Supreme Court Case No. S200944
2nd Appellate District 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

PETITIONER'S OPENING BRIEF ON THE MERITS

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I. ISSUE PRESENTED

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 the offer made last in time is the operative offer for purposes of the cost-shifting provisions of Section 998(c)?

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

State Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

State Statutes

Other Authorities

II. INTRODUCTION

The Second Appellate District, Division 1, held in its certified for publication opinion in *Raymond and Gloria Martinez v. Browncо 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 establishing and promulgating the well-established rule that where successive Section 998 offers are made, the earlier offers are extinguished by service of a subsequent offer, the Courts of Appeal in *Wilson*, *Distefano, Palmer* and *One Star* weighed several important factors. First, the Courts considered general principles of contract law because "the theory of section [998] is that the process of settlement and compromise is a contractual one, and the applicable principles are those relating to contracts in general [citation]." *Distefano*, *supra*, 263 Cal.App.2d at 385; *Palmer, supra*, 108 Cal.App.4th at 159. Second, the Courts considered the purpose of Section 998 which is to "encourage the settlement of lawsuits prior to trial [citations]." *T.M. Cobb*, *supra*, 36 Cal.3d at 279; *Distefano*, *supra*, 263 Cal.App.2d at 385; *Wilson, supra*, 72 Cal.App.4th at 391; *Palmer, supra*, 108 Cal.App.4th at 158; *One Star, supra*, 179 Cal.App.4th at 1093-1094. As a corollary, the Courts considered the potential for gamesmanship and manipulation of the cost-shifting provisions of Section 998(a) if subsequent offers were not held to extinguish prior offers. *Wilson*,

supra, 72 Cal.App.4th at 391; *Palmer*, *supra,* 108 Cal.App.4th at 158; *One Star*, *supra,* 179 Cal.App.4th at 1095. Finally, the Courts considered the preference for "bright line" rules given the punitive nature of the cost-shifting provisions of Section 998. *Distefano*, *supra*, 263 Cal.App.2d at 385; *Wilson*, *supra,* 72 Cal.App.4th at 391; *Palmer*, *supra,* 108 Cal.App.4th at 158; *One Star*, *supra,* 179 Cal.App.4th at 1094-1095. After weighing the forgoing considerations, the Courts of Appeal in *Wilson*, *Distefano,* and *Palmer* concluded that the rule which would best serve all interests and was consistent with the legislative intent is the rule that where successive Section 998 offers are made, the earlier offers are extinguished by service of a subsequent offer. *Distefano*, *supra*, 263 Cal.App.2d at 385; *Wilson*, *supra,* 72 Cal.App.4th at 389-391; *Palmer*, *supra,* 108 Cal.App.4th at 158.

In addition to the factors considered by the Courts of Appeal, the legislative history of Section 998, its predecessor, former Section 997, and Civil Code Section 3291 reflect that the legislature has embraced and accepted the judiciary's long-standing construction of Section 998 that where successive offers are made, the earlier offers are extinguished by service of a subsequent offer.[1]

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[1] *See*, James S. Reid, State Bar, Analysis and Discussion re Assem. Bill No. 1814 (1971-1972 Reg. Sess.), Sen. Com. on Judiciary bill files; Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1814 (1971-1972 Reg. Sess.) June 21, 1971, p. 1., Sen. Com. on Judiciary bill files; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill 1324 (1993-1994 Reg. Sess.) May 27, 1994, p.2, at

In stark contrast, the new rule developed by the Second Appellate District, Division 1 in *Martinez* is inconsistent with well-settled tenets of statutory construction and is in direct conflict with the legislative history of Section 998, its predecessor, former Section 997, and Civil Code Section 3291. Moreover, the rule proffered by the Second Appellate District, Division 1 undermines the legislative purpose of Section 998 of encouraging pretrial settlement. In addition, the new rule promulgated by the Second Appellate District, Division 1 is fatally uncertain and encourages gamesmanship and manipulation of the provisions of Section 998.

As a consequence, it is incumbent on this Court to endorse and adopt the long-standing, well-reasoned rule that where a party serves a series of offers to compromise under Section 998 each succeeding offer extinguishes and supersedes the prior offer such that the offer made last in time is the operative offer for purposes of the cost-shifting provisions of Section 998(c).

<http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_1301-1350/sb_1324_cfa_940527_171615_sen_floor>; Sen. Bill No. 203, approved by Governor, April 6, 1982, Sen. Final Hist. (1981-1982 Reg. Sess.) p. 147.

