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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DON PARK,

Plaintiff, Cross-defendant and Appellant,

v.

MICHELLE L. MOORE,

Defendant, Cross-complainant and Respondent.

G035563

(Super. Ct. No. 04CC06411)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter J. Polos, Judge. Reversed and remanded with directions.

Del Tondo & Thomas, Douglas J. Del Tondo and Bryan M. Thomas for Plaintiff, Cross-defendant and Appellant.

Manning & Marder, Kass, Ellrod, Ramirez, Brian T. Moss and Scott Wm. Davenport for Defendant, Cross-complainant and Respondent.

* * *

INTRODUCTION

Plaintiff Don Park appeals from a judgment following his acceptance of defendant Michelle L. Moore's offer to settle Park's automobile accident lawsuit pursuant to Code of Civil Procedure section 998. (All further statutory references are to the Code of Civil Procedure unless otherwise specified.) Park contends the trial court's judgment erroneously set off $26,022.01 from a $50,000 settlement, giving credit to Moore for amounts previously paid on her behalf to repair Park's vehicle.

In her section 998 offer, Moore agreed to pay Park a total of $50,000 and dismiss her cross-claims against Park in exchange for his agreement to dismiss his claims against her and other consideration detailed in the offer. The offer was silent regarding any offset for amounts previously paid on Moore's behalf to repair Park's vehicle. Section 998 offers are to be strictly construed in favor of the offeree. The trial court's authority under section 998 was limited to entering judgment based on the terms of the offer. By including Moore's claimed offset as part of the judgment, the trial court erred because it necessarily adjudicated the terms of the settlement offer. We reverse and remand with directions that the clerk of the superior court enter judgment in the amount of $50,000 in favor of Park, without offset.

BACKGROUND

In June 2004, Park filed a complaint for negligence against Moore. The complaint alleged that on March 2, 2004, Park was driving his brand new Ferrari 360 Modena Spyder in a shopping center parking lot when Moore, who was driving a Ford Expedition at the time, collided with Park's vehicle. Park alleged $30,000 in physical damage to his vehicle, $225,000 in loss of use damages, and $90,000 in diminution of value damages.

Moore filed a cross-complaint against Park for intentional infliction of emotional distress, alleging Park "outrageously, intentionally, and maliciously, and with reckless disregard of the fact that [Park] . . . would certainly cause [Moore] to suffer severe emotional and physical distress made statements directly to [Moore], her employer and others in the community while [Moore] was pregnant." Moore alleged, "[a]s a proximate result of the acts of [Park] . . . , [Moore] suffered severe emotional and physical distress. Such distress includes, but is not limited to, anxiety, difficulty eating and sleeping, nervousness and a miscarriage."

On September 28, 2004, Moore served a statutory offer to compromise under section 998 on Park's attorney, which stated, "TO PLAINTIFF DON PARK AND HIS ATTORNEY OF RECORD: [¶] Pursuant to California *Code of Civil Procedure* §998, defendant MICHELLE L. MOORE hereby presents the following Statutory Offer to Compromise: [¶] In full settlement of this action, defendant MICHELLE L. MOORE hereby offers to pay plaintiff DON PARK the total sum of $50,000.00 (Fifty Thousand Dollars) in exchange for each of the following: [¶] 1. The entry of a Request for Dismissal with prejudice on behalf of the plaintiff in favor of defendant; [¶] 2. The execution and transmittal of a general Release of All Claims by plaintiff in favor of defendant; [¶] 3. Acceptance of this statutory offer would result in the dismissal with prejudice of any and all cross-claims by this offering party; and, [¶] 4. Each party to bear their own respective costs and attorney's fees. [¶] If the above offer is not accepted prior to trial, or within thirty (30) days after it is made, whichever occurs first, it shall be deemed withdrawn and may not be given in evidence upon a trial."

Park's attorney filed and served a written acceptance of Moore's statutory offer to compromise, and executed and filed a request for dismissal of the complaint with prejudice, requesting that the trial court "retain jurisdiction to enforce Statutory Offer to Compromise." Park attached to his filed acceptance a document entitled "Release of All Claims," which was dated October 6, 2004, signed by Park, and stated in part, "KNOW

ALL MEN BY THESE PRESENTS, that the undersigned hereby acknowledges receipt of draft for Fifty Thousand DOLLARS ($50,000.00), payable to 'Don Park; and his attorneys of record, Del Tondo & Thomas' and the undersigned does hereby accept said draft and in consideration thereof, does hereby release and forever discharge Michelle L. Moore and all other persons, firms or corporations, of and from any and all claims, demands, actions and causes of action, arising out of or which are in any way incident to that certain accident, casualty or event which occurred on or about the 2nd day of March, 2004."

