing.

Plaintiffs sought $92,146 for the presentation.

In his declaration, plaintiffs' counsel argued the PowerPoint "was a concise, effective and efficient method of displaying the evidence for the jury, saving on time and judicial resources," and was "essential for the Court and the jury to understand the sophisticated and complex analysis of how the accident occurred, and plaintiffs' severe burn and psychological injuries. . . . [¶] The jurors deliberated for over six (6) days on the liability issue alone. Clearly this was a close call for plaintiffs. If the closing had not been so well presented due in large part to [the PowerPoint], then the outcome most probably would not have been as favorable."

At the costs hearing, plaintiffs' counsel argued that because Judge Ettinger had granted each party only two hours for closing argument, the PowerPoint was "reasonably helpful" to the trier of fact in that it allowed plaintiffs to put on 134 exhibits in two hours. "[A]fter the twenty-three day trial, . . . the jury was out for an additional six and-a-half more days" counsel argued, "[a]nd the questions that they had while they were out were primarily focused on liability. And due to a number of issues, we were on the cusp of a mistrial so that the potential of a hung jury was very close and perhaps maybe even potentially a defense verdict. So I think that this closing argument was essential to our winning the case."

Brownco's counsel argued the PowerPoint presentation was a "multimedia extravaganza," with no slide depicting solely an exhibit.

The trial court found that the "complicated graphics" were "necessary to demonstrate the[] facts to the jury" and "was appropriate and helpful to aid the trier of fact." It allowed the cost.

This was an abuse of discretion. The PowerPoint presentation was an allowable cost only if it was reasonably *necessary* to the conduct of the litigation rather than merely convenient or beneficial. Nothing in the record suggests it was. As noted, the presentation set forth plaintiffs' argument, not evidence. We know of no authority, and plaintiffs cite none, holding that visual aids setting forth a party's argument during closing remarks are reasonably necessary to the conduct of litigation.

It appears the trial court and plaintiffs' counsel applied the wrong standard to the PowerPoint cost item. Counsel repeatedly argued, and the trial court found, that the presentation was reasonably *helpful* to the trier of fact. But this standard applies to only "[m]odels and blowups of exhibits and photocopies of exhibits," which are allowable costs under subdivision (a) of section 1033.5 if they were "reasonably helpful to aid the trier of fact," i.e., to help the trier of fact determine the facts of the case. The reasonably helpful standard does not apply here because the PowerPoint did not comprise blowups of exhibits and did not help the jurors determine the facts of the case, it helped them understand only plaintiffs' argument.

Plaintiffs argue *El Dorado Meat Company v. Yosemite Meat* (2007) 150 Cal.App.4th 612 and *American Airlines, Inc. v. Sheppard, Mullin* (2002) 96 Cal.App.4th 1017 support the proposition that high-tech methods used to display documents to the jury are recoverable as costs. The cases are distinguishable. In *El Dorado Meat Company*, the prevailing party sought to recover the cost of preparing and displaying at trial a 37-page exhibit distilling years' worth of business data. The appellate court held the exhibit was reasonably necessary to the litigation. In *American Airlines*, the prevailing party sought costs for "imaging documents and deposition transcripts." (*Id.* at p. 1057.) Citing the rule that models and blowups of exhibits are an allowable cost if they are reasonably helpful to the trier of fact, the appellate court held the costs were recoverable. The obvious difference between those cases and the instant one is that in them, the prevailing party sought reimbursement for presenting evidence to the jury, whereas here plaintiffs seek reimbursement for the cost of presenting their argument.

B. Section 998 Expert Fees

The trial court denied Gloria's request for expert fees incurred after her first statutory offer but before her second, finding the second offer extinguished the first for all purposes. Gloria contends this was error. The appeal presents the following issue: When a plaintiff makes two reasonable section 998 offers, both of which expire by operation of law, can the plaintiff recover expert fees incurred after the first offer—in

addition to those incurred after the second? The issue is one of statutory interpretation that we review de novo. (*Ray v. Goodman* (2006) 142 Cal.App.4th 83, 87.)