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. [Joint Appendix submitted in conjunction with Appellant's Opening brief, below (hereinafter "JA") 002.] On March 1, 2007, Raymond Martinez filed the present action against Browncо for personal injuries he sustained in the June 2, 2005 incident contending that metal dust from Browncо's demolition work caused the electrical panel to explode. [JA 001.] His wife, Gloria Martinez, also claimed loss of consortium. [JA 007-008.] Browncо 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.] Browncо answered the Complaint on May 18, 2007. [JA 010-015.]

On August 30, 2007, a mere three months after Browncо answered the Complaint, Raymond Martinez served Browncо 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 Browncо'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 Browncо 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 Browncо'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 Browncо with a dramatically 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 Browncо 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, Browncо filed a Motion to Tax Costs. [JA 075-324.] Browncо moved to tax the expert fees plaintiffs paid to Browncо's experts as each of these experts was deposed prior to Raymond Martinez's February 8, 2010 Section 998 Demand. [JA 076-077, 083-087.] Browncо 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, Browncо's Motion to Tax came on for hearing before the Honorable Elihu Berle. [JA 620-621; Reporter's Transcript of Hearing on Browncо's Motion to Tax Costs ("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 Browncо'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 Browncо filed its Notice of Appeal of the Order on its Motion to Tax Costs (on issues not raised by its Petition for Review). [JA 622-624.] On September 29, 2010, Raymond and Gloria Martinez filed their Notice of Cross-Appeal of the Order on the Motion to Tax Costs disputing the taxing of expert fees and costs incurred prior to February 8, 2010. [JA 632-634.]

On February 10, 2012, the Second Appellate District, Division 1, issued a published decision which, in part, reversed the trial court's order taxing the expert fees incurred prior to February 8, 2010. [Exhibit "1" to Browncо's Petition for Review.]

IV. LEGAL DISCUSSION

A. The Rules of Statutory Construction and Legislative History Compel the Construction and Application of Section 998 Embraced in the *Wilson* Line of Authorities

As noted by this Court in *T.M. Cobb*, *supra*, "[t]he fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.]" 36 Cal.3d at 340. "In determining such intent, the court must first look to the words of the statute." *Id.* "When an examination of statutory language in its proper context fails to resolve an ambiguity, courts turn to secondary rules of interpretation, such as maxims of construction, which serve as aids in the sense that they express familiar insights about conventional language usage. [Citations.] Courts also may turn to the legislative history of an enactment as an aid to its interpretation. [Citations.] 'Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.]'" *Katz v. Los Gatos–Saratoga Joint Union High School District*, 117 Cal.App.4th 47, 55 (2004). Moreover, Government Code Section 9080 specifically provides "(a) The Legislature finds and declares that legislative records relating to bills, resolutions, or proposed constitutional amendments before the Legislature provide

evidence of legislative intent that may be important in the subsequent interpretation of laws enacted in the Legislature."

Here, the plain language of Section 998 is silent with respect to the effect of a subsequent offer on earlier offer to compromise under Section 998. As a consequence, this Court and the Courts of Appeal in *Wilson*, *Distefano, Palmer*, and *One Star* turned to principals of contract law for guidance in applying Section 998. Specifically, 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, supra,* 36 Cal.3d 380. In so holding, this Court concluded that invoking principles of contract law in applying Section 998 would promote the purpose of Section 998 of encouraging pre-trial settlement. *Id.* at 280-283. In each subsequent published decision to address the effect of a later offer to compromise under Section 998 on a

prior offer for cost-shifting purposes, California appellate courts have uniformly turned to principals of contract law for guidance.[2]

In *Distefano*, the Court of Appeal was confronted with a factual scenario wherein defendants made a series of offers to compromise under former Code of Civil Procedure §997.[3] 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 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

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2 *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.

3 Section 998, enacted in 1971, replaced Section 997 which was the operative statute in *Distefano.*

(*Bennett v. Brown*, 212 Cal.App.2d 685, 688 (1963) [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 (1924).

Id. at 385 [emphasis added]. The foregoing reasoning was expressly approved by this Court in *T.M. Cobb*. 36 Cal.3d at 279.

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 stating that it found the above-cited reasoning in *Distefano, supra,* both persuasive and applicable to the matter before it. *Id.* at 390.

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 Browncо 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 – Browncо's insurance policy limits. [JA 110-112, 114-116.]

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 Browncо'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. 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, the 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." *Martinez v. Brownco Construction Company, Inc.*, 36 Cal.Rptr.3d 899, 909 (2012). 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.*, 163 Ohio App.3d 1, 9, 836 N.E.2d 1 (Ohio App. 9 Dist.2005) ["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].)