The court clerk entered dismissal of the complaint with prejudice on October 7, 2004. Moore's counsel executed a request for dismissal with prejudice of the cross-complaint on November 15, 2004, and the court clerk entered dismissal as requested that same date.

On January 6, 2005, Park filed a motion for entry of judgment pursuant to the statutory offer to compromise under sections 998 and 664.6, requesting the trial court to enter judgment in favor of Park in the amount of $50,000. Park's attorney's declaration, filed in support of the motion, stated that when he went to Moore's counsel's office to pick up the $50,000 settlement check, he was offered a check in the sum of approximately $23,076. Park's counsel did not accept the check.

According to the declaration, Moore's counsel later told Park's counsel that "the $26,022.10 in *pre-litigation* property repairs paid by Met Life [Moore's insurance carrier] were supposed to be set-off and deducted from the $50,000 settlement figure" and that the "intent was only to offer the balance." In his declaration, Park's counsel offered evidence of the parties' earlier settlement discussions: "In August 2004—prior to Ms. Moore's $50,000 [section] 998 Offer—I had demanded that Ms. Moore's insurance carrier tender in settlement its remaining policy limits of $26,000 and include its anticipated defense costs for a total settlement of $49,000." He further stated, "[w]hen I received Ms. Moore's [section] 998 Offer for $50,000 in September 2004, I reasonably

assumed that either my bad-faith argument had been successful and Ms. Moore's carrier (Met Life) had agreed to include its defense costs, or that Ms. Moore was contributing personal monies to the remaining $26,000 policy limits in order to avoid the significant excess personal liability." He continued, "[f]urthermore, in numerous correspondence the $50,000 settlement figure was confirmed. In Exhibit C, my letter of October 7, 2004 to Ms. Moore's counsel, I enclosed not only the formal acceptance of the [section] 998 Offer, but also I demanded the prompt tender of 'a settlement check in the sum of $50,000.00.' In response, I received a letter from [Moore's counsel] acknowledging receipt of this letter, and then two settlement agreements from Ms. Moore's counsel which *both* included a recitation of the $50,000 settlement amount." He concluded his declaration, stating, "[y]et, it was not until November 16, 2004 that Defendant Ms. Moore (through [counsel]) showed any indication she did not understand her obligation to tender payment of $50,000. All these facts make me certain there was no mistake involved. Ms. Moore agreed to pay $50,000 in settlement of a significantly larger claim."

Moore filed a "Response" to Park's motion, in which she requested that judgment be entered in the amount of $50,000 and that she "receive all offsets for pre-litigation partial payments to which she is legally entitled pursuant to *Insurance Code*, § 11583 and *Dewalt v. Berkeley Forge & Tool, Inc.* (1992) 9 Cal.App.4th 1087." Moore's attorney filed a declaration in support of her response, stating (1) he "repeatedly informed [Park's] counsel that this was a $50,000 policy and that [he] could not offer any additional money beyond the policy limits"; (2) in July 2004, Park's counsel requested information about whether Moore had an umbrella policy in place; (3) he responded that no umbrella policy was in place; (4) Park's counsel requested a declaration from Moore regarding the amount of her available insurance coverage; (5) Moore provided a declaration confirming her property damage limit is $50,000; (6) "[d]uring all phases of the negotiation of this case, [he] repeatedly informed [Park]'s counsel that [he] had authority for only $50,000.00 and that there would never be any additional monies";

(7) Park signed a release in November 2004 in which he stated he "'acknowledge[d] receipt from the releasees the sum of $50,000.00 (Fifty Thousand Dollars) as good and valid consideration to settle any and all claims connected with the incident, the lawsuit and the handling and settlement of it by or on behalf of the releasees'"; (8) he had "explained very clearly that [Park's counsel's] alleged 'bad faith' argument failed . . . for the simple reason that this circumstance arises all the time and if the carrier were to pay above policy for one insured, it would open itself to a bad faith allegation on every future claim where such a demand wasn't paid"; and (9) "[a]s for [Park's counsel's] claim he 'reasonably believed' that Mrs. Moore was now contributing the additional monies—he knew better."[1]

At the hearing, the trial court adopted its tentative ruling on Park's motion, stating, "[a]s I indicated in the tentative, the motion to enter judgment is granted. I believe, per the [*De Walt*] case, the credit is appropriate under the facts and circumstances of this case. [¶] Thus, the payments of [$]23,076 and [$]26,924 constitute full satisfaction of the judgment."