1. Procedural History

As stated, Raymond alleged one cause of action for negligence. Gloria alleged one cause of action for loss of consortium. Plaintiffs each made offers to compromise pursuant to section 998 on August 30, 2007 and February 8, 2010, Gloria first for $250,000 and then for $100,000, Raymond first for $4,750,000 and then for $1,500,000. Each offer lapsed by operation of law after Brownco took no action to accept or reject it. At trial, Raymond's recovery of $1,646,674 was less than his first 998 offer but more than his second. Gloria's recovery of $250,000 equaled her first offer and exceeded her second.

Plaintiffs incurred $188,536.86 in expert fees between August 30, 2007 and February 8, 2010, and an additional $64,555.45 in expert fees after February 8, 2010. Plaintiffs do not contend Raymond is entitled to fees incurred between August 30, 2007 and February 8, 2010 and defendant does not dispute that Gloria and Raymond are both entitled to fees incurred after February 8, 2010. Brownco moved to tax the $188,536.86 cost item on the ground that pursuant to *Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382 (*Wilson*), Gloria was not entitled to fees incurred in the time between the offers because her second offer nullified her first offer. The trial court agreed, and disallowed the cost item.

2. Interpretation of Section 998

To interpret section 998 we follow "'[t]he fundamental rule of statutory construction . . . that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.]' [Citation.] In determining that intent, we first examine the words of the statute itself. [Citation.] Under the so-called 'plain meaning' rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning. [Citation.] If the language of the statute is clear and unambiguous, there is no need for construction. [Citation.] However, the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with

its purpose. [Citation.] If the terms of the statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] '"We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' [Citation.] The legislative purpose will not be sacrificed to a literal construction of any part of the statute." (*Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1515-1516.)

The Legislature enacted section 997 and its successor, section 998, to encourage pretrial settlement of litigation.[3] (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280 (*Cobb*) ["the clear purpose of section 998 and its predecessor, former section 997, is to encourage the settlement of lawsuits prior to trial"]; *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1114 [the "very essence of section 998" is its encouragement of settlement].) Section 998 provides that not less than 10 days prior to trial, "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, proof of acceptance is filed with the court and judgment is entered accordingly. (*Id.*, subd. (b)(1).) "If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn." (*Id.*, subd. (b)(2).)

"If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding . . . , the court . . . , in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the

---

[3] Section 998, enacted in 1971 (Stats. 1971, ch. 1679, § 3, pp. 3605-3606), replaced section 997 (added by Stats. 1851, ch. 5, § 390, p. 113, repealed by Stats. 1971, ch. 1679, § 1, p. 3605).

plaintiff, in addition to plaintiff's costs." (§ 998, subd. (d).)[4] "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 . . . , the court . . . , in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses . . . 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." (§ 998, subd. (c)(1).)

Pursuant to the terms of subdivision (d) of section 998, Gloria was entitled (in the court's discretion) to expert witness fees incurred after August 30, 2007 because on that date she made a reasonable statutory offer to settle that Brownco failed to accept. (§ 998, subd. (d).)

Brownco contends Gloria's second section 998 offer superseded the first offer for purposes of cost shifting. We disagree.

3. Multiple Section 998 Settlement Offers

Section 998 is silent as to the effect of a later section 998 offer on an earlier offer. Brownco invites us to fill this silence essentially by adding the following language to subdivision (d): If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment, the court may require the defendant to pay the plaintiff's expert witness fees "*unless plaintiff makes a later offer to compromise*."

Two cases would seem to support the modification.

a. Distefano v. Hall

In *Distefano v. Hall* (1968) 263 Cal.App.2d 380 (*Distefano*), the defendants served a first statutory offer to settle for $20,000, which was not accepted. (*Id.* at pp. 383-384.) Four years later, after a full trial and reversal of the judgment on appeal, defendants made a second statutory offer, for $10,000, which was also not accepted. After a second full trial, the plaintiff obtained a verdict in the amount of $12,559.96 and was allowed costs.

---

[4] Expert fees are generally disallowed as costs otherwise. (§ 1033.5, subd. (b)(1).)