Id. at 909-910. [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." *Id.* at 910.

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." *Id.* [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*, was simply incorrect.

Moreover, the Second Appellate District's description of the new rule it articulated in *Martinez* as the "existing rule" and "the rule installed by the Legislature" is without any legislative or legal support. *Martinez, supra,* 36 Cal.Rptr.3d at 911. As is readily apparent from the cases cited above, the existing rule is the *Wilson* rule that a later Section 998 offer extinguishes and supercedes any prior offer. *See, Distefano, supra,* 263 Cal.App.2d at 385; *Wilson, supra,* 72 Cal.App. 4th at 389-391; *Palmer, supra,* 108 Cal.App. 4th at 157. Additionally, the Second Appellate District provides absolutely no explanation or support for its assertion that the new rule articulated in *Martinez* was "installed by the Legislative itself." *Id.* Moreover, this statement is entirely inconsistent with its express acknowledgement that "Section 998 is silent as to the effect

of a later 998 offer on an earlier offer." *Martinez, supra,* 36 Cal.Rptr.3d at 908.

In fact, the legislative history of Section 998, its predecessor Section 997 and Civil Code Section 3291 reflect that the Legislature has accepted and endorsed the *Wilson* rule that a subsequent offer to compromise under Section 998 extinguishes any prior offer.

In that regard, it is presumed that when the Legislature either enacts a new statute or amends an existing statute that it was cognizant of the construction which had been placed by the courts on the statute in question. *See, Palos Verdes Faculty Association et al. v. Palos Verdes Peninsula Unified School District*, 21 Cal.3d 650, 659 (1978). The construction of a statute by judicial decision becomes a part of it. *People v. Hallner*, 43 Cal.2d 715, 721 (1954). Moreover, "[w]here a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it. [Citations.]" *People v. Hallner*, 43 Cal.2d at 719.

Code of Civil Procedure Section 998 was enacted in 1971 and replaced its similar predecessor, Code of Civil Procedure Section 997. Notably, Section 998 was enacted 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. In fact, when Assembly Bill 1814 (Hayes), later codified as Section 998, was under consideration, the State Bar of California provided "Analysis and Discussion" regarding its purpose. The State Bar's analysis included, in pertinent part: "New Section 998, as added by this bill, rewrites, clarifies and combines old Sections 997 and 998. It contains no substantive changes" (emphasis added). (James S. Reid, State Bar, Analysis and Discussion re Assem. Bill No. 1814 (1971-1972 Reg. Sess.), Sen. Com. on Judiciary bill files.) [45] Similarly, the Assembly Committee on the Judiciary also found that "AB 1814 combines present CCP 997 and 998. Differences are: 1. New section only applies prior to commence of trial...; 2. Allows court discretion to award defendant his costs from the time of filing the complaint and cost of expert witnesses not employed by the defendant." (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1814 (1971-1972 Reg. Sess.) June 21, 1971, p. 1., Sen. Com. on Judiciary bill

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4 Browncо has concurrently filed a Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291. Copies of the referenced Legislative materials are attached to the motion.

5 Exhibit 1 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

files.)[6] Given that *Distefano* was decided three years earlier, the analyses provided by the State Bar and the Judiciary Committee strongly suggest that Section 998 was both not intended to change the application of that holding and signals the Legislature's approval of *Distefano's* application of the identical provisions of Section 997.

Moreover, in 1994 the Legislature saw fit to amend the statute to overrule a case interpreting Section 998 that it believed had been wrongly decided, *Encinitas Plaza Real v. Knight*, 209 Cal.App.3d 996 (1989). *See*, C.C.P. §998(c)(2)(B). A strong inference can be drawn from the Legislature's deliberate act in overruling *Encinitas*, coupled with its silence regarding *Distefano*, that the Legislature agreed with the interpretation and application of Section 997 found in *Distefano*. If the Legislature believed that *Distefano* had it been wrongly decided it presumably would have overturned that decision via amendment, as well.