The trial court signed a judgment stating: "PLEASE TAKE NOTICE that this Court, having on February 9, 2005, granted the Motion for Entry of Judgment by plaintiff DON PARK, as requested in said motion; [¶] IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that: [¶] Plaintiff DON PARK, shall take $50,000.00, against defendant MICHELE MOORE and that defendant MICHELLE MOORE is entitled to a pre-judgment offset in the amount of $26,022.01 based on monies which have already been paid to plaintiff DON PARK. Accordingly, plaintiff DON PARK is

[1] Moore did not argue to the trial court and does not argue on appeal that it was a mistake, within the meaning of section 473, subdivision (b), that the terms of her section 998 offer did not refer to the $26,022.01 setoff. We therefore do not further discuss this issue.

entitled to a net-judgment of $23,977.99." The court's judgment was entered February 28, 2005; Park appealed.

DISCUSSION

Park contends the trial court erred by including in the $50,000 judgment an offset in the amount of $26,022.01, thereby crediting Moore for the amount paid on her behalf to repair Park's car, even though Moore's section 998 offer was silent as to any offset. We conclude the trial court erred by including Moore's requested offset in the judgment.

Section 998, subdivision (b) provides in part: "Not less than 10 days prior to commencement of trial or arbitration (as provided in Section 1281 or 1295) of a dispute to be resolved by arbitration, 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 at that time." Section 998, subdivision (b)(1) states in part, "[i]f the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly."

In *Berg v. Darden* (2004) 120 Cal.App.4th 721, 727, the appellate court stated, "[t]here are two important reasons statutory compromise offers must be clear and specific. First, from the perspective of the offeree, the offer must be sufficiently specific to permit the recipient meaningfully to evaluate it and make a reasoned decision whether to accept it, or reject it and bear the risk he may have to shoulder his opponent's litigation costs and expenses. [Citation.] Thus, the offeree must be able to clearly evaluate the worth of the extended offer. [Citation.] The party extending the statutory offer of compromise bears the burden of assuring the offer is drafted with sufficient precision to satisfy the requirements of section 998. [Citations.] To that end, a section 998 offer is construed strictly in favor of the party sought to be subjected to its operation." (See also

Barella v. Exchange Bank (2000) 84 Cal.App.4th 793, 799 ["a section 998 offer must be strictly construed in favor of the party sought to be subjected to its operation"].)

The court in *Berg v. Darden, supra,* 120 Cal.App.4th at page 727, continued: "Second, section 998 offers must be written with sufficient specificity because the trial court lacks authority to adjudicate the terms of a purported settlement. 'Section 998 was designed to encourage settlement of disputes through a straightforward and expedited procedure.' [Citation.] Once the offer is accepted, the clerk or court performs the purely ministerial task of entering judgment according to the terms of the parties' agreement. [Citation.] Neither the clerk nor the court is authorized to adjudicate a dispute over the terms of section 998 agreements before entering judgment."

In *Saba v. Crater* (1998) 62 Cal.App.4th 150, 152, a defendant attempted to extend a section 998 offer, which did not refer to attorney fees, to the plaintiff. The appellate court stated, "[t]he parties disagreed on the terms of the settlement, specifically whether the offer included attorney fees. The trial court purported to adjudicate this dispute, heard evidence as to the intent of the parties and found the offer did not include such fees. Section 998 does not grant the court the authority to adjudicate such a dispute. The entry of judgment pursuant to section 998 is merely a ministerial act which may be performed by the clerk of the court. This is another reason a formal written offer and acceptance are required; the clerk could hardly resolve the kind of dispute which confronted the court here." (*Id.* at p. 153.)

In *Bias v. Wright* (2002) 103 Cal.App.4th 811, 821, a panel of this court similarly held the trial court erred by adjudicating the terms of the parties' purported settlement under section 998. In *Bias v. Wright*, the defendant faxed a written confirmation of oral acceptance, which imposed an added condition that the parties bear their own costs, of the plaintiff's settlement offer under section 998. (*Bias v. Wright, supra,* at p. 814.) The plaintiff's offer was silent as to costs. (*Ibid*.) When the defendant's counsel contacted the plaintiff's counsel to obtain information to prepare the

settlement check, the plaintiff's counsel informed him the defendant had not accepted the plaintiff's offer because the notice of acceptance added the term that each party would bear their own respective costs. (*Id.* at p. 815.) The defendant's counsel told the plaintiff's counsel that the defendant had accepted the plaintiff's section 998 offer and that the defendant would pay the plaintiff's allowable costs. (*Ibid*.)