On appeal, defendants contended they were not required to pay plaintiff's costs; on the contrary, plaintiff was required to pay their costs because he refused to accept their first offer of $20,000 and failed to obtain a more favorable judgment. (*Id.* at p. 384.) The appellate court disagreed, concluding that defendants' second offer extinguished the first, and because plaintiff's verdict of $12,559.96 was more favorable than defendant's second offer he was not required to pay defendants' costs. (*Ibid.*)[5].

b. Wilson v. Wal-Mart

In *Wilson, supra*, the plaintiff served an initial offer to compromise for $150,000. One year later she made a second offer, for $249,000. The defendant accepted neither offer, and a jury subsequently awarded plaintiff $175,000. (72 Cal.App.4th at p. 387.) The trial court granted defendant's motion to tax the expert witness fee component of plaintiff's cost bill on the ground that her second offer "superseded and extinguished" her first offer for purposes of section 998. (*Id.* at p. 388.)

Relying heavily on *Distefano*, our colleagues in the Third Appellate District affirmed the order, holding that any new offer communicated prior to a valid acceptance of a previous offer extinguished and replaced the prior offer. (*Wilson*, at pp. 389-390.)

Distefano and *Wilson* set forth the rule defendant urges here: When a second section 998 offer is made after the first has been withdrawn by operation of law, the second offer controls the benefits afforded by section 998 to the offeror and the burdens to which the section exposes the offeree. The cases support the rule with several rationales.

c. General Contract Law Principles

The primary rationale for the rule that subsequent section 998 offers extinguish prior offers is that it comports with general principles of contract law, specifically the principle that "any new offer communicated prior to a valid acceptance of a previous

---

[5] The court limited its holding to the facts before it. (263 Cal.App.2d at p. 384 ["where a case has been tried, appealed and reversed for retrial . . . an offer of compromise made before the second trial pursuant to section 997 should clearly supersede that made before the first trial"].)

offer, extinguishes and replaces the prior one." (*Distefano*, *supra*, 263 Cal.App.2d at p. 385; *Wilson*, *supra*, 72 Cal.App.4th at pp. 389-390.) We think application of contract principles compels the opposite result here.

Section 998 involves the contractual process of settlement and compromise, so "it is appropriate for contract law principles to govern the offer and acceptance process under section 998" where such principles "neither conflict with the statute nor defeat its purpose." (*Cobb*, *supra*, 36 Cal.3d at p. 280.) Because the issue here is whether Gloria's second offer extinguished her first, the principles most pertinent concern termination of offers, also called termination of the power of acceptance.

An offeree's power of acceptance may be terminated by revocation of the offer, rejection by the offeree, the making of a counteroffer, lapse of time, incapacity of the offeror, or the "non-occurrence of any condition of acceptance under the terms of the offer." (Rest.2d Contracts, § 36.) "Most offers are revocable." (*Id.*, § 42, com. a.) An offer is revoked by communication from the offeror of its intention not to enter into the proposed contract. (*Id.*, § 42.) The manifestation of such an intention may be express, as when the offeror explicitly revokes the offer, or implied, as when the offeree "takes definite action inconsistent with an intention to enter into the proposed contract." (*Id.*, § 43; 1 Corbin on Contracts (rev. ed. 1993) § 2.20, pp. 226-227.) The making of a second offer involving the same subject matter but with terms different from those of the first offer constitutes a definite action inconsistent with an intention to enter into the contract as originally proposed and terminates the offeree's power to accept the terms of the original offer. (1 Corbin on Contracts, *supra*, § 2.20, p. 229; *Abrams-Rodkey v. Summit County Children Servs.* (Ohio App. 9 Dist. 2005) 163 Ohio.App.3d 1, 9 ["a later-made offer will revoke a previous offer to the extent that the offers are inconsistent"]; *Norca Corp. v. Tokheim Corp.* (N.Y.A.D. 1996) 227 A.D.2d 458, 458-459 [same].)

Lapse occurs when the time specified for acceptance in the offer expires, or, if no time is specified, a reasonable time passes. (Rest.2d Contracts, § 41.) A lapsed offer has no enduring contractual effect. (*Id.*, § 35 ["A contract cannot be created by acceptance of

an offer after the power of acceptance has been terminated in one of the ways listed in § 36."]) A later offer therefore cannot "extinguish" a lapsed offer.