Even more tellingly, in connection with the 1994 amendment the Legislature specifically cited *Distefano* with approval on another point. Discussing Senate Bill 1324 (Kopp), the author provided a Bill Analysis dated May 27, 1994. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill 1324 (1993-1994 Reg. Sess.) May 27, 1994, p.2, at <http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_1301-

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6 Exhibit 1 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

1350/sb_1324_cfa_940527_171615_sen_floor>.)[7] Therein, *Distefano* was cited for its determination that "where a contract provides for attorneys' fees, the fees are technically not regarded as part of the costs, but as special damages expressly authorized by the contract." *Distefano* 263 Cal.App.2d at 385, fn.4. Not only does this reference indicate that the Legislature was aware of the *Distefano* decision, but also that it was cognizant of the nuances of the decision contained in the footnotes and thought, at a minimum, that the case required no correction and was rightly decided on another point. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill 1324 (1993-1994 Reg. Sess.) May 27, 1994, p.2, at <http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_1301-1350/sb_1324_cfa_940527_171615_sen_floor>.)[8] Later in the Bill Analysis, *Distefano* is referenced as part of a "consistent line of cases dating back to 1968 and 1954," further suggesting it was a properly decided and well-established case. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill 1324 (1993-1994 Reg. Sess.) May 27,

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[7] Exhibit 2 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

[8] Exhibit 2 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

1994, p.2, at <http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_1301-1350/sb_1324_cfa_940527_171615_sen_floor>.)[9]

In addition, it should be underscored that Section 998 has been amended eight times and none of the amendments addressed the effect of successive offers. That fact, in and of itself, indicates that the Legislature agreed with the existing judicial application of Section 998 regarding successive offers and believed the cases interpreting successive offers did not need to be addressed in the statute itself. Importantly, two of the amendments to Section 998 occurred after the "bright line rule" was most clearly articulated in *Wilson, supra,* 72 Cal.App.4th 382. The Legislature's decision to not address the holdings in *Distefano* and *Wilson* which unequivocally held that that a subsequent offer to compromise under Section 998 extinguishes any prior offer is a clear indication that the Legislature approved the judiciary's construction and application of Section 998 in this respect. *People v. Hallner*, *supra*, 43 Cal.2d at 719.

In addition, eleven years after the enactment of Section 998, 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

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[9] Exhibit 2 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

> 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 the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure 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).

Additionally, the legislative history of Civil Code §3291 provides added support for the proposition that the Legislature was aware of, and agreed with, the existing judicial construction Section 998 that a later offer superseded and extinguished prior offers. Civil Code §3291 was enacted in 1982 as part of Senate Bill 203 (Rains). Senate Bill 203 (Rains) was a contentious piece of legislation with the principal purpose of increasing the interest rate applicable to civil judgments from 7% to 10%. After the Bill was passed to the Assembly, a series of amendments were considered which provided for the recovery of interest in certain situations where Section 998 offers to compromise were not accepted.

The possibility of linking the recovery of interest to a Section 998 offer was first raised in an amendment proposed on August 18, 1981, which provided:

> If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which is not accepted within 30 days by the defendant and the plaintiff obtains a more favorable judgment, the court shall, in entering judgment for the plaintiff in the action, add to the amount of damages assessed by the verdict of the jury, or found by the court, interest on the amount calculated at the rate of 10 percent per annum and calculated from the date of service of process to the date of satisfaction of the judgment, and include the interest in the judgment as a part thereof.

(4 Assem. J. (1981-1982 Reg. Sess.) p. 6662; (Sen. Bill No. 203, approved by Governor, April 6, 1982, Sen. Final Hist. (1981-1982 Reg. Sess.) p. 147.)[10] Thus, the legislature's initial foray into linking the recovery of interest to Section 998 was silent as to successive offers, and provided for interest from the date of service of process. That changed quickly, as the

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[10] Exhibits 3 and 4 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

legislature expressly considered and apparently debated whether the first or last offer to compromise under Section 998 should control the date from which interest could be recovered.

Less than a week later, on August 24, 1981, the issue was raised in a proposed amendment containing the following language:

Amendment 4

...

> The judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the initial offer pursuant to Section 998 of the Code of Civil Procedure, and interest shall accrue until the satisfaction of the judgment.

(4 Assem. J. (1981-1982 Reg. Sess.) p. 6849 (Emphasis added).)[11] The fact that the Legislature saw fit to include the word "initial" suggests it that viewed the proposal as a departure from the settled application of Section 998 – if it intended to have Civil Code §3291 apply in the same manner as Section 998, "initial" should not have been necessary as any subsequent offer would have superseded a prior offer pursuant to the holding in *Distefano*.

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11 Exhibit 3 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

The issue was further considered and voted on at least twice in September of 1981. (Sen. Bill No. 203, approved by Governor, April 6, 1982, Sen. Final Hist. (1981-1982 Reg. Sess.) p. 147.)[12] On September 4, 1981, the Legislature adopted an amendment to replace "initial" with "plaintiff's first" and add "which is exceeded by the judgment." (4 Assem. J. (1981-1982 Reg. Sess.) p. 7481); (Sen. Bill No. 203, approved by Governor, April 6, 1982, Sen. Final Hist. (1981-1982 Reg. Sess.) p. 147.)[13] The amendment was passed, and its language was ultimately written into Civil Code §3291: "...calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until satisfaction of judgment."

It can reasonably be inferred that the foregoing language was included because it represented a departure from the case law interpreting Section 998 which held that the last offer controlled. Put another way, had the Legislature intended Civil Code §3291 to apply in the same manner as Section 998, neither "initial" nor "first offer" should have been necessary.

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12 Exhibit 4 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

13 Exhibits 3 and 4 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

Corroborating this inference, on September 9, 1981 Assemblyman Nolan proposed an amendment which would have, rather than simply referencing Section 998 offers to compromise, grafted much of the Section 998 language directly into Civil Code §3291. That proposed amendment – purportedly mirroring Section 998 – included that the "last offer" controlled. Specifically, the proposed amendment read:

> Not less than 30 days prior to commencement of trial as defined in subdivision 1 of Section 581 of the Code of Civil Procedure, the plaintiff may serve an offer in writing upon the defendant to the action and the defendant may serve an offer in writing upon the plaintiff in the complaint to allow judgment to be taken in accordance with the terms and conditions stated at that time. If either offer is accepted, the accepted offer with the proof of acceptance shall be filed, and the clerk or the judge shall enter judgment accordingly. If neither offer is accepted is accepted prior to trial, both shall be deemed withdrawn and cannot be given in evidence upon the trial.
>
> (a) If the plaintiff's offer is not accepted and the plaintiff obtains a judgment more favorable than his or her last offer made pursuant to this section, <u>the amount</u>

of the judgment shall bear interest at 10 percent per annum from the date of the plaintiff's last offer. This subdivision shall be effective only if the offer remains open for acceptance by the defendant until the commencement of trial.

(b) If the defendant's offer is not accepted and the plaintiff obtains a judgment for an amount which is less than the last offer made by the defendant pursuant to this section, the amount of the judgment shall be reduced by an amount equal to 10 percent per annum from the date of the defendant's last offer. This subdivision shall be effective only if the offer remains open for acceptance by the plaintiff until the commencement of trial.

(4 Assem. J. (1981-1982 Reg. Sess.) p.7661 (emphasis added).)[14] Although there are some differences between the language of Section 998 and this proposed amendment, it seems clear that the intent was to create a parallel statute in Civil Code §3291. As such, the inclusion of the "last offer" language strongly suggests an understanding that where multiple offers

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[14] Exhibit 3 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

under Section 998 are made, the last offer was controlling for purposes of cost-shifting. Assemblyman Nolan's proposed revisions were ultimately voted down. (Sen. Bill No. 203, approved by Governor, April 6, 1982, Sen. Final Hist. (1981-1982 Reg. Sess.) p. 147.)[15] However, the fact that this proposed amendment was not accepted and the "first offer" language was written into the statute, with a reference to Section 998, certainly supports the inference that the "first offer" language was included because, again, it represented a departure from Section 998.

In sum, the rule articulated in *Distefano, Wilson* and *Palmer* often referred to as the *Wilson* rule – that a subsequent offer to compromise under Section 998 extinguishes and supercedes prior offers – is consistent with both rules of statutory construction and the legislative history of Section 998, its predecessor Section 997 and Civil Code §3291. Moreover, the statutory and legislative record reflect that the Legislature has embraced this long-standing judicial construction and application of Section 998. Consequently, the rule articulated in *Distefano*, *Wilson* and *Palmer* should be confirmed as the proper construction of Section 998 where a party serves multiple offers to compromise under that section.

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15 Exhibit 4 to Motion to Take Judicial Notice of Legislative Records Related to the Enactment and Amendment of Code of Civil Procedure §998 and Civil Code §3291.

B. The Construction and Application of Section 998 that a Later Offer to Compromise Extinguishes and Supersedes Any Prior Offer is Consistent With the Legislative Purpose of Encouraging Pre-trial Settlement

It is universally accepted that the purpose of Section 998 is the encouragement of pretrial settlement. The construction and application of Section 998 found in *Distefano*, *Wilson* and *Palmer*, that a later offer to compromise extinguishes and supersedes any prior offer, is consistent with the legislative purpose of encouraging pre-trial settlement. 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 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].

Similarly, 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 Browncо accepted her offer or not, the case would have still proceeded forward as Browncо did not accept her husband's offer of $4,750,000. [JA 097.] Browncо'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 Browncо, 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 Browncо 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 Browncо wisely 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 $5,000,000 policy limits demand made three months after Browncо 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. *Martinez, supra,* 136 Cal.Rptr.3d at 910-911.

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.*[16] The bright line rule in *Wilson* had been in place

[16] 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

for 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 very 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

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Cal.App.4th 83, 91 (2006).

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.

Moreover, the potential for gamesmanship and abuse of Section 998's cost-shifting provisions is extremely high if the construction and application of Section 998 proffered by the Second Appellate District, Division 1 in *Martinez* is endorsed by this Court. The potential for parties' taking unfair advantage by "gaming the system" in the use of Section 998 offers should be of paramount concern. *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,* 122 Cal.App.4th 1540 (2004). 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. Alternatively, a party could serve a series of alternately higher and lower offers with the expectation that he/she will meet or beat one of the offers at

trial. In fact, under the *Martinez* holding the very gamesmanship employed by the plaintiff in *Wilson* would be permissible.

In *Wilson*, a personal injury plaintiff served an initial offer to compromise in accordance with Section 998 for $150,000, each side to bear its own costs and attorney fees. The defendant made no response to the offer within the 30-day period provided by that statute and, accordingly, the offer was deemed rejected. 72 Cal.App.4th 387. Fifteen months later, plaintiff served a second section 998 offer on the defendant in the increased amount of $249,000, with each side to bear its own costs and fees. That offer also was rejected by defendant's failure to accept it within the statutory period. *Id.* At trial, the judgment in plaintiff's favor was greater than her first offer, but lower than her final offer to compromise under Section 998. *Id.* In discussing the *Wilson* plaintiff's contention that she was entitled to recover expert fees from her first Section 998 offer, the Court of Appeal noted with some skepticism:

> Furthermore, there is some dissembling in Wilson's argument that we are reluctant to endorse. On the eve of trial she was unwilling to save the parties and the trial court the cost of trial for anything less than $249,000, yet she now asks to be reimbursed "998" costs as if she would have been willing to do so for $150,000. While we do not suggest impropriety, such

fictions tend to undermine respect for our system of justice.

Id. at 391 [emphasis added.].

In discussing the potential for gamesmanship if subsequent offers under Section 998 do not extinguish the earlier offers, the Court of Appeal in *Wilson* further explained:

> 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.

The facts in *Martinez* present another example of plaintiffs manipulating the provisions of Section 998 and attempting to "game the system." Although Gloria Martinez was the only plaintiff who recovered an amount equal to her early Section 998 offer, at the trial court level and before the court of appeal the briefs submitted on her behalf repeatedly referred to the "Martinezes" having given up "their" right to recover $200,000 in expert fees by serving a subsequent offer to compromise on the eve of trial. It was, however, Gloria Martinez's August 30, 2007 Code of Civil Procedure Section 998 offer to compromise her loss of consortium claim for $250,000, served concurrently with her husband Raymond Martinez's Section 998 offer to compromise in the amount of $4,750,000, alone, that was matched at trial. Mr. Martinez recovered less than one-third of his August 30, 2007 C.C.P. §998 offer to compromise at the time of trial and, accordingly, he was not entitled to recover any expert fees incurred prior to February 8, 2010 and he had no standing to appeal the trial court's order taxing expert fees incurred prior to February 8, 2010.

In the proceedings before the trial court, the Martinezes did not dispute that each of the experts Browncо retained testified regarding issues related to Raymond Martinez's claims, and none of them testified regarding any issue specific to Gloria Martinez. [JA 16-18, 97-99, 118-128, 22[illegible]-223, 228-232.] Similarly, they did not dispute that each of the experts they retained testified regarding Raymond Martinez's claims, and

none of them testified regarding any issue specific to Gloria Martinez. [JA 16-18, 97-99, 234-246.] Consequently, the Martinezes made no showing that the expert fees incurred prosecuting Raymond Martinez's case were reasonably necessary to Gloria Martinez's loss of consortium claim as required by Sections 998(d) and 1033.5(c)(2). Nonetheless, Gloria Martinez sought recovery of all the expert fees expended in working up her husband's personal injury claim based upon the early offer to compromise her loss of consortium claim.

Courts have consistently held that "one having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees." *Jones v. Dumrichob,* 63 Cal.App.4th 1258 (1998), quoting *Pineda v. Los Angeles Turf Club, Inc.* 112 Cal.App.3d 53, 63 (1980). Here, Gloria Martinez's early Section 998 offer was made with no reasonable expectation that it would be accepted without Browncо also accepting Raymond Martinez's offer for $4,750,000. Thus, Gloria Martinez's offer was a quintessential "no risk" offer. Even if Browncо had accepted Gloria Martinez's 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.[17] Any suggestion that had

[17] Again, *Wilson* is helpful: "although settlements achieved earlier rather than

Brownco accepted Raymond Martinez' $4.75 million offer, Gloria Martinez would have nevertheless continued to prosecute her case (and employed the same experts), would be disingenuous.