The defendant in *Bias v. Wright, supra*, 103 Cal.App.4th 811 moved to enforce the purported settlement under section 998, and after hearing argument and receiving evidence, the trial court granted the defendant's motion and entered judgment in favor of the plaintiff, "plus such costs as may be provided by law." (*Bias v. Wright, supra,* at p. 816.) The appellate court reversed, holding, inter alia, the trial court erred by adjudicating the terms of the parties' purported settlement under section 998. (*Bias v. Wright, supra,* at p. 821.) The court stated, "the trial court could not adjudicate the parties' dispute over the meaning of the offer and acceptance, and enter judgment based on that adjudication." (*Ibid.*) The *Bias* court further stated, "[t]he trial court was confronted with conflicting documentation regarding whether [the defendant]'s purported acceptance was absolute and unequivocal. Faced with contradictory evidence regarding acceptance, the trial court should have declined to enter judgment under section 998 because a trial court cannot adjudicate disputed facts concerning the parties' intent in reaching a section 998 compromise and enter judgment." (*Id.* at p. 822.)

Here, Moore's offer was clearly stated. She offered $50,000 and the dismissal with prejudice of her cross-claims against Park in exchange for the dismissal with prejudice of his claims against her. The offer specified the parties would bear their own costs and attorney fees. The offer, however, was silent as to Moore's later claim to an offset for amounts previously paid to repair Park's car. We strictly construe the language of the offer in favor of the offeree, Park. The language of the offer did not put Park on notice that Moore intended to claim an offset from the offered $50,000 settlement amount. The only way the trial court could have decided that Moore's

$50,000 settlement offer included the offset was by considering the evidence offered by the parties regarding the meaning of the terms of the offer. Pursuant to the well-settled, consistent authorities cited above, the trial court was not authorized to adjudicate the terms of the section 998 offer. The trial court was only authorized under section 998 to enter judgment in favor of Park, based on the terms set forth in the offer. Unlike *Bias v. Wright, supra,* 103 Cal.App.4th 811, here there was an unequivocal offer and an unequivocal acceptance under section 998. Therefore, the trial court erred by failing to enter judgment in favor of Park in the amount of $50,000, as agreed, without setoff.

Moore argues the trial court did not err because it entered judgment in favor of Park in the "total" amount of $50,000, but then properly applied a credit in favor of Moore in the amount of $26,022.01 pursuant to Insurance Code section 11583, as interpreted in *Dewalt v. Berkeley Forge & Tool, Inc.* (1992) 9 Cal.App.4th 1087. The trial court's tentative ruling and comments on the record at the hearing on Park's motion to enter judgment under section 998 show the court relied on *Dewalt* in deciding that the offset should be included in the judgment.

But neither Insurance Code section 11583 nor *Dewalt v. Berkeley Forge & Tool, Inc.* interpreting it has anything to do with the nature of the claim before us and neither applies here. Insurance Code section 11583 provides in part, "[n]o advance payment or partial payment of damages made by any person, or made by his insurer under liability insurance as defined in subdivision (a) of Section 108, as an accommodation *to an injured person* or on his behalf to others or to the heirs at law *or dependents of a deceased person because of an injury or death claim or potential claim* against any person or insured shall be construed as an admission of liability by the person claimed against, or of that person's or the insurer's recognition of such liability, with respect to such injured or deceased person or with respect to any other claim arising from the same accident or event. *Any such payments shall, however, constitute a credit and be deductible from any final settlement made or judgment rendered with respect to such*

injured or deceased person which does not expressly take into account such advance payments." (Italics added.)

In *Dewalt v. Berkeley Forge & Tool, Inc., supra,* 9 Cal.App.4th 1087, 1089, the appellate court held, "[w]e conclude the Legislature only intended [Insurance Code section 11583] to be a simple rule of accounting to make clear that where the parties fail to consider the advance in negotiating their settlement, it is the insurer and not the claimant who benefits by the parties' oversight. [Fn. omitted.] The statute was neither intended to prescribe the contents of the written settlement agreement nor modify the law authorizing the use of oral evidence to explain the intent of the parties and the circumstances surrounding their agreement."

Park sued Moore for negligence, solely claiming property damages. This case did not involve injury or death, as contemplated by Insurance Code section 11583. Therefore, even if Insurance Code section 11583 applied to a section 998 settlement, the credit the trial court applied to the $50,000 judgment would not fall within the accommodation payments referenced in Insurance Code section 11583 because that credit constituted payments for the repair of Park's car. Moore offers no other legal authority supporting the application of the setoff from the $50,000 settlement offer under the circumstances of this case.

DISPOSITION

The judgment is reversed. The matter is remanded with directions that the clerk of the superior court enter judgment in favor of appellant in the amount of $50,000, without setoff, on the terms set forth in the section 998 offer. Appellant is to recover costs on appeal.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.