Here, Gloria's first offer lapsed long before she made her second offer. It thereafter retained no contractual significance and thus could not have been revoked or extinguished by the second offer. (See *Gallagher v. Heritage* (1983) 144 Cal.App.3d 546, 550 ["when an acceptance has not been effected under the terms of Code of Civil Procedure section 998, subdivision (b) . . . . [b]y its terms the offer has been withdrawn, but the statutorily imposed benefits and burdens remain"], disapproved on another ground in *Cobb*, *supra*, 36 Cal.3d at p. 280, fn. 8). The sole significance of the first offer was that pursuant to section 998 it entitled Gloria to cost shifting if Brownco failed to obtain a more favorable judgment. This conditional entitlement vested when Brownco allowed Gloria's first offer to lapse. Nothing in contract law requires that Gloria be divested of the entitlement simply because she later made another offer.

d. Encouragement of Settlement

Acknowledging that the purpose of former section 997 was to encourage the settlement of litigation without trial, the *Distefano* court observed that "to give less than full effect to the parties' reappraisals of the merits of their respective positions where a case has been tried, appealed and reversed for retrial" would deny the parties flexibility and discourage settlement. (263 Cal.App.2d at p. 385.) The *Wilson* court posed a somewhat different scenario that might arise if a late settlement demand does not extinguish an earlier demand. "A plaintiff might be encouraged to maintain a higher settlement demand on the eve of trial and refuse to settle a case that should otherwise be settled if the plaintiff finds comfort in the knowledge that, even if the plaintiff receives an award less than his or her last demand, the plaintiff might still enjoy the cost reimbursement benefits of section 998 so long as the award exceeded a lower demand made by the plaintiff sometime during the course of the litigation. The reverse might be true of the defendant. 'Rolling the dice' then becomes somewhat less risky and we note that lawsuits are not often settled by reducing the risk of trial." (*Wilson, supra*, 72 Cal.App.4th at p. 391.)

We find this reasoning to be unpersuasive in this case. The purpose of section 998 is to encourage settlement by affording benefits to those who make reasonable settlement offers and imposing concomitant burdens on those who unreasonably reject them. Here, Gloria made two reasonable offers. To deny her the benefit of making the first offer simply because she made a later offer would actually discourage her making the later offer, and thus discourage settlement.

e. Preference for Bright Line Rules

Finally, the *Wilson* court supported its holding with the observation that "the legislative purpose of section 998 is generally better served by a bright line rule in which the parties know that any judgment will be measured against a single valid statutory offer—i.e., the statutory offer most recently rejected—regardless of offers made earlier in the litigation." (*Wilson, supra*, 72 Cal.App.4th at p. 391.) Assuming for the sake of argument that bright line rules are to be preferred generally, the existing statutory rule, that a judgment will be measured against the earliest reasonable section 998 offer regardless of later offers, seems clear enough and has the added benefit of having been installed by the Legislature itself. The *Wilson* court suggested that while such a rule "arguably might promote settlement in some cases, its potential for mischief, or at least confusion, is apparent." (*Ibid.*) But a prevailing party who has made a reasonable pretrial offer pursuant to Code of Civil Procedure section 998 is eligible for specified costs only so long as the offer was made in good faith. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) Whether a section 998 offer was made in good faith is left to the sound discretion of the trial court. (*Ibid.*) Here, any mischief or confusion may be addressed by the trial court when it exercises its discretion in awarding costs.

4. Conclusion

Where a party makes two section 998 offers to compromise more than 30 days apart, the purpose of section 998 is adequately served by the statute's existing language, which entitles an offeror to cost shifting from the date of the earliest reasonable offer. This rule encourages early settlement, respects the Legislature's preference for early discovery and evaluation of the merits of lawsuits, and presents a certain, bright line rule

by which settlement negotiations may be guided. If any mischief or confusion results from later offers, or any gamesmanship arises, the court can address such concerns when it awards costs.

Here, it is undisputed that if Gloria had not made her second section 998 offer she would have been entitled (in the court's discretion) to an award of expert fees incurred after the first offer. No principle requires a different result simply because she made the second offer. The trial court thus abused its discretion when, albeit following *Wilson*, it found that Gloria's second offer to settle extinguished her first. The matter will be remanded to afford the court an opportunity to reexamine Gloria's entitlement to expert fees.