The trial courted similarly viewed the Martinezes' claims that they could recover the expert fees incurred prosecuting Raymond Martienz's personal injury claim based upon Gloria Martinez's offer to compromise her loss of consortium claim with skepticism. [RA 17:3-16.] To those ends Judge Berle queried:

> But, you're saying we have a situation where all the experts, all twenty experts testify in connection with the injury suffered by one spouse.
>
> And no expert testified with respect to the issue of the loss of consortium. The only thing that happened in the loss of consortium claim was the second spouse suffered a loss of consortium. She or he testified as a percipient witness and that was it.
>
> And you are saying that if the costs are totally disallowed to the party that suffered the injury on the

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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." *Wilson, supra,* 72 Cal.App.4th at 390.

other cause of action, nevertheless, the costs could be recoverable for the loss of consortium claim even though no expert was hired to testify on anything to do with the loss of consortium?

[RA 17:3-11.] [Empasis added.] In short, Gloria Martinez's claim that she can bootstrap recovery of expert fees incurred prosecuting Raymond Martienz's personal injury claim based upon her offer to compromise her loss of consortium claim is the height of gamesmanship.

Moreover, the construction of Section 998 endorsed by the Second Appellate District, Division 1 in *Martinez* encourages, if not mandates, that a party serve a series of Section 998 offers in varying amount *regardless of any intention that the offers be accepted* to maximize the chance of recovery of expert fees and interest if the case does proceed to trial. In fact, it can reasonably be concluded that if the construction of Section 998 proffered in *Martinez* is adopted, attorneys will be required to serve a series of Section 998 offers to compromise – not for the true purpose of Section 998 of fostering settlement, but for the strategic purpose of maximizing the potential for the recovery of costs under the cost-shifting provisions of Section 998(c). Without question, there is a very real risk that the true purpose of Section 998 of fostering settlement will be entirely usurped by tactical considerations related to the cost-shifting provisions of

Section 998(c) if the service of a later Section 998 offer to compromise does not extinguish and supersede the party's prior offer.

As aptly observed by Judge Berle during oral argument on Browncо's Motion to Tax Costs:

> Well, my concern is what is to prevent a party being more philosophical about the use of 998 offers? What is to prevent the parties from entering into a series of 998 offers let's say from 2007 to 2010 every year coming up with a different number starting with five million then four, three, two, one, going down the road, and then it comes to a result of the trial, whatever the final verdict is, and then going back and saying let's go back to whatever number we had in the past going to the last number which gave the parties an opportunity to settle.
>
> And how serious is the defendant supposed to take any of those offers in terms of actually resolving the cases as opposed to posturing a number for the purpose of setting up costs requested down the road?

[RT, pp. 12:14-13:1.] [Emphasis added.]

As correctly recognized by Judge Berle, the likely outcome of adopting the application of Section 998 proffered by Second Appellate

District, Division 1 in *Martinez*, will be a flood of Section 998 offers which litigants, in turn, will be unlikely to consider as serious offers to resolve the litigation. Instead, Section 998 offers will be reduced to a purely strategic mechanism to shift costs if a case proceeds to trial and the true purpose of Section 998, the encouragement of pre-trial settlement, will be lost.

In short, the construction and application of Section 998 found in *Distefano*, *Wilson* and *Palmer*, that a later offer to compromise extinguishes and supersedes any prior offer, is consistent with the legislative purpose of encouraging pre-trial settlement. The construction of Section 998 proffered in *Martinez*, on the other hand, encourages gamesmanship and manipulation of the provisions of Section 998 and will result in the true purpose of Section 998 of fostering settlement being entirely usurped by tactical considerations related to the cost-shifting provisions of Section 998(c).

C. The Construction and Application of Section 998 that a Later Offer to Compromise Extinguishes and Supersedes Any Prior Offer is Consistent With the Preference for "Bright Line" Rules

Section 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."[18]

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[18] *See Wilson, supra*, 72 Cal.App.4th at 391; *Palmer, supra*, 108 Cal.App.4th at158 *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, Inc.*, 158 Cal.App.4th 109, 129 (2007); *Barella v. Exchange Bank*, 84 Cal.App.4th 793, 799 (2000).

The court in *Wilson* explained:

> 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, the earlier offers are extinguished by service of the subsequent offer, was would best serve the legislative purpose of Section 998 and prevent

manipulation and abuse of its cost-shifting provisions. *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, stated in *Martinez* that its rule that a judgment will be measured against the earliest "reasonable" section 998 offer "seems clear enough." *Martinez*, 136 Cal.Rptr.3d at 911. [19] First, "seems clear enough" is obviously inadequate when a applying a punitive statute that punishes a non-settling party with what often can be a dramatically increased cost award. *Elite Show Services, supra,* 119 Cal.App.4th at 268 (2004). Moreover, the Second Appellate District, Division 1 seems to suggest in its opinion that the obvious mischief and pitfalls that will follow from its rule

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[19] The court of appeal's unfounded and unsupported assertion that its rule is the "existing rule" and that it was "installed by the Legislature itself" is addressed in Section IV.A., above.

can be defused by the trial court when it exercises its discretion in awarding costs.

This conclusion is unrealistic and provides a party receiving a series of Section 998 offers that they believe are unreasonable and gamesmanship with no certainty whatsoever as to how the offers will be treated. As it is, the scales are tipped in favor of the offeror with respect to the evaluation of whether an offer was reasonable. The general rule is that where the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs under Section 998, placing the burden on the offeree to prove otherwise. *Elrod v. Oregon Cummins Diesel, Inc.*, 195 Cal.App.3d 692, 700 (1987). Hence, whether an offer was carefully calculated, or if it was pure happenstance that a party met its offer *– as was the case with Gloria Martinez's initial 998 offer* - there is a presumption of reasonableness even though it is determined in hindsight. If, as the Second Appellate District, Division 1's rule requires, a party is also required to wait until after trial and after a trial judge evaluates the series of offers to learn whether the offers are valid for cost-shifting purposes, the resulting lack of certainty would be intolerable.

In short, the rule promulgated by the Second Appellate District, Division 1 provides no certainty or clarity to a party who has received a series of offers under Section 998. In contrast, the bright-line

rule articulated in *Wilson* that where successive Section 998 offers are made, the earlier offers are extinguished by service of the subsequent offer provides all parties and the court with absolute certainty with respect to how the offers are treated and the consequences for both issuing and not accepting an offer under Section 998.

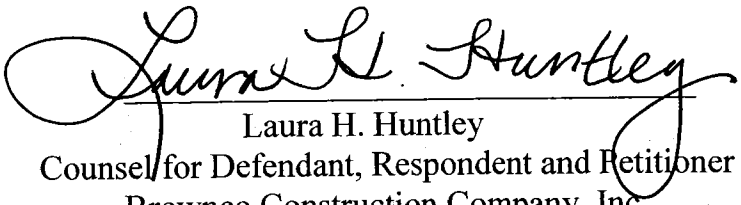
V. CONCLUSION

In sum, the bright line rule set forth in *Wilson* and its progeny that where successive Section 998 offers are made, the earlier offers are extinguished by service of the subsequent offer is consistent with the judicial policies underlying Section 998, is consistent with principals of contract law, is consistent with principals of statutory construction and is consistent with the legislative history of Section 998, its predecessor, former Section 997, and Civil Code Section 3291 and is, therefore, the proper construction and application of Section 998 where a party has served a series of offers to compromise.

As a consequence, Browncо Construction Company, Inc. respectfully requests that this Court reverse the Court of Appeal's decision below and adopt the construction and application of Section 998 that where successive Section 998 offers are made, the earlier offers are extinguished by service of a subsequent offer.

Dated: May 29, 2012

Respectfully submitted,



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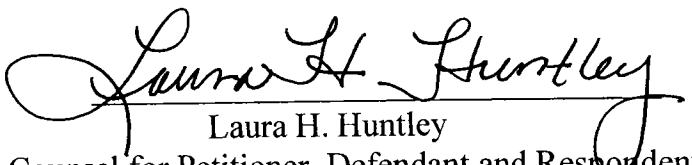

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PROOF OF SERVICE

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 May 29, 2012, I served the foregoing document described as PETITIONER'S OPENING BRIEF ON THE MERITS on all interested parties by placing the true copies thereof enclosed in sealed envelopes addressed as indicated below:

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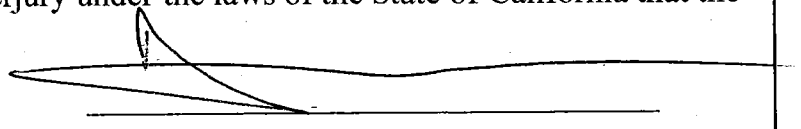

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