Brownco argues that even if Gloria is theoretically entitled to expert fees under section 998, she cannot obtain them here because the experts, whose opinions pertained only to the circumstances surrounding Raymond's injury, were not reasonably necessary to litigation of Gloria's claim for loss of consortium. Because the record does not clearly reflect the content of the experts' opinions, we will leave it to the trial court to determine the necessity of their evidence.

DISPOSITION

The order on defendant's motion to tax costs is reversed as to the $92,146 plaintiffs sought for their PowerPoint presentation and the $188,536.86 Gloria Martinez sought for expert fees incurred between August 30, 2007 and February 8, 2010. The matter is remanded to the trial court for its discretionary determination of Gloria's entitlement to these expert fees. In all other respects, the judgment is affirmed. All parties are to bear their own costs.

CERTIFIED FOR PUBLICATION.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

Laura H. Huntley
Lindahl Beck LLP
660 S Figueroa St #1500
Los Angeles, CA 90017-3457

Division 1
RAYMOND MARTINEZ et al.,
Plaintiffs, Cross-complainants and Appellants,
v.
BROWNCO CONSTRUCTION COMPANY, INC.,
Defendant and Appellant.
B226665

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 660 South Figueroa Street, Suite 1500, Los Angeles, California 90017-3457.

On March 19, 2012, I served the foregoing document described as ***PETITION FOR REVIEW*** on all interested parties by placing the true copies thereof enclosed in sealed envelopes addressed as indicated below:

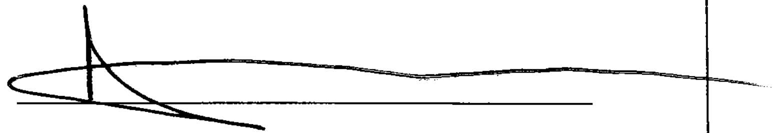
Supreme Court of California
Office of the Clerk
350 McAllister Street
San Francisco, CA 94102
[Original and 13 copies, plus one for conforming/return]

___ BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

_X_ BY FEDERAL EXPRESS as follows: I caused said document to be sent Federal Express for overnight delivery (next business morning) to the offices of the addressee.

Executed on March 19, 2012, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the County of Los Angeles, State of California. I am
4 over the age of 18 and not a party to the within action; my business address is 660 South
5 Figueroa Street, Suite 1500, Los Angeles, California 90017-3457.

6 On March 19, 2012, I served the foregoing document described as
7 ***PETITION FOR REVIEW*** on all interested parties by placing the true copies thereof
8 enclosed in sealed envelopes addressed as indicated below:

Albro L. Lundy, III, Esq. Norman Coe, Esq. Baker, Burton & Lundy 515 Pier Avenue Hermosa Beach, CA 90254 Tel: (310) 376.9893 Fax: (310) 376.7483 Victor George, Esq. 20355 Hawthorne Blvd., Second Floor Torrance, CA 90503 Tel: (310) 856-5410 Fax: (310) 856-5420 Attorneys for Plaintiffs Raymond Martinez and Gloria Martinez	Los Angeles Superior Court Central Civil West Courthouse Clerk of the Court for The Honorable Elihu M. Berle 600 South Commonwealth Avenue Los Angeles, CA 90005 [1 copy] Court of Appeal Clerk of the Court Second Appellate District, Division 1 300 South Spring Street, Suite 2217 Los Angeles, CA 90013 [1 copy]

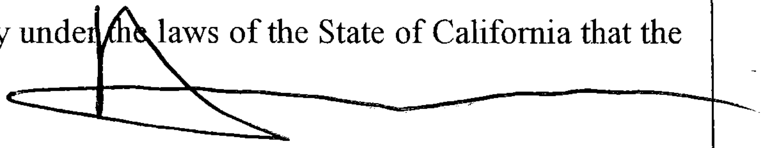
9 10 11 12 13 14 15 16 17 18 19

20 _X_ BY MAIL: I am "readily familiar" with the firm's practice of collection and
21 processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

22 Executed on March 19, 2012, at Los Angeles, California.

23 ___ BY FEDERAL EXPRESS as follows: I caused said document to be sent Federal
24 Express for overnight delivery (next business morning) to the offices of the addressee.

25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct.



27